PROBABLY NOT THE BEST REGULATORY REGIME IN THE WORLD? THE EU'S FAILURE TO ENSURE THE EFFECTIVE REGULATION OF ALCOHOL MARKETING IN EUROPE AND WHAT COULD BE DONE TO IMPROVE IT

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INTRODUCTION

Alcohol is a ubiquitous product in today's society, and nowhere more so than Europe. The European Union is the heaviest drinking region in the world, with an average adult alcohol consumption of 12.5 litres – 27g per day – of pure alcohol per year,[1] and over one fifth of the European population aged 15 and over reporting heavy episodic drinking (over 50g alcohol) at least once a week.[2]

Alcohol is recognised to constitute a major risk to the health of individuals and populations. If consumed in excess, alcohol is a major hazard to human health. Excessive consumption of alcohol is known to be a cause of at least 60 different types of disease and condition, including cancers, cardiovascular diseases, reproductive disorders and pre-natal harm.[3] Alcohol is also an addictive substance, with estimates suggesting that 23 million Europeans are dependant on alcohol in any given year.[4]

Such is the risk that excessive alcohol consumption poses to public health, the EU in 2006 adopted an EU Alcohol Strategy,[5] which sets out the causes for action against alcohol use,

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[1] 'Alcohol in the European Union: Consumption, harm and policy approaches', World Health Organisation 2012, 1

[2] 'Evidence for the effectiveness and cost-effectiveness of interventions to reduce alcohol related harm', World Health Organisation 2009, 1, available at http://www.euro.who.int/__data/assets/pdf_file/0020/43319/E92823.pdf (accessed 07/09/2012)

[3] 'Alcohol in the European Union: Consumption, harm and policy approaches', World Health Organisation 2012, 5

[4] Anderson and B Baumberg, ''Alcohol in Europe', Institute of Alcohol Studies, London 2006. 3

[5] Communication on An EU strategy to support Member States in reducing alcohol related harm COM(2006) 625 final

and sets out five key targets for EU and national policies to pursue. The adoption of such a strategy is in line with the recent Resolution of the World Health Assembly in May 2010,[6] which endorses the World Health Organisation's Global Strategy to reduce the harmful use of alcohol[7] and encourages its members to implement it. This Global Strategy calls for 'comprehensive action across numerous sectors'[8] and emphasies that 'Policies to reduce the harmful use of alcohol must reach beyond the health sector, and appropriately engage such sectors as development, transport, justice, social welfare, fiscal policy, trade…as well as civil society and economic operators'.[9]

In light of this the EU strategy envisages the implementation of a number of medical, social and legal initiatives to combat the harm caused by the abuse of alcohol,[10] covering many different areas of the production, promotion, sale and consumption of alcohol.

This piece of research work intends to analyse of one of these policy areas: the legal regulation of the marketing of alcoholic beverages within the EU.

As one of the key stages in the process by which consumers, and particularly young consumers, come into contact with alcohol, the marketing of alcoholic beverages is subject to a great deal of attention by scientific research projects, policy makers and the industry alike. Advertising is crucial for any business, and alcohol producers are no exception. Any alcohol producer, like any other business, will advertise because 'he is interested in selling more of his product', [11] and thus alcoholic beverages are feverishly marketed across the spectrum of beverage types and strengths, and in almost every sort of media possible. Herein lies the problem. The desire of the alcohol producers to advertise and sell ever more of their products is fundamentally at odds with the fact that alcohol is a dangerous drug, and

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[6] WHA63.13, 'Global strategy to reduce the harmful use of alcohol', World Health Assembly May 2010, available at http://apps.who.int/gb/ebwha/pdf_files/WHA63/A63_R13-en.pdf (accessed 07/09/2012)

[7] 'Global Strategy to reduce the harmful use of alcohol', World Health Organisation 2010, available at http://www.who.int/substance_abuse/alcstratenglishfinal.pdf (accessed 07/09/2012)

[8] 'Global Strategy to reduce the harmful use of alcohol', World Health Organisation 2010, available at http://www.who.int/substance_abuse/alcstratenglishfinal.pdf (accessed 07/09/2012), 6

[9] 'Global Strategy to reduce the harmful use of alcohol', World Health Organisation 2010, available at http://www.who.int/substance_abuse/alcstratenglishfinal.pdf (accessed 07/09/2012), 6

[10] See in particular commitments made as a result of the European Alcohol and Health Forum, http://ec.europa.eu/health/alcohol/forum/forum_details/index_en.htm#fragment1 (accessed 30/08/2012)

[11] P Nelson, 'Advertising as Information', (1974) Journal of Political Economy, 82(4), 729-754, 729

consumption of it should be kept at safe levels. What is more, research has shown that there is a causal link between the advertising of alcohol and the consumption of alcohol, which shows that alcohol advertising is effective in encouraging the consumption of the product.

Therefore, as a result, one of the strategies that both EU and national policy makers and legislators have chosen to take in response is to place legal restrictions on the advertising of alcoholic beverages, in order to keep the commercial exploitation of consumers through advertising under control. There is doubt however as to the effectiveness of the measures taken thus far, with both EU legislation and national level controls coming under scrutiny. This piece of research work will attempt to show that the controls on alcohol advertising enacted at EU level are inadequate, as are many of the control enacted by Member States. It will reveal that the operation of the EU Treaties prevents Member States from pursuing a truly effective alcohol policy at national level, and that the resulting state of the legal landscape does not do enough to help prevent harm to EU public health through alcohol abuse. The research conducted here suggests instead that new legislation at EU level might be a better way forward, and presents findings which indicate that it would be possible for a new, more stringent and more effective EU regulatory scheme to be put into place.

The discussion will be conducted in the following way. Chapter One starts by revealing the extent of the harm that can result from the abuse of alcohol and moves on to consider the scientific links that have been found between the advertising of alcohol and its consumption. Having exposed the link, the analysis moves on to consider what has been done to counter the potential risk of harm to human health that alcohol advertising poses. There are two possible levels of action, EU and national level, so Chapter 2 moves on to look at the EU level interventions in the field of alcohol advertising. These interventions do not cover every aspect of alcohol advertising regulation, so therefore much of the control must be exercised at national level. Thus Chapter 3 concentrates on how, in the absence of EU regulations, national law has developed to produce a starkly disparate regulatory landscape, and how the interventions of the European Court of Justice to ensure that national laws respect the balance to be made between protecting public health and ensuring free trade have contributed to this. If the regulatory regime for alcohol advertising that currently exists within the EU is deemed to be insufficient, then some further development needs to occur if irresponsible advertising is to be properly confronted. Chapter Four takes this idea and concludes the discussion by asking whether more extensive measures on alcohol advertising could be adopted at EU level, principally in the form of harmonisation, but also in other forms such as soft-law.

CHAPTER 1 - WHY SHOULD ALCOHOL ADVERTISING BE REGULATED?

THE RISKS ALCOHOL ITS IRRESPONSIBLE ADVERTISING POSE TO HUMAN HEALTH

It is a fact that 'alcohol has been part of human culture from the dawn of civilisation'.[12] However, it is equally well accepted these days that 'alcohol is a causal factor for accidents, injuries and harm to both drinkers and people around them'.[13] This section will briefly examine the dangers of alcohol, to provide a clearer picture of why alcohol as a substance is tightly controlled by law.

Alcohol has been found to be the leading risk factor for burden of disease amongst young people in the WHO European Region, and the third highest risk factor overall.[14] It is a chemically dangerous to human health in a number of ways. It is 'an intoxicant affecting a wide range of structures and processes in the central nervous system which, interacting with personality characteristics, associated behaviour and sociocultural expectations, are causal factors for intentional and unintentional injuries and harm to both the drinker and others'.[15] It is also 'an immunosuppressant which increases the risk of communicable diseases, including tuberculosis'.[16] Furthermore, alcoholic beverages are classed as carcinogenic by the International Agency for Research on Cancer, increasing the risk of cancers of various types.[17]

A significant body of evidence shows the startling impact that alcohol consumption has on public health. Alcohol is 'the fifth most important cause of the global burden of

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[12] J Saunders, P Anderson and J Rey, 'Alcohol policy and the prevention of harm in young people' in J Saunders and J Rey (Eds) 'Young People and Alcohol: Impact, Prevention, Policy, Treatment',Wiley-Blackwell, Chichester 2011, 106

[13] J Saunders, P Anderson and J Rey, 'Alcohol policy and the prevention of harm in young people' in J Saunders and J Rey (Eds) 'Young People and Alcohol: Impact, Prevention, Policy, Treatment',Wiley-Blackwell, Chichester 2011, 106

[14] Framework for alcohol policy in the WHO European Region, WHO 2006, 1

[15] 'Alcohol in the European Union: Consumption, harm and policy approaches', World Health Organisation 2012, 5

[16] European Status Report on Alcohol and Health 2010, World Health Organisation 2010, 6

[17] European Status Report on Alcohol and Health 2010, World Health Organisation 2010, 6

disease, accounting for an estimated net harm of 4.4%'.[18] It is estimated that 'overall, approximately 4% of deaths worldwide are caused by alcohol'.[19]

Alcohol abuse also has a negative impact outside the sphere of health. Each year the social cost of alcohol is estimated to be €125 billion.[20] Put another way, 'in Europe, the social costs of alcohol are normally estimated to amount to between 1% and 3% of GDP'.[21] Finally, 'these figures are comparable to, or even exceed, government expenditures on social security and welfare, and approximate to 25% of health service expenditure'.[22]

According to a recent publication from the WHO on the evidence for the effectiveness of various interventions to reduce alcohol related harm,[23] the Member States 'have a duty to look after the important needs of people individually and collectively' and therefore must be obliged 'to provide conditions that allow people to be healthy'. The established facts on the health and social costs of alcohol consequently should demand action by the EU to reduce as far as possible the harmful effects of alcohol consumption, in whatever ways are effective and necessary. The above publication proposes several courses of action that could be taken, among them establishing optimal levels of tax on alcohol, providing all consumers with information about the effects of alcohol, reducing the availability of alcohol through devices such as purchase age limits, combating drink driving, and implementing controls on the advertising of alcoholic beverages.

Controlling the irresponsible promotion and advertising of alcohol appears to be at the very least one of the most popular methods for tackling alcohol related harm, as according to a Eurobarometer survey conducted in 2006,[24] 76% of the European

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[18] J Saunders, P Anderson and J Rey, 'Alcohol policy and the prevention of harm in young people' in J Saunders and J Rey (Eds) 'Young People and Alcohol: Impact, Prevention, Policy, Treatment',Wiley-Blackwell, Chichester 2011, 107

[19] J Saunders, P Anderson and J Rey, 'Alcohol policy and the prevention of harm in young people' in J Saunders and J Rey (Eds) 'Young People and Alcohol: Impact, Prevention, Policy, Treatment',Wiley-Blackwell, Chichester 2011, 107

[20] R Gordon and P Anderson, 'Science and alcohol policy: a case study of the EU Strategy on Alcohol', (2011) Addiction, 106 (Suppl. 1), 55-66, 55

[21] Institute of Alcohol Studies IAS Factsheet, 'Economic Costs and benefits', www.ias.org.uk/resources/factsheets/economic_costs_benefits.pdf (accessed 10/01/12), 3

[22] Institute of Alcohol Studies IAS Factsheet, 'Economic Costs and benefits', www.ias.org.uk/resources/factsheets/economic_costs_benefits.pdf (accessed 10/01/12), 3

[23] 'Evidence for the effectiveness and cost-effectiveness of interventions to reduce alcohol related harm', World Health Organisation 2009, available at http://www.euro.who.int/__data/assets/pdf_file/0020/43319/E92823.pdf (accessed 07/09/2012)

[24] TNS Opinion & Social, 'Attitudes towards alcohol' (Special Eurobarometer No. 272b), European Commission, Directorate-General Communication, 2007 available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_272b_en.pdf (accessed 07/09/2012)

population would approve the banning of alcohol advertising targeting young people in all Member States. Controlling irresponsible alcohol advertising could also be an effective way of reducing harm, since as the next section will show alcohol advertising is positively linked with alcohol consumption. Irresponsible alcohol advertising should be seen as that which deliberately portrays alcoholic beverages or a drinking lifestyle in a positive light such as to underrepresent the dangers that alcohol poses to human health. Consumers should be able to assess the risks of the product for themselves, however irresponsible alcohol advertising, particularly when directed at vulnerable consumers as much alcohol advertising is, will be likely to distort the consumer's ability to make an objective decision and persuade them to adopt an attitude towards drinking that does not reflect the reality of the drug, and can cause them serious harm. Alcohol is a dangerous and highly addictive substance, and when alcohol companies are allowed to encourage behaviour prejudicial to human health there will certainly be an increased number of people who develop alcohol-related illnesses.

THE LINKS BETWEEN ALCOHOL ADVERTISING AND CONSUMPTION

It has long been a matter of contention whether alcohol advertising causes increased consumption of alcoholic beverages. Early studies showed extremely mixed results, many failing to find any link between advertising and consumption. However, recent studies have been increasingly united in concluding that there is an identifiable link between alcohol advertising and the extent to which alcohol is consumed.

Numerous studies stretching from the 1980s to the present day have examined the impact of alcohol advertising upon consumers, and in particular upon young people and children. Some studies have assessed the general links between alcohol advertising and increased levels of consumption. One study found that 'exposure to televised alcohol advertising has also been found to produce a decrease in the confidence of heavy drinkers that they could resist drinking heavily again in the future (Sobell, Sobell, Toneatto & Leo, 1993)'.[25]

However it has been acknowledged that 'the vast majority of published studies refer to young people', most likely because 'they are a particularly vulnerable group, with a potential to experience risk or harm in the short term and throughout their lives (Newbury-Birch et al. 2008)'.[26] When it comes to children, the evidence seems to be

[25] B Gunter, A Hansen and M Touri, 'Alcohol Advertising and Young People's Drinking', (2009) *Young Consumers*, Volume 10, No 1, 4-16, 4

[26] 'Does marketing communication impact on the volume and patterns of consumption of alcoholic beverages, especially by young people? - a review of longitudinal studies', Scientific Opinion of the Science Group of the European Alcohol and Health Forum, http://ec.europa.eu/health/ph_determinants/life_style/alcohol/Forum/docs/science_o01_en.pdf (accessed 12/01/12), 4

much more clear-cut. The recent review for the European Alcohol and Health Forum reports that 'based on the consistency of findings across the studies… it can be concluded from the studies reviewed that alcohol marketing increases the likelihood that adolescents will start to use alcohol, and to drink more if they are already using alcohol'.[27] The report found that 'although the full body of the evidence is not uniform in its findings, nevertheless the longitudinal studies show considerable consistency in outcome… The longitudinal studies find an impact of alcohol marketing on drinking, consistent with the findings of econometric studies, and supported by experimental findings'.[28] This was backed up by conclusions from other similar reviews. Smith & Foxcroft (2009) said that 'the data from these studies suggest that exposure to alcohol advertising in young people influences their subsequent drinking behaviour. The effect was consistent across studies, a temporal relationship between exposure and drinking initiation was shown, and a dose response between amount of exposure and frequency of drinking was clearly demonstrated in three studies. It is certainly plausible that advertising would have an effect on youth consumer behaviour, as had been shown for tobacco and food marketing'.[29] Meier (2008) said that 'Regardless of their explicit intention there is evidence for an effect of alcohol advertisements on underage drinkers. Consistent with this, evidence suggests that exposure to such interventions as TV, music videos and billboards, which contain alcohol advertisements, predicts onset of youth drinking and increased drinking'.[30] Finally, Anderson et al (2009) concluded that 'Longitudinal studies consistently suggest that exposure to media and commercial communications on alcohol is associated with the likelihood that adolescents will start to drink alcohol, and with increased drinking amongst baseline drinkers. Based on the strength of this association, we conclude that alcohol advertising and promotion increases the likelihood that adolescents will start to use alcohol, and to drink more if

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[27] 'Does marketing communication impact on the volume and patterns of consumption of alcoholic beverages, especially by young people? - a review of longitudinal studies', Scientific Opinion of the Science Group of the European Alcohol and Health Forum, http://ec.europa.eu/health/ph_determinants/life_style/alcohol/Forum/docs/science_o01_en.pdf (accessed 12/01/12), 2

[28] 'Does marketing communication impact on the volume and patterns of consumption of alcoholic beverages, especially by young people? - a review of longitudinal studies', Scientific Opinion of the Science Group of the European Alcohol and Health Forum, http://ec.europa.eu/health/ph_determinants/life_style/alcohol/Forum/docs/science_o01_en.pdf (accessed 12/01/12), 13

[29] L Smith and D Foxcroft, 'The effect of alcohol advertising, marketing and protrayal on drinking behaviour in young people: systematic review of prospective cohort studies', (2009) BMC Pubic Health 9:51

[30] P Meier, 'Independent review of the ffects of Alcohol pricing and promotion Part A: Systematic Reviews', http://www.dh.gov.uk/en/Publichealth/Healthimprovement/Alcoholmisuse/DH_4001740, section 2.7

they are already using alcohol'.[31] These results make it hard to deny that a relationship between alcohol promotion and alcohol use by the young exists.

Regardless of the exact correlation between advertising and consumption, it seems certain that 'through raising young people's awareness and familiarity with alcohol, advertising is a contributor towards their decision eventually to take up drinking'.[32]

In all, a large body of research has been established suggesting that alcohol advertising is linked to increased consumption, particularly among the young. Despite insistence by alcohol producers that the purpose of alcohol marketing is to increase brand share and not recruit new drinkers, the effects of their marketing strategies clearly do not correlate to their aims.

This existence of this link between advertising and consumption has caused both the EU and national legislatures to adopt various interventions to try to reduce it. The next Chapter explores the interventions that have been adopted at EU level and analyses how successful they have been in light of the determination and subtlety of modern advertising.

CHAPTER 2 – THE EU REGULATORY SCHEME FOR ALCOHOL ADVERTISING

In the previous Chapter, we looked at the risks to health posed by harmful alcohol consumption and how alcohol advertising is positively linked to increased levels of alcohol consumption. In this Chapter we will turn to identifying the ways in which the EU has attempted to address the problem of excessive alcohol consumption through the regulation of alcohol marketing. It is possible to identify the Audiovisual Media Services Directive, the Unfair Commercial Practices Directive and the EU Alcohol and Health Forum as being three instruments of EU policy that are directly relevant to the regulation of alcohol advertising. While none of these have been created specifically to address alcohol marketing, this Chapter will analyse how successful each is in contributing to the construction of an

[31] P Anderson, A de Bruijn, K Angus, R Gordon and G Hastings, 'Impact of alcohol advertising and media exposure on adolescent alcohol use: a systematic review of longitudinal studies'. Alcohol Alcohol, Advance Access published January 14, 2009 doi: 10.1093/alcalc/agn115

[32] B Gunter, A Hansen and M Touri, 'Alcohol Advertising and Young People's Drinking', (2009) *Young Consumers*, Volume 10, No 1, 4-16, 3

effective regulatory scheme that adequately controls irresponsible alcohol advertising, and will offer an explanation for any deficiencies that are found.

PART 1 - THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE

INTRODUCTION

Despite the risks alcohol poses to human health, and the link that marketing has been shown to have with consumption, alcohol companies continue to relentlessly promote their products, especially to a younger audience. It is worrying that statistics show that in the UK 96% of 13 year olds were aware of alcohol advertising and had, on average, come across it in more than five different media.[33] One commentator furthermore remarks that it is 'no wonder a leading British brewer is able to boast that young men "think about four things – we brew one and sponsor two of them'.[34] One company even claims that it aims to 'become the most respected youth brand'.[35] Against this background educational policies are simply overwhelmed, and thus the importance of regulation of the alcohol advertising industry becomes paramount.

Directive 2010/13/EU,[36] commonly known as the Audiovisual Media Services Directive (AVMSD), is therefore a hugely important piece of European legislation where the regulation of alcohol advertising is concerned, since it is the only piece of legislation to contain provisions directly regulating the promotion of alcohol. It arose as a result of what the Commission refers to as 'media convergence at a technical level'.[37] The Commission, after initiating a consultation on the existing Television Without Frontiers Directive[38] (TVWFD) and the future of audiovisual media services in the EU, acknowledged that 'a thorough revision of the Directive might be necessary to take account of technological developments and

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[33] House ofCommonsHealth Committee. Alcohol. Firstreportof session 2009-10.Volume I.www.publications.parliament.uk/pa/cm200910/cmselect/cmhealth/151/151i.pdf.

[34] G Hastings, '"They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents', (2009) The Alcohol Education and Research Council, 3

[35] G Hastings, '"They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents', (2009) The Alcohol Education and Research Council, 41

[36] Directive 2010/13/EU, OJ L 95/1, 15.4.2010

[37] 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - The future of European Regulatory Audiovisual Policy', COM/2003/0784 final

[38] Directive 89/552/EEC, OJ L 298, 17.10.1989, p23

changes in the structure of the audiovisual market'.[39] Essentially, as one commentator put it, 'the TWF Directive dates from 1989... and in recent years the cracks have been beginning to show'.[40] A new Directive was considered necessary to accommodate the rapid growth of new media and ensure that it was subject to an appropriate regulatory regime. The result was the AVMSD, which replaces and renames the old TVWFD, and purports to update it in a variety of key areas. The mains ones include the extension of the regulatory scope of the old TVWFD to all audiovisual media services, in order to create 'a level playing field across the entire sector', [41] and the creation of a 'technology neutral' regulatory scheme, by setting down a body of rules that 'regulate[s] audiovisual content notwithstanding the platform used to deliver such content'.[42]

Two key features have been retained from the TVWFD however. The first of these is the fact that the Directive is minimum harmonisation. Article 4 of the Directive states that:

'Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law'.

Crucially therefore, Member States are free to impose a stricter standard than that established by the Directive, which alcohol advertisements in that State must then comply with.

The second key feature retained by the AVMSD is the Country of Origin Principle. This is expressed in Articles 2(1) and 3(1), which state that:

'Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State'.

and that

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[39] 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - The future of European Regulatory Audiovisual Policy', COM/2003/0784 final

[40] H Wardale, The new frontier – the Audiovisual Media Services Directive', EIPR 2009, 31(6), 336-341

[41] V Little, 'Audiovisual Media Services Directive: Europe's Modernisation of Broadcast Services Regulations', Journal of Law, Technology and Policy, Vol 1, 2008, 235

[42] E McEneaney, 'The Audiovisual Media Services Directive, (2008) Ent LR, 19(3), 59-61, 59

'Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.'

Thus, only the Member State in which the service provider is established has jurisdiction over its activities, and each Member State must allow services originating from other Member States to be freely transmitted on their national territory in cases where the Directive applies.

HOW DOES THE AVMSD APPLY TO ALCOHOL ADVERTISING?

There are only two provisions within the AVMSD that mention the advertising of alcoholic beverages directly. These are Article 9(1)(e) and Article 22.

ARTICLE 9(1)(E)

Article 9(1)(e) forms part of a larger general provision on advertising, and states that:

> *'audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages'.*

While this provision applies to all forms of audiovisual alcohol promotion falling within the scope of the Directive, its effect is limited in other ways.

The use of the word 'specifically' means that the Article has not prohibited audiovisual commercial communications from being aimed at minors. The requirement is that they must not *specifically* be aimed at minors, and this reduces the clarity of the provision considerably, since there is no intimation that advertisements cannot be addressed to others while still reaching minors. A situation could be envisaged where 'advertisements for such products could be broadcast right before, during, or after children's programmes without being considered as specifically aimed at minors'.[43] This interpretative loophole in Article 9(1)(e) has led one commentator, in the context of marketing unhealthy foods to children, to describe the protection offered by this provision as 'particularly weak',[44] and observe that 'the EU has not followed the recommendations of several stakeholders to ban

[43] O Castendyk, E Dommering and A Scheuer, 'European Media Law', Kluwer Law International, Alphen aan den Rijn 2008, 600

[44] A Garde, 'Towards the liberalisation of product placement on UK television?', (2011) Communications Law, 16(3), 92-98, 96

such marketing'.[45] A similar appraisal could certainly be made when it comes to alcohol marketing to children. The WHO Framework for alcohol policy sates that 'all children and adolescents have the right to grow up in an environment protected from the negative consequences of alcohol consumption and, to the extent possible, from the promotion of alcoholic beverages'.[46] Declining to implement a clear-cut ban on advertising alcohol to children is arguably a retreat from the commitment to this principle.

A provision similar to Article 9(1)(e) can be found in the UK Advertising Standards Code that Ofcom thoroughly revised in 2005. This states that 'alcohol advertisements must not be likely to appeal strongly to people under 18, especially by reflecting or being associated with youth culture or showing adolescent or juvenile behaviour'.[47] While this is still not an absolute ban, the regulatory approach selected is based on how the viewer perceives the advertisement, and not on whom the advertisement is targeted at. This alternative and arguably superior approach may be one the EU should take note of, not least because the results of research conducted into the implementation of the new rules on behalf of Ofcom and the ASA show that 'importantly, however, given the objectives of the Advertising Code changes, there has been a decline in the proportion of young people saying they feel the commercials are aimed at them'.[48]

ARTICLE 22

Article 22 is the only article in the Directive devoted entirely to alcohol. It contains a series of requirements that advertisements for alcoholic beverages must comply with. The Article states that:

'Television advertising and teleshopping for alcoholic beverages shall comply with the following criteria:
(a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages;
(b) it shall not link the consumption of alcohol to enhanced physical performance or to driving;
(c) it shall not create the impression that the consumption of alcohol contributes towards social or sexual success;
(d) it shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;

[45] A Garde, 'Towards the liberalisation of product placement on UK television?', (2011) Communications Law, 16(3), 92-98, 96

[46] 'Framework for alcohol policy in the WHO European Region', World Health Organisation 2006, 23

[47] BCAP Code, Rule 19.15.1

[48] 'Young People and Alcohol Advertising: An investigation of alcohol advertising following changes to the Advertising Code', Ofcom and ASA November 2007, 9

(e) it shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;
(f) it shall not place emphasis on high alcoholic content as being a positive quality of the beverages.'

Article 22 is limited in its scope – the first two words confine the rest of it to 'television advertising' only. This limited scope still gives rise to uncertainty, namely whether communications that are initially broadcast on television, but then reproduced elsewhere, for example on websites, would qualify for the purposes of Article 22 as television advertising. For example advertising spots appearing before the start of each programme selected for viewing on the ITV Player – such a medium is undoubtedly an on demand, and therefore non-linear service, and therefore not 'television advertising', however the advertisement seen here is identical to the one broadcast on terrestrial television. The uncertain scope of 'television advertising' therefore raises substantial questions.

Furthermore, the provisions in the Article are generalised, and constitute no more than what could be regarded as common sense. It is therefore unsurprising that 'several Member States have not limited their action of implementing this provision in its literal formulation, but have introduced more restrictive provisions'.[49] Compared to what is considered necessary in self-imposed industry codes of conduct, the provisions in Article 22 appear very basic. For example, the Portman Group Code of Conduct is a self-regulatory code devised by the industry for ensuring that its members promote alcohol in a socially responsible manner. It consists of eleven provisions, compared to six in Article 22, and contains requirements that are broader and deeper than those in the Directive. For instance Rule 3.2.(g) requires that promotions for alcoholic beverages must not 'urge the consumer to drink rapidly or to "down" a product in one'. Rule 3.2.(d) states that a drink, its packaging and any promotional material must not directly or indirectly 'suggest any association with sexual success', whereas the AVMSD uses the less strongly worded phrase 'shall not create the impression that the consumption of alcohol contributes towards…sexual success'. Such a comparison shows that Article 22 has enacted a most basic set of rules for the control of alcohol promotion, and that it is entirely possible to generate a similarly formulated and similarly sized set of conditions with more depth and strength.

HOW EFFECTIVE ARE THESE PROVISIONS IN CONTROLLING ALCOHOL PROMOTION?

As a result of the generality of the Articles applicable to alcohol advertising, the provisions they contain are not as effective at creating a harmonised and protective set of conditions for television advertising of alcoholic beverages as they perhaps could be.

[49] O Castendyk, E Dommering and A Scheuer, 'European Media Law', Kluwer Law International, Alphen aan den Rijn 2008, 593

For a start, there is not a single prohibition anywhere in either Article. Unlike the minimum harmonisation of the Tobacco Directive, where the minimum standard was a ban on all advertising, the AVMSD sets a lower minimum standard, leaving it to the discretion of each Member State to elect to impose a ban on all or some forms of audiovisual alcohol promotion. This is exactly what France has done for example, its Loi Evin prohibiting all television advertising for alcoholic beverages. This law has furthermore survived challenges before the European Court of Justice (ECJ), principally in *Commission v France*[50] and *Bacardi France*.[51]

Apart from the requirement not to overly emphasise, nether Article makes reference to the alcohol content of products, leaving Member States free to introduce 'a sort of de-minimis criterium applying prohibitions only to beverages exceeding a certain alcoholic percentage'.[52] This is exactly what happened in the case of *Aragonesa*, where a Spanish rule banning the advertising of beverages with an alcohol content above twenty three degrees was challenged. Even though the ban was considered a restriction on the freedom to provide services, it was nonetheless upheld because as a targeted and equally applicable measure it could not 'in any event be criticized for being disproportionate to its stated objective'.[53] In addition the Articles do not differentiate between different types of alcoholic beverage, so Member States can 'introduce this sort of diversification provided it does not constitute a means of arbitrary discrimination'.[54] Thus several Member States have elected to impose advertising bans on particular types of beverage, predominantly spirits.

A further way in which the provisions allow Member States to introduce divergent implementations of the rules is in relation to cultural interpretations of the Articles. They do not set down empirically how much alcohol must be drunk in order for its being linked to one of the listed factors to become prohibited, or how much alcohol constitutes 'immoderate consumption'. This particular term is not defined anywhere in the Directive, and thus its interpretation is left to the Member States, between which the 'level of socially accepted moderacy',[55] varies greatly. For example, one Member State could regard it as perfectly acceptable to allow 'an advertisement showing a large number of empty bottles

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[50] Case 262/02 *Commission v France (Loi evin)* (2004) ECR I06569

[51] Case C-429/02, Bacardi France SAS and Télévision française 1 SA (TF1) et al. (2004) ECR I-06613

[52] O Castendyk, E Dommering and A Scheuer, 'European Media Law', Kluwer Law International, Alphen aan den Rijn 2008, 595

[53] Joined cases C-1/90 and C-176/90 *Aragonesa* [1991] ECR I-04151, para 18

[54] O Castendyk, E Dommering and A Scheuer, 'European Media Law', Kluwer Law International, Alphen aan den Rijn 2008, 595

[55] O Castendyk, E Dommering and A Scheuer, 'European Media Law', Kluwer Law International, Alphen aan den Rijn 2008, 596

the day after a party, whereas in other countries with more restrictive policies such an advertisement may be considered unlawful'.[56]

The rules are also vague to the extent that their effectiveness can be called into question. Alcohol is not allowed to be linked with social success for example, however it has been rightly pointed out that 'it is hard to imagine an advertisement showing a person consuming alcohol all alone'[57] and that since 'for health reasons alcohol should be consumed together with food and that dinners are usually social events',[58] any advertisement for alcohol could potentially fall under the prohibition if construed widely enough.

The subjectivity inherent in the provisions also undermines their effectiveness. Eurocare in its position paper on the revision of the TVWFD said that 'since advertising uses association, suggestion and symbolism, rules [such - sic] as the ones in article 15 [now art 22], intended to restrict the contents of advertising, will therefore never be infallible'.[59] Others have suggested that the subjective approach in Article 22 will lead to difficulties because it requires 'verification of the feeling or the image that the consumption of alcohol can create in the viewer'.[60] In comparison, bans such as the one in the Tobacco Advertising Directive are both objective and verifiable, as it can be empirically observed when the rule is contravened.

HOW DO THE PROVISIONS ON PRODUCT PLACEMENT APPLY?

Changes made to the rules on product placement could have an extremely significant impact on how alcohol promotion is regulated. Product placement is defined in the Directive as:

'any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration'[61]

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[56] O Castendyk, E Dommering and A Scheuer, 'European Media Law', Kluwer Law International, Alphen aan den Rijn 2008, 596

[57] O Castendyk, E Dommering and A Scheuer, 'European Media Law', Kluwer Law International, Alphen aan den Rijn 2008, 600

[58] O Castendyk, E Dommering and A Scheuer, 'European Media Law', Kluwer Law International, Alphen aan den Rijn 2008, 600

[59] Eurocare position paper on the revision of the "Television Without Frontiers" Directive, http://eurocare.org/content/download/3285/17129/version/5/file/Eurocare+position+paper+on+the+revision+of+the+Television+without+Frontiers+Directive.pdf (accessed 31 October 2011)

[60] O Castendyk, E Dommering and A Scheuer, 'European Media Law', Kluwer Law International, Alphen aan den Rijn 2008, 601

[61] Article 1(m)

In the TVWFD product placement was banned outright, however the AVMSD adopts a 'newly formulated attitude towards product placement',[62] and while it is still banned in the AVMSD in Article 11(2), in 11(3) the Member States are permitted to chose to allow product placement in a certain number of cases.

It must be assumed that since the Directive does not mention alcohol in relation to product placement, alcohol can therefore now be legitimately promoted through this medium where it could not have been before. Worse still, alcohol promotion in this form may go unregulated by the provisions of Article 22 since product placement is arguably not 'television advertising', leaving it to be regulated only by Article 9(1)(e). Allowing product placements of alcohol to be regulated less strictly than traditional spot advertising is dangerous, due to the fact that product placement is 'often part of the storyline of fictional works and thus part of the "reality" they represent',[63] and therefore 'its attractant effect may be much stronger than that of conventional advertising in commercial breaks'.[64] This affords advertisers an opportunity to associate the product in a most direct way with a particular concept or lifestyle, where such a practice is not allowed for traditional spot advertising, thus creating a method of entirely circumventing the aims of rules such as those in Article 22. A good example might be the James Bond films, which have made his character and everything it stands for synonymous with Martini, where it is unlikely that traditional spot advertising would be able to suggest a link between the glamorous lifestyle of a secret agent and an alcoholic beverage.

HOW DO THE PROVISIONS ON SPONSORSHIP APPLY?

The sponsorship of audiovisual content by alcohol producers is also indirectly covered by the AVMSD. Sponsorship is defined in the Directive as:

'any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promoting their name, trade mark, image, activities or products'[65]

The prohibition on the sponsorship of news and current affairs programmes in Article 10(4) is important to note, since this is the only outright ban applicable to alcohol promotion to be

[62] M Burri-Nenova, 'The New Audiovisual Media Services Directive: Television *without* frontiers, television *without* cultural diversity', (2007) CMLR, 44, 1689, 1713

[63] M Burri-Nenova, 'The New Audiovisual Media Services Directive: Television *without* frontiers, television *without* cultural diversity', (2007) CMLR, 44, 1689, 1715

[64] M Burri-Nenova, 'The New Audiovisual Media Services Directive: Television *without* frontiers, television *without* cultural diversity', (2007) CMLR, 44, 1689, 1715

[65] Article 1(k)

found anywhere in the Directive. This is of scant consolation though, given that in the same provision there is a refusal to unconditionally ban the sponsorship of children's programmes.

The Directive's silence on sponsorship by alcohol producers must be contrasted with the explicit prohibitions of tobacco sponsorship and prescription medicine sponsorship in Articles 10(2) and (3). This is a theme that runs throughout the Directive, and once again the lack of regulation of this form of alcohol promotion raises questions as to whether the circumvention of Article 22 is possible by using sponsorship instead. As 'the lines between product placement and sponsorship are fluid',[66] the concerns applicable to product placement are equally applicable for sponsorship. Sponsorship is by definition the association of a product with a particular activity or concept. If sponsorship by an alcohol producer is allowed, the barrier of the advertisement itself is skipped entirely, and there is an immediate and direct connection between the alcoholic product and the ideas conveyed by the programme. A good example might be Heineken's sponsorship of the Rugby World Cup coverage.

WHAT ARE THE CONSEQUENCES OF THE DIRECTIVE'S LIMITED SCOPE FOR THE REGULATION OF ALCOHOL ADVERTISING?

WHAT ARE THE LIMITATIONS IN SCOPE OF THE AVMSD? WHAT TYPES OF ALCOHOL ADVERTISING ARE THEREFORE NOT COVERED?

The AVMSD extended the provisions of the old TVWFD to ostensibly cover all audiovisual media services, attempting to create 'a level playing field across the entire sector'.[67] However this apparent extension in scope has in fact resulted in severe uncertainties, which in fact rather limit the scope of the Directive. This then has a knock on effect on the regulation of alcohol advertising, since some forms of alcohol promotion will fall outside the scope of the Directive altogether and are therefore left unregulated at European level.

Audiovisual Media Services

There is an initial problem with how audiovisual media services are categorised. The Directive has divided audiovisual content into two different categories - traditional television

[66] C Angelopoulos, 'Product Placement in European Audiovisual Productions', (2010) IRIS plus, 2010-3, 19

[67] V Little, 'Audiovisual Media Services Directive: Europe's Modernisation of Broadcast Services Regulations', Journal of Law, Technology and Policy, Vol 1, 2008, 235

broadcast services, which are referred to as linear services, and new audiovisual content such as video on demand (VOD), which are referred to as non-linear services. These categories are then subject to different rules. The justification for this presented in the recitals to the Directive is that:

'The availability of on-demand audiovisual media services increases consumer choice. Detailed rules governing audiovisual commercial communication for on-demand audiovisual media services thus appear neither to be justified nor to make sense from a technical point of view'[68]

Even if it is accepted that there is an economic argument for regulating some services more lightly, it is submitted that 'the linear/non-liner distinction is not an adequate basis for determining the level of content regulation'.[69] The obvious problem comes when one realises that it is entirely possible for the same piece of content to be broadcast on both platforms, resulting in it being subject to two different sets of regulation depending on how it is accessed. This completely contradicts the stated aim of the AVMSD to create a 'technology neutral' scheme by setting down a body of rules that 'regulate[s] audiovisual content notwithstanding the platform used to deliver such content'.[70] The Directive does not appear to recognise that 'certain content that is strictly regulated in the linear sector because of its harmful effect on the public, such as alcohol advertising…is of the same detrimental quality with an on-demand programme',[71] and this must be seen as a serious flaw of the AVMSD.

The definitions used in the AVMSD also limit its effectiveness. An audiovisual media service is defined in the Directive as:

'A service... which is under the editorial responsibility of a media service provider and the principle purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks… such an audiovisual media service is either a television broadcast… or an on demand audiovisual media service'[72]

Therefore there are six criteria which a service must fulfil before it falls to be regulated by the Directive:

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[68] Directive 2010/13/EU, OJ L 95/1, 15.4.2010, recital 79

[69] A Breitschaft, 'Evaluating the linear/non-linear divide – are there any better factors for the future regulation of audiovisual media content?', (2009) Ent LR, 20(8), 291, 291

[70] E McEneaney, 'The Audiovisual Media Services Directive, (2008) Ent LR, 19(3), 59-61, 59

[71] [71] A Breitschaft, 'Evaluating the linear/non-linear divide – are there any better factors for the future regulation of audiovisual media content?', (2009) Ent LR, 20(8), 291, 293

[72] Article 1(a)(i)

- 'The service must be operated by a media service provider which exercises "editorial responsibility";
- The media service provider must be based in the European Union;
- The service must consist of "programmes"
- The principal purpose of the programmes must be to inform, entertain or educate
- The service must be mass-media meaning that "it is intended for reception by and could have a clear impact on a significant proportion of the general public";
- In the case of an on demand service, the service must be television-like. This means that the on-demand service "competes for the same audience as television broadcasts and the nature and means of access to the service would lead the user to reasonably expect regulatory protection"'.[73]

'Programmes and television-like'

The requirement that the service consist of 'programmes' constitutes a major limitation of scope and point of uncertainty.[74] A programme is defined in Article 1(1)(b) as a 'set of moving images with or without sound'. It must also constitute 'an individual item within a schedule or a catalogue established by a media service provider', and furthermore the 'form and content' must be 'comparable to the form and content of television broadcasting'. As a result of this definition, it is therefore obvious that radio communications are excluded from the scope of the AVMSD. Furthermore, the requirements of being an individual item within a catalogue and of being 'television-like' mean that it is 'hard to determine what length and what quality are necessary for uploaded videos to be covered by this definition'.[75] Presumably content such as a singular movie trailer or a short clip of a sports event posted on website would not be covered by the AVMSD. If an audiovisual service must be television-like in order to be covered, then surely only material that is comparable to the content of traditional broadcasts would be covered, leaving much of the new media content which has previously never been seen on television untouched. This would seem to contradict the stated aims of the directive, if indeed it is meant to extend regulation to all new types of audiovisual content. The very requirements in the definition of a programme seem to contradict themselves. How can a service be similar to the form and content of television broadcasting if it was never intended to constitute an item within a schedule or catalogue? This lack of clarity will mean that much audiovisual content which the public would expect to be regulated would not fall within the scope of the AVMSD.

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[73] S Ridgway, 'The Audiovisual Media Services Directive – what does it mean, is it necessary and what are the challenges to its implementation?', CTLR 2008, 14(4), 108-113, 109

[74] Since according to 1(1)(a)(i) the 'principle purpose' of an audiovisual media service is the 'provision of programmes'

[75] A Breitschaft, 'Evaluating the linear/non-linear divide – are there any better factors for the future regulation of audiovisual media content?', Ent LR 2009, 20(8), 291-295, 293

Editorial responsibility

One of the main points of uncertainty in the definition of an audiovisual media service, and a major limitation of the scope of the AVMSD, is the requirement that the service must be under the 'editorial responsibility' of a 'media service provider'. Editorial responsibility is defined in Article 1(1)(c) as 'the exercise of effective control both over the selection of the programmes and over their organisation'. A media service provider is defined in Article 1(1)(d) as 'the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised'. Straight away it is clear from this definition that content published on YouTube may not be covered by the AVMSD. Thus, user-uploaded clips of professionally produced alcohol advertisements may go unregulated. Some commentators would disagree with this interpretation and are of the opinion that 'sites such as You Tube exercise a degree of editorial control over the content posted… can attract many thousands of viewers… [and] offers a mix of user generated and professional material'.[76] However, the AVMSD requires effective control, and it is submitted that the degree of control exercised by YouTube may not be sufficient.

A comparison can be made between YouTube and television shows such as 'You've Been Framed' that consist entirely of user-generated content. The content that appears on You've Been Framed is produced by individuals outside the control of the television broadcaster, however the particular bits of content that appear on the show are ultimately decided by the television broadcaster. In contrast, YouTube content, whether clips originating from a television broadcaster or not, is ultimately decided by the individual users who post it. The essential question for the purposes of the AVMSD is which example demonstrates 'effective control' by a 'media service provider'? Arguably the broadcaster showing You've Been Framed effectively controls which clips it shows, and how they are organised, and therefore does exercise editorial responsibility over its content. Could the same be said of YouTube, which does not prescribe what can or cannot be posted, instead relying on users to 'flag' offensive content? If editorial responsibility for content is not shown, then it will fall outside the scope of the AVMSD. This brings us back to the recurring problem of advertisements that are clearly intended to be subject to regulation, but are not because of the form in which they are accessed.

Audiovisual commercial communications

Not only could potentially harmful alcohol promotion be excluded from the scope of the AVMSD due to the format it is broadcast in, but it could also be excluded because it does not meet the definition of an 'audiovisual commercial communication'. These are defined in the directive in Article 1(1)(h) as:

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[76] R Craufurd Smith, 'Media Convergence and the Regulation of Audiovisual Content' (2007) 60 Current Legal Problems 238, 269-270

'Images with or without sound which are designed to promote, directly or indirectly, the goods, services, or images of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement'.

Thus, if a communication is not offered in return for remuneration or self-promotional purposes, and does not accompany a programme, then it will not fall to be regulated by the Directive. What therefore will happen, for example, to the website of a company selling alcoholic beverages? There is no denying that such websites can be powerful promotional tools, however it is unlikely they will fall within the definition of audiovisual commercial communication. Even if they are taken to fulfil the condition of having a self-promotional purpose, it could not be said that such websites 'accompany or are included in a programme'. This conclusion is strongly supported in Recital 22, which considers as outside the scope of the Directive, 'websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service'. Further examples of non-linear advertising content that may fall outside the definition of an audiovisual commercial communication are viral emails that are designed to 'gain credibility by making it seem as if the message is from a trustworthy friend',[77] and the Facebook pages and Facebook 'seeding' tactics of alcohol companies, which have the ability to reach large numbers of children – for instance 'an evaluation of Smirnoff's Facebook presence showed that almost three quarters of its contacts are in significant danger of breaching the Diageo Marketing Code (i.e. are underage)'.[78] Considering that many new forms of advertising may fall outside the scope of the Directive, it is of concern that recent research has highlighted that some companies such as WKD consider that '"TV is no longer the dominant media with the WKD audience"'.[79] If European instruments such as the AVMSD only focus on declining advertising mediums, how are they to provide effective regulatory protection against irresponsible advertising when excluded new media 'are a fast-growing channel for alcohol advertising, currently running neck and neck with television and set soon to outstrip it'?[80] Although alcohol companies try to prevent minors from accessing their websites through devices such as age confirmation

[77] G Hastings, '"They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents', (2009) The Alcohol Education and Research Council, 4

[78] G Hastings, '"They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents', (2009) The Alcohol Education and Research Council, 4

[79] G Hastings, '"They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents', (2009) The Alcohol Education and Research Council, 41

[80] G Hastings, '"They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents', (2009) The Alcohol Education and Research Council, 41

checks, it has been revealed that 'the effectiveness of these controls is very limited',[81] and thus it must be asked whether the solution should instead be to ensure that powerful new audiovisual media cannot fall outside the scope of regulatory instruments such as the AVMSD.

CONSEQUENCES OF THE LIMITATIONS OF THE DIRECTIVE

The loopholes and restricted scope of the AVMSD will lead to two particular outcomes, both of which could have negative consequences for the protection of public health and the functioning of the internal market.

Consequences of limitations in connection to Minimum Harmonisation

The inevitable result of leaving so much to interpretation in a minimum harmonisation Directive is that the Member States are invited to flesh out the detail of the vast majority of rules on their own.

The First Application Report on the implementation of the AVMSD reveals that 'in implementing the AVMSD requirements on alcohol advertising, 22 Member States have put in place somewhat stricter rules for alcohol advertising involving channels, advertised products or time slots'.[82] A document[83] produced by the Contact Committee of the AVMSD responsible for monitoring the implementation of the Directive shows that these additional regulations cover a broad range of possibilities.

The result of each Member State being allowed to expand on the provisions of the Directive in such divergent ways is that there are great disparities between the standard of alcohol advertising regulation in each Member State, which can lead to negative consequences in two ways. Firstly, the differences between Member State laws can create obstacles in the internal market. *De Agostini* made it clear that 'the Directive does not in principle preclude application of national rules with the general aim of consumer protection provided that they do not involve secondary control of television broadcasts in addition to the control which the broadcasting Member State must carry out'.[84] In other words, the Country of Origin principle is not absolute, and therefore the disparities between Member State laws could

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[81] G Hastings, '"They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents', (2009) The Alcohol Education and Research Council, 45

[82] First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee ad the Committee of the Regions on the application of Directive 2010/13.EU "Audiovisual Media Services Directive", COM(2012) 203 final, 7

[83] Available at http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact_comm/35_table_1.pdf (accessed 15/07/2012)

[84] Joined cases C-34/95, C-35/95 and C36/95 *De Agostini* [1997]I-03843, para 34

still lead to advertisements having to comply with several different sets of rules depending on which country they are broadcast in. Secondly the differences between national rules are prejudicial to the promotion of public health. It has been noted that the AVMSD does not sufficiently ensure that the standard and coverage of control over alcohol advertising will curb irresponsible practices. Allowing the Member States to introduce wildly divergent additional regulation as a result of the minimum harmonisation approach will arguably make things worse, since alcohol producers trying to advertise their product as effectively as possible will actively look for new media outlets and alternative formats that lie outside the tangled web of regulation. For instance a recent report on alcohol company advertising strategies reveals that advertisers are not only drawn to the 'growth and youth appeal of the internet but also the "creative freedom" it affords compared to traditional forms of media. This is particularly salient in a context of increasingly stringent restrictions on more conventional means of advertising'.[85] Advertisers will more than likely take advantage of such opportunities to push their core persuasive messages to as broad and young an audience as possible. This will potentially make it extremely hard to monitor how alcohol producers are targeting children and how alcohol advertising is affecting consumption.

Consequences of limitations in connection to the Country of Origin Principle

This divergence will in turn lead to a further problem, which is the potential abuse of the Country of Origin principle. The ECJ has 'explicitly confirmed that Member States were bound to accept broadcasts from other Member States, without being able to apply the stricter national standards which they may impose on national broadcasts'.[86] Broadcasters have used this fact to establish themselves in the Member State whose laws are most conducive to their activities, enabling them to be subject to less restrictive regulation while still being able to broadcast to the entire EU, including their 'real' home state. This practice of 'forum shopping' must be seen as a negative consequence of the limitations of the Directive since 'forum shopping threatens individual Member States' approach to broadcast regulation'.[87]

The relevant case law is illustrative of this point. The *VT4* case confirmed that a television broadcaster comes under the jurisdiction of the state of establishment, and if there is more than one state of establishment then 'the one in whose territory the broadcaster has the centre of its activities, in particular where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together'.[88] Importantly, the case also held that 'the mere fact that all the broadcasts and advertisements are aimed exclusively at

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[85] G Hastings, '"They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents', (2009) The Alcohol Education and Research Council, 42

[86] A Garde, 'Food Advertising and Obesity Prevention: What Role for the European Union?', (2008) J Consum Policy, 31, 25, 33

[87] J Harrison and L Woods, 'European Broadcasting Law and Policy', CUP, Cambridge 2007, 192

[88] Case C-56/96 *VT4* [1997] ECR I-03143, para 23

the Flemish public does not, as VTM claims, demonstrate that VT4 cannot be regarded as being established in the United Kingdom'.[89] In other words, an audiovisual media service provider cannot be prevented from being considered as established in a particular Member State even if they subsequently provide services exclusively to a different Member State.

In seeking to counter the negative effects of such behaviour, the general Treaty provisions may be of some assistance. In *TV10*, a challenge was mounted against a finding that a broadcasting company established in Luxembourg and transmitting to the Netherlands was in fact a domestic company attempting to evade national legislation designed to promote a pluralistic and non commercial media service. When referred to the ECJ, it was held that:

'the Court has already held in connection with Article 59 of the Treaty on the freedom to provide services that a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedoms guaranteed by the Treaty for the purpose of avoiding the rules which would be applicable to him if he were established within that State'[90]

Thus, the Court 'applied the "evasion-doctrine" to allow TV10 to be considered a company subject to Dutch law'.[91] However, the reasoning of the Court implies that 'the decisive criterion is the intention with which a company establishes itself in a Member State',[92] which contradicts reasoning in other cases such as *VT4* which suggest that it does not matter if the company intends to broadcast entirely to a different Member State. As a result, even though TV10 was considered to be lawfully established in one Member State, it was found to be wrongly pursuing an economic activity in a different Member State, and consequently there 'remains a large grey zone of cases which, depending on what criteria are used, can be governed by the law of different Member States'.[93]

In any event, the attempt to circumvent the Dutch policy of creating a pluralistic and non-commercial media service, and thus leave it ineffective, was prevented not by the provisions of the AVSMD but by the interpretation of the general Treaty provisions. The AVMSD does in fact make provision in Article 2(7) for Member States to adopt appropriate measures to 'prevent abuse or fraudulent conduct', and contains an express reference to the avoidance principle in the recitals. However, these safeguards are undermined firstly by the fact that recitals to directives are non-binding, but mainly because 'abuse or fraudulent conduct' is

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[89] Case C-56/96 *VT4* [1997] ECR I-03143, para 22

[90] Case C-23/93 *TV10 SA v Commissariaat voor de Media* [1994] I-04795

[91] G Straetmans and C Goemans, 'Case Law:TV10', [1995] Colum J Eur L, 1, 319, 327

[92] G Straetmans and C Goemans, 'Case Law:TV10', [1995] Colum J Eur L, 1, 319, 327

[93] G Straetmans and C Goemans, 'Case Law:TV10', [1995] Colum J Eur L, 1, 319, 328-9

not defined anywhere in the Directive, prompting one commentator to highlight that the 'vagueness of this drafting is a serious weakness'.[94]

IS THE AVMSD KEEPING PACE WITH THE DEVELOPMENT OF ADVERTISING?

It is not entirely surprising that the AVMSD has failed to enact strong controls on modern advertising – by tracking the development of advertising it is possible to see that the EU regulators are pitted against an ever moving set of goalposts.
The fact that Article 22 AVMSD is one of the few provisions that has substantively remained unchanged from the old TVWFD makes the situation worse. This is mainly down to the fact that EU has made clear in its EU Alcohol Strategy that, for now at least, it does not intend to propose any harmonising legislation in the field of the prevention of alcohol-related harm,[95] insisting that competence remains with the Member States and preferring instead to leave the development of alcohol policy to interventions such as the EU Alcohol Forum. Thus, what we see in the AVMSD is an extension of scope that has not been mirrored by a strengthening of provisions to cope with modern advertising that has become increasingly subtle. Some have commented that 'sophisticated communications and subtle emotional concepts such as sociability and masculinity that comprise modern advertising (and sponsorship) often defy intelligent analysis by the regulator, especially when the thinking and strategising that underpins them remain hidden'.[96] To a great extent, the idea that regulators simply cannot second-guess the subtle activities of modern advertising with qualitative regulation holds a lot of truth.

Advertising before the advent of the sort of content controls we see in the AVMSD was very blunt in what it suggested, without detailed rules to constrain it. Some examples are the following.

This advertisement from 1967 is for Falstaff Beer, with the caption 'First down, Five to go'. These ads tell the reader quite directly that it is fine to drink large amounts of alcohol at once. Thinking about the alcoholic again, 'ads like these tell the alcoholic and those around him or her that it is all right, indeed splendid, to be obsessed by alcohol, to

[94] J Harrison and L Woods, 'European Broadcasting Law and Policy', CUP, Cambridge 2007, 183

[95] Communication on An EU strategy to support Member States in reducing alcohol related harm COM(2006) 625 final, 4

[96] G Hastings et al, 'Alcohol advertising: the last chance saloon', (2010) BMJ, 340, 184, 186

consume large amounts of it on a daily basis'.[97] Thus, when alcohol producers are not forced to promote consumption of their products in moderation, they will try their hardest to directly exhort viewers to consume as much of their product as possible.

This advertisement dates from 1983 and is for Budweiser Beer. The slogan reads 'Bring out your best'. This unequivocally suggests to the reader that in order to perform better at basketball, or sport in general, you should drink Budweiser beer. This completely goes against the reality that 'alcohol consumption actually decreases athletic performance'.[98] Advertisements like these which 'wrongly imply that sports and alcohol are safely complementary activities'[99] are quite simply dangerous, as they counteract the healthy living messages that governments promote.

The advertising strategies that can be seen above would never have complied with even the requirements found in the AVMSD. When the TVWFD was introduced in 1989, followed subsequently be the AVMSD, advertising techniques have become increasingly sophisticated and subltle, and have sread to a number of alternative media, in order to evade the rules that have been laid down. Alcohol producers will always attempt to portray the same core messages, and if the advertising strategies have to evolve to accommodate the rules in place then this is what will happen. Examples include the following:

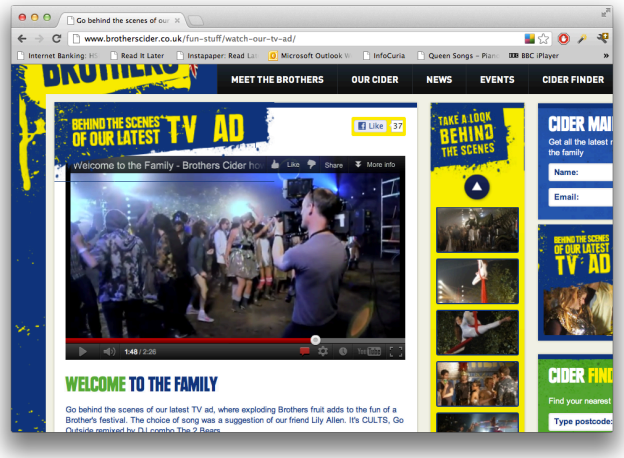
This television spot from 2011 is for Michelob Ultra Beer, and features the slogan the slogan 'Welcome to the ultra life, where you never have to settle for less'. Again, this is another sport themed advert, but this time on the face of it the advert does not contain any direct references to drinking large amounts of beer, or what the beer is able to do for the drinker. Instead, the advert associates the beer with a particular lifestyle, in this instance with those that enjoy mountain biking. It dos not suggest that the beer will increase your performance, but does suggest that the type

[97] J Kilbourne, 'Deadly Persuasion:7 Myths Alcohol Advertisers Want You to Believe', http://www.medialit.org/reading-room/deadly-persuasion-7-myths-alcohol-advertisers-want-you-believe (accessed 8/01/12)

[98] J Kilbourne, 'Deadly Persuasion:7 Myths Alcohol Advertisers Want You to Believe', http://www.medialit.org/reading-room/deadly-persuasion-7-myths-alcohol-advertisers-want-you-believe (accessed 8/01/12)

[99] J Kilbourne, 'Deadly Persuasion:7 Myths Alcohol Advertisers Want You to Believe', http://www.medialit.org/reading-room/deadly-persuasion-7-myths-alcohol-advertisers-want-you-believe (accessed 8/01/12)

of person who mountain bikes is also the type of person who will enjoy the beer. Thus, it still subtly associating alcohol with sport, and in particular the enjoyment of sport, which is supposedly prohibited by the codes.



This page of the Brothers Cider website, while not specifically an advert itself, is a promotion of the alcoholic brand. It features an audiovisual clip of the making of the latest 2012 television advertisement, which depicts an impressionistic festival scene, and features a caption which reads 'the choice of song was suggested by our friend Lily Allen'. Setting aside the debate on whether or not the content of a website such as this would even come within the scope of the AVMSD, if it were to be analysed under its provisions, then again on the face of it there is nothing to suggest that the website encourages immoderate drinking, or specifically targets young children. However the association of the brand with music festivals, and the endorsement by a popular singer, both of which would not only appeal to young adults but to minors below the legal drinking age, achieve the real aim of the alcohol producer. Even though the AVMSD has implemented rules designed to safeguard the young from alcohol advertisements, the alcohol industry continues to target young people, and successfully so. This evidence suggest the complete opposite to the industry's insistence that they do not try to create new drinkers, only to encourage brand switching.

The strategy of subtle suggestion and association to avoid the alcohol advertising controls appears to be working - studies have found ample evidence that alcohol advertising can and does appeal to young people and minors even if those advertisements comply with laws designed to stop them from doing so. For instance, reports have found that 'even in advertisements that do not portray actual consumption of alcohol, young people perceive the characters as heavy drinkers'.[100] This could conceivably be the case with the Brothers website shown above. It has been found that 'while many codes restrict the use of young people in advertisements, having them present is not necessary for an advertisement to be appealing to under-age drinkers - it is enough to show the lifestyles to which young adults aspire'.[101] Furthermore, 'there is evidence for targeting of alcohol advertisements to underage drinkers, and consistent

[100] W Mistral, 'Effectiveness of national policies and initiatives to reduce alcohol-related harm among young people', March 2009, Paper prepared for the Young People and Alcohol Project.

[101] P Anderson and B Baumberg, 'Alcohol in Europe, A public health perspective: A report for the European Commission', (2006), London, Institute of Alcohol Studies.

evidence that exposure to television, music videos and sponsorship which contain alcohol advertisements predicts onset of youth drinking and increased drinking'.[102] Finally, one report highlights that 'American studies have found that children and teenagers respond particularly positively to TV advertisements featuring animals, humour, music and celebrities' and goes on to suggest that 'policy makers should ensure that advertisements should focus on product-related characteristics, using content less appealing to children and teenagers'.[103]

In summary, the AVMSD not only fails to create a set of rules that in isolation are strong and well defined, but also fails to create a set of rules that take into account the tendency of alcohol advertisers to play the rules with subtle techniques that will influence the viewer to almost the same extent as direct exhortations while still staying within the letter of the law.

CONCLUSION

In summary, the AVMSD can be seen as a Directive that has failed to fulfill its potential. As the only piece of consumer legislation that has thus far made an attempt to directly that directly regulate how alcohol can be advertised, it should have been expected that it would have been made to stretch as far as possible to ensure that the practices of advertisers are subjected to some effective measure of control. However where the Directive should have been given a broad scope it is in fact narrow. Where the Directive could have been expected to enact strong provisions, they are in fact fairly weak. And where the Directive purports to put in place a regulatory scheme fit for the modern technological era, it in fact lacks the vision to cope with the constantly developing advertising practices of today.

Educational programmes are simply beleaguered by the determination of the alcohol companies – 'for every £1 laid out on advising young people about the downsides of drinking, several hundred pounds are spent encouraging them to drink more'.[104] Stronger controls on alcohol advertising are needed. Given the scientific evidence on the matter, one of the answers should be to at least broaden and toughen the scope and content of current EU alcohol advertising legislation. There is little point in grand statements in the EU Alcohol Strategy to the effect that that the aim of the joint effort is to agree a code of conduct to

[102] P Anderson and B Baumberg, 'Alcohol in Europe, A public health perspective: A report for the European Commission', (2006), London, Institute of Alcohol Studies, 287

[103] Institute of Alcohol Studies, 'Alcohol & Advertising: IAS Factsheet', http://www.ias.org.uk/resources/factsheets/advertising.pdf (accessed 9/01/12)

[104] G Hastings and N Sheron, 'Alcohol marketing to children', (2011) BMJ, 342(2), 720, 720

implement at national *and EU level*[105] if some effective solutions such as further harmonising legislation are taken out of the equation.
The AVMSD, for all its faults, is not the only EU legislative measure applicable to alcohol advertising though. The earlier Unfair Commercial Practices Directive can also be directly applied to the advertising of alcoholic beverages, and it is to this Directive that the analysis in the next part of this Chapter turns.

PART 2 - THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE

INTRODUCTION

Directive 2005/29,[106] otherwise known as the Unfair Commercial Practices Directive (UCPD) is another important Directive in the EU's legislative scheme for alcohol advertising.

The UCPD is organised so that 'the fairness of commercial practices will be tested in accordance with a *blacklist*, one *grand general clause* and two *small general clauses*',[107] with the enquiry conducted in that order by the Court. The so called blacklist is contained in Annex 1 of the Directive, and comprises an exhaustive list of 31 commercial practices that are deemed to be unfair in all circumstances, and thus are prohibited without the need to refer to the main general cause that forms the core of the Directive. It is because the practices in the Annex are deemed to be unfair without the necessity of a case-by-case examination of the issues that this part of the Directive is applied first. Should the commercial practice in question not align to one of those in the Annex, it will then be tested for compatibility with the main general clause of the Directive. This is contained in Article 5 and states simply that 'Unfair commercial practices are prohibited', subsequently defining a practice as unfair if it is 'contrary to the requirements of professional diligence or it 'materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches'. This main general clause is then backed up by two smaller general clauses, which provide that commercial practices will also be unfair if they are misleading (Article 6) or aggressive (Article 8).

The UCPD adopts an approach of maximum harmonisation, meaning that the Member States cannot improve upon the level of protection established by the Directive in their national law. As the 2001 Green Paper on EU Consumer Protection stated, the 'virtuous

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[105] n4 above, 16

[106] Directive 2005/29/EC of the European Parliament and of the Council of May 11 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EC, Directive 97/7/EC, 98/27/EC and2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149/22, 11.6.2005,

[107] J Stuyck, E Terryn and T van Dyck, 'Confidence through fairness? The new Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market', (2006) CMLR, 43, 107, 108

circle [of efficient cross border supply and demand of goods and services] can only be achieved if the regulatory framework in place encourages consumers and businesses to engage in cross border trade. Different national laws on commercial practices relating to business-consumer relations can hinder this evolution'.[108] In order to encourage consumer and business confidence in the Internal Market, the Directive's maximum harmonisation approach therefore replaces the existing laws of the Member States and attempts to lay down a single level of protection against unfair commercial practices.

However, where the UCPD is relevant to the regulation of alcohol advertising the level of regulatory protection is again quite limited. The fact that the scope of the Directive is confined to business to consumer transactions (B2C) only serves to exacerbates these limitations. Overall it is another example of a rare piece of EU legislation applicable to alcohol advertising that insufficiently protects the interests of the consumer against the marketing efforts of the alcohol producers.

This section will discuss how the Directive applies to alcohol advertising, and how its scope and construction may cause problems for alcohol advertising.

HOW DOES THE DIRECTIVE APPLY TO ALCOHOL ADVERTISING?

The UCPD contains no references specifically to alcohol advertising, however it does cover commercial communications in general. Article 2(d) provides that the definition of a B2C commercial practice includes 'commercial communication including advertising and marketing', so alcohol advertisements will fall to be regulated by the Directive where they have not been excluded from its scope by other provisions.

Article 5(3) of the Directive contains a reference to what are commonly known as advertising 'puffs'. The Article provides that commercial practices likely to have an effect on a particularly vulnerable group of people are to be assessed from the point of view of the average member of that group. However it then states that:

'This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally'.

Unlike the AVMSD, which contains provisions on alcohol advertising that are arguably not strong enough to effectively curb irresponsible practices, this provision of the UCPD actively prevents the strong regulation of alcoholic beverages, positively encouraging the use of irresponsible practices to consumers who are less able to recognise them for what they are.

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[108] Green Paper on European Union Consumer Protection, presented by the Commission of the European Community on October 2, 2001, COM(2001) 531 final, point 2.1, p 3

Firstly, as was shown in Chapter one, alcohol producers do as much as they can to persuade consumers to drink their products, and that they do actively promote alcohol to young consumers. Young consumers, by virtue of their 'age or credulity', to use the language of Article 5(3), are particularly vulnerable to alcohol advertising, and in fact Recital 18 gives children as an example of particularly vulnerable consumers who are worthy of protection from exploitation by unfair commercial practices. In light of this one would think that 'puff' advertising of alcohol, whose advertorial value lies in the ability of the consumer to recognise it as such and remember it, is exactly the kind of practice that the UCPD should be making special provision against to protect vulnerable consumers such as children, since due to their age or credulity they are not able to recognise that such advertisements are intended to be an attention-grabbing embellishment on reality and not a reflection of it.

It is regrettable then that Article 5(3) has prevented the altered test for vulnerable consumers from having an impact on the practice of 'puff' advertising. It considerably reduces the protection that can be afforded to children against alcohol advertising that uses exaggerations and puffery. Children are routinely exposed to alcohol advertising, as was shown in Chapter One, and early exposure can form the basis for future drinking habits, so what might children make of the well known Carlsberg strapline – 'probably the best beer in the world' – an exaggerated statement intended to catch the attention of viewers, the majority of whom would recognise the tongue in cheek nature. Children exposed to the same statement might be subconsciously fooled into believing that Carlsberg was in some way superior to other products, and might be induced into starting to drink Carlsberg on the strength of this strapline.

Recital 6 also contains a reference to advertising. This states that

'this Directive does not affect accepted advertising and marketing practices, such as legitimate product placement…which may legitimately affect consumer's perceptions of products and influence their behaviour without impairing the consumer's ability to make an informed decision'

Putting the internal contradictions of this statement aside (if the consumer's perception of the product is affected, how can he then make an informed decision about it?), this clause represents a further opportunity for alcohol producers to promote irresponsible messages through the medium of product placement.

It has been noted that the treatment of product placement in the AVMSD means that the promotion of alcohol in product placement form is regulated less strictly by that Directive than traditional spot advertising, thus allowing associations to be made that would not be allowed in traditional adverts. Recital 6 of the UCPD achieves a similar result, in that it allows product placement of alcohol to escape restrictions on what it can suggest.

Essentially this provision is stating that practices affecting the ability of consumers to make a decision, but which are nonetheless considered acceptable and legitimate as advertising practices in general will not be affected by the UCPD. Therefore firstly, in relation to product placement, it is clear that this Directive is not intended to catch any product placement that would in isolation be considered as misleading. Therefore, so far we have examined two of the most important consumer protection Directives applying to advertising and neither of them has taken a firm grip on setting out a comprehensive regulatory scheme which protects the consumer from the negative effects of product placement. The AVMSD contains a substantial hole in that it leaves it up to the Member States whether to legalise product placement or not, and even then contains flimsy provisions on how is should be controlled. If one thought that the UCPD might provide a safety net in controlling the misuse of product placement, then one will be disappointed. This is worrying considering that some public consultation responses on whether product placement should be legalised in the UK following the adoption of the AVMSD stated that 'any changes to the rules on product placement in UK television should supersede the inadequate safeguards outlined by the AVMS Directive by specifically prohibiting the placement of alcoholic drinks or associated products'.[109]

HOW DOES THE SCOPE AND CONSTRUCTION OF THE DIRECTIVE EXACERBATE THESE PROBLEMS

EXCLUSION OF PUBLIC HEALTH

Public health concerns are explicitly excluded from the scope of the UCPD. Article 3(3) states that the Directive is 'without prejudice to Community or national rules relating to the health and safety aspects of products'. A substantial majority of the concerns voiced over commercial communications for alcohol relate to the encouragement of excessive consumption or other health related effects of promoting alcoholic substances, and legislators have acted accordingly. This means that, in addition to the fact that the provisions directly applicable to advertising contain loopholes, this public health exclusion prevents a large number of alcohol advertising laws from being caught by the general prohibitions in the Directive that cover misleading and aggressive practices. Worse, it means that where there are specific advertising bans in a Member State, if they concern the protection of public health, they will not be covered by the Directive. This will result in continued national diversity in this area despite the aim of the Directive to create a single unfair commercial practices law across Europe.

[109] Consultation on Product Placement on Television: Response from Alcohol Concern to the Department for Culture, Media & Sport, para 5.1

However this exclusion in Article 3(3) is complicated by the fact that other provisions within the Directive seem to contradict it. Against the fact that the Directive seemingly unequivocally excludes all laws relating to the health and safety aspects of product from its scope, commentators point out that 'the Directive is inconsistent because No 17 of the Annex prohibits as unfair, falsely claiming that a product is able to cure illness, dysfunction or malformations. Does this not refer to health protection?'[110] Furthermore, Point 28 of the Annex seems to be another candidate liable to cause confusion. It provides that 'including in an advertisement a direct exhortation to children to buy advertised products' is a practice to be considered unfair in all circumstance. What if the exhortation is for an alcoholic product which, if purchased, could have an adverse affect on the child's health? Such exclusions in the Annex would surely override the exclusion in the main body of the Directive, as the black list in the annex is usually applied first by the Court, and thus the regulation of some advertising claims that could have an adverse impact on health will have been harmonised by the UCPD after all.

Howells et al sum up the problem:

'"Positively" it is clear that the Directive, and the legislation based upon it, ought to be applied to misleading health claims in the marketing of products that may have an impact on health and safety. On the other hand, however, if there are stricter rules than the Directive in national product safety or health legislation concerning such marketing, they should not "negatively" be struck down with reference to the maximum character of the Unfair Commercial Practices Directive, because they may be needed to support health policies that are intended to be outside the scope of the Directive'.[111]

There is a thin line created by the inconsistencies within the Directive as to what can be challenged as an unfair commercial practice under it, and what cannot. For example, would the Directive apply to a certain advertising circular that came before an ASA adjudication in 2009 for the company 'Alcohol in Emergency', claiming that the drinks delivery service was 'your quick link to drink'. This comes close to falling within the wording of Point 17, which prohibits 'falsely claiming that a product is able to cure illness, dysfunction or malformations'. The ASA upheld the complaint on the basis that the advertisement suggested that someone might urgently need alcohol in a comparable way to requiring medical attention, so it would not be far fetched to say that it could fall within the prohibition established by the Annex, given that the advertisement could unfairly lead intoxicated or addicted persons into believing that the drinks service could solve their craving for alcohol. This is despite the Directive excluding the health and safety aspects of products from its scope.

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[110] H-W Micklitz, 'Unfair Commercial Practices and Misleading Advertising', in H-W Micklitz, N Reich and P Rott (eds), 'Understanding EU Consumer Law', Intersentia, Oxford 2009, 71

[111] G Howells, H-W Micklitz and T Wilhelmsson, 'European fair trading law: the Unfair Commercial Practices Directive, Ashgate 2006, 75

Therefore, the internal contradictions of the Directive surrounding the purported exclusion of health and safety concerns from its scope could cause problems for the regulation of alcohol advertising which would not occur if misleading or aggressive health claims were included in the scope of the Directive.

MAXIMUM HARMONISATION

Another salient feature of the UCPD is that it is a maximum harmonisation directive. Where a Directive adopts a maximum harmonisation approach 'Member States may not go beyond the level of protection provided for in the Directive'.[112] This approach attempts to standardise the rules for unfair commercial practices, however it also leads to deregulation of consumer protection measures, as will be seen from the case law below, removing from the Member States the ability to react to future developments in alcohol advertising by enacting stricter or even simply different rules.

The main reasoning put forward by the Commission in favour of using a maximum harmonisation approach in the UCPD is twofold. Firstly, the aim of the Directive of establishing a single set of rules on unfair commercial practices demands maximum harmonisation 'otherwise, the positive effects of having a single set of rules in the internal market will not be achieved', [113] since 'harmonisation at a reasonable level of consumer protection also implies that the directive does not contain minimum clauses'.[114] The other argument is that of 'businesses needing confidence that they would not be confronted with more protective national laws in order to encourage them to trade on a European wide basis'.[115] The Commission apparently 'argued that any objections were irrational as all unfair

[112] Health & Consumer Protection Directorate General, 'The Unfair Commercial Practises Directive: New laws to stop unfair behaviour towards consumers', p27, http://ec.europa.eu/consumer/cons_int/safe_shop/fair_bus_pract/index_en.htm (Accessed 17 November 2011)

[113] Health & Consumer Protection Directorate General, 'The Unfair Commercial Practises Directive: New laws to stop unfair behaviour towards consumers', p27, http://ec.europa.eu/consumer/cons_int/safe_shop/fair_bus_pract/index_en.htm (Accessed 17 November 2011)

[114] B De Groote and K De Vulder, 'European framework for unfair commercial practises: analysis of Directive 2005/29', JBL 2007, Jan, 16-42, 28

[115] G Howells, 'Unfair Commercial Practices Directive – A Missed Opportunity?', in S Weatherill and U Bernitz (eds), 'The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques', Hart Publishing, Oxford 2007, 108

practices would be caught by the general clause'.[116] While the Directive might be aimed to provide an increase in certainty for businesses, what it does provide in practice is increased uncertainty for Member States. The operation of the Annex as the first step in the enquiry means that the maximum harmonisation character of the Directive will in fact invalidate many existing Member State rules for stepping beyond the protection offered first and foremost by the blacklist.

There are multiple examples in the case law of national governments being disappointed when their consumer protection legislation has been found illegal due to the fact that it goes beyond the maximum standard set in the UCPD. One example is the *VTB-VAB* case, in which the commercial practice of making combined offers was banned by the Belgian government. The Court reminded us that the maximum harmonisation character of the UCPD meant that 'Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection'.[117] This means that where a Member State wishes to prohibit a certain practice in all circumstances, they can go no further than banning those practices that are listed in the Annex. Consequently, since the Belgian law set down 'a presumption of unlawfulness of combined offers',[118] it was incompatible with the Directive, because 'such practices are not referred to in Annex I to the Directive'.[119] Thus in this instance a piece of national legislation aiming to establish a high level of consumer protection was found to be incompatible with the UCPD because the Directive did not have the foresight to establish that same level of protection.

Other recent examples from the case law might include *Mediaprint*, where an Austrian outright ban on the offer of bonus with the purchase of goods or services was declared unlawful since 'it is undisputed that practices consisting in offering consumers bonuses associated with the purchase of products or services do not appear in Annex I to the Directive. Therefore, they cannot be prohibited in all circumstances'.[120] Another example is *Plus*, where a German law prohibiting practices that make the participation of consumers in a lottery conditional on the purchase of goods and services, again a practice not found in the Annex, was found to run 'counter to the content of Article 4 of Directive 2005/29, which expressly prohibits Member States from maintaining or adopting more restrictive national

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[116] G Howells, 'Unfair Commercial Practices Directive – A Missed Opportunity?', in S Weatherill and U Bernitz (eds), 'The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques', Hart Publishing, Oxford 2007, 108

[117] Joined cases C-261/07 and C-299/07 *VTB-VAB* [2009] ECR I-02949, para 52

[118] Joined cases C-261/07 and C-299/07 *VTB-VAB* [2009] ECR I-02949, para 59

[119] Joined cases C-261/07 and C-299/07 *VTB-VAB* [2009] ECR I-02949, para 60

[120] Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v "Österreich"-Zeitungsverlag GmbH* [2010] ECR I-10909, para 35

measures, even where such measures are designed to ensure a higher level of consumer protection'.[121]

In light of this case law, can it really be said that the UCPD Directive not only achieves its aim of creating a single unfair commercial practices law that gives increased confidence to consumers and traders operating within the internal market, but also fulfils the obligation in Article 9 TEU that 'In defining and implementing its policies and activities, the Union shall take into account requirements linked to…a high level of…protection of human health'. The maximum harmonisation approach taken is not conducive to achieving either. The crux of the problem is that maximum harmonisation 'could be used to outlaw more detailed national provisions on a broad – and certainly partially unforeseeable – field without necessarily offering a sufficient protection in replacement'.[122] This deregulation without sufficient replacement is exactly what the UCPD has achieved, which is a particular problem in the field of alcohol advertising regulation since Directive does not purport to offer any protection against unfair practices impacting upon the health of the consumer, while the one or two health related practices in the Annex may indicate that establishing a presumption again commercial practices impacting on health may actually be banned by the Directive.

For instance, a Member State could enact a law banning the retail practice, in relation to alcohol, whereby a product is temporarily doubled from its usual price for a period of time and then dropped back to the original price under the promotion that it is now 'half price', on the basis that this would unfairly mislead alcoholics into believing that they were getting more drink for a cheaper price. The UCPD would preclude such a national law, because establishing a presumption that such a practice is unfair does not appear in the Annex, and thus would contravene the fact that Member States may not enact stricter rules than those found in the Directive. Clearly if a situation of this sort did arise in relation to alcohol advertising, the UPCD will have 'led to the lowering of consumer protection standards in the Member States that have traditionally provided a higher level of protection'.[123]

BUSINESS TO CONSUMER ONLY

Another deficiency in the construction of the UCPD that could have a negative effect on the regulation of alcohol advertising is the restriction of the Directive's scope to business to

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[121] Case 304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217, para 50

[122] G Howells and T Wilhelmsson, 'EC Consumer Law: Has it Come of Age' (2003) ELR, 28, 370, 383

[123] A Garde, 'The Unfair Commercial Practices Directive: A successful example of legislative harmonisation?' in P Syrpis (ed), 'The Judiciary, the Legislature and the EU Internal Market', CUP, Cambridge 2012, 126

consumer transactions only. Article 3(1), which provides the primary remit of the Directive, states that:

'This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product'.

One negative consequence of this is that the regulatory scheme applicable to advertising is split in two. What used to be provided for in a single Directive, the Directive on Misleading and Comparative Advertising[124] which provided for the protection of consumers and traders alike, is now split over two Directives, with the UCPD taking exclusive responsibility for B2C relations and the Misleading and Comparative Advertising Directive being left to continue regulating B2B relations. One commentator goes so far as to say that 'by distinguishing between unfair practices and their negative effects as far as consumers are concerned, and unfair practices with negative effects as far as companies are concerned, the EU has moved backward with regard to the directive on misleading and comparative advertising'.[125]

However, although the Directive does not apply to B2B commercial practices, there is nothing to stop a trader challenging an unfair B2C practice, or conversely a national law that prohibits such a practice. Recital 6 to the Directive states that it applies to practices 'which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors'. This has been interpreted to mean that traders can initiate legal action to ensure that the Directive is properly applied in cases of unfair B2C commercial practices. A particularly stark example is the *Mediaprint* case, where it was argued that the national rule in question did not fall within the scope of the Directive as it pursued wider objectives, namely the protection of consumers and businesses against unfair commercial practices. However the Court ruled that this did not prevent the Directive applying since 'as is evident from recital 6 in the preamble to the Directive, only national legislation relating to unfair commercial practices which harm 'only' competitors' economic interests or which relate to a transaction between traders is thus excluded from that scope'.[126] Since the national law mentioned the protection of consumers, it fell within the scope of the Directive, and due to the maximum harmonisation character of the Directive analysed above the law was found to be incompatible with the Directive.

The worrying thought therefore is that the scope of the UCPD is defined in such a way whereby traders may use the Directive to remove higher levels of consumer protection law against unfair advertising practices at national level, either deliberately or incidentally. Even

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[124] Initially Directive 84/450 on misleading advertising, extended to cover comparative advertising in 1997, codified in 2006 as Directive 2006/114.

[125] C Poncibo and R Incardona, 'The EU Unfair Commercial Practices Directive: a faltering first step', LLR 2005, 1(2), 317-337, 319

[126] Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v "Österreich"-Zeitungsverlag GmbH* [2010] ECR I-10909, para 21

though the UCPD has split the law relating to B2C and B2B practices, many national legislators have not, and so 'national laws often pursue the dual objectives of protecting fair competition and consumers in tandem, thus making the boundary alien to several Member States' legal systems'.[127] The interest of the trader in seeking redress against his competitor may indirectly drag the interests of the consumer into the picture, something that would not happen if the Directive were defined more sharply in whether traders have an interest under the UCPD or not.

Having said this, many commercial practices may be 'completely innocuous when viewed from a consumer perspective yet capable at the same time of giving rise to serious distortions of competition',[128] and thus traders will have an interest in challenging them. This may mean after all that 'the fact that traders have an indirect interest in ensuring that the UCP Directive is correctly interpreted and applied may reap benefits'.[129] An example again from recent ASA adjudications is a 2010 poster and TV campaign for Carling larger that carried the claims 'NEW TASTE LOCK CAN' and 'Scientifically proven to lock in great taste'. Heineken, a competitor, was able to challenge under the ASA codes firstly that the ad was misleading as it implied that the can used new technology, and secondly that it misleadingly implied that the can was better than those of its competitors. Although consumers may not be aware of this, traders may well be, and allowing a trader to challenge such a practice under the UCPD may in fact benefit the consumer, helping to remove a piece of advertising that was damaging to consumer interests. On the other hand one must be careful with a situations involving misleading alcohol advertising. A trader would have to establish that such a practice would affect the economic interests of the consumer – arguing that a health risk is posed will not be covered by the Directive, and it must not be forgotten that the trader could not challenge the distortion of competition outright.

The Commission believed that the adoption of the Directive would mean that businesses could innovate in greater certainty. On the above analysis, whether or not this was achieved is questionable. During the debates leading up to the adoption of the Directive the German government pushed for a set of rules that applied to commercial practices whether aimed at harming consumers or businesses.[130] It was highlighted that 'in many countries the rules on marketing do not distinguish between consumer protection measures and unfair conduct by

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[127] A Garde, 'The Unfair Commercial Practices Directive: A successful example of legislative harmonisation?' in P Syrpis (ed), 'The Judiciary, the Legislature and the EU Internal Market', CUP, Cambridge 2012, 133

[128] A Pliakos and G Anagnostaras, 'Harmonising national laws on commercial practices: sales promotions and the impact on business to business relations', EL Rev (2010), 35(3), 425-435, 426

[129] A Garde, 'The Unfair Commercial Practices Directive: A successful example of legislative harmonisation?' in P Syrpis (ed), 'The Judiciary, the Legislature and the EU Internal Market', CUP, Cambridge 2012, 134

[130] H Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices', (2010) 73(1), 89-118, 94

a business that harms competitors'.[131] Thus, it is not clear exactly how the Directive as enacted, only regulating unfair commercial practices which affect the economic interests of consumers, will give businesses increased confidence. After all, 'an unfair commercial practice such as misleading advertising, if effective, should both harm consumers and damage the profits of competitors'.[132] Therefore harmonisation of the rules of just one side of the coin will surely not completely satisfy the objective of giving businesses legal certainty. The Directive states that 'both consumers and business will be able to rely on a single regulatory framework'[133] – how will relying on laws which expressly exclude the direct protection of business interests help business though?

THE RELATIONSHIP BETWEEN THE UCPD AND THE AVMSD

The two instruments of EU law analysed thus far do not stand in isolation of one another. In fact, it is possible to identify telling points at which the UCPD is linked to the AVMSD. This section will seek to explore whether these links work in favour of the effective regulation of alcohol advertising or against it.

Likewise, the UCPD has a general deferral clause that states that 'in the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects'.[134] There are then further deferrals in Annex 1 which refer specifically to the old TVWFD (as amended by the AVMSD), in particular in Point 28 of the Annex: 'including in an advertisement a direct exhortation to children to buy an advertised product or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting'.[135] This is now Article 9(1)(g) of the AVMSD, which states that 'audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity'. Taking alcohol advertising as our example, the question that must be asked as a result of this state of affairs is this: will the media that an unfair advertising practice is carried in therefore affect its chances of being declared illegal. If the exhortation is made in

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[131] H Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices', (2010) 73(1), 89-118, 94

[132] H Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices', (2010) 73(1), 89-118, 94

[133] Recital 12, UCPD

[134] Article 3(4), UCPD

[135] Article 28 of Annex 1, UCPD

a non-audiovisual medium, then the UCPD will catch it. If it is made in an audiovisual medium, then according to Point 28 of the Annex, the AVMSD should apply, and as has been shown previously in this Chapter, the AVMSD is weak in when determining which audiovisual commercial communications its rules should be applied to. If the exhortation is found not to fall within the AVMSD, does this mean that it is then thrown back to the UCPD? Uncertainties such as this do not help in determining the fate of an alcohol advertisement.

One particularly interesting point in the relationship between the UCPD and the AVMSD is the extent to which one has influenced the other when considering how informed a consumer is presumed to be. One commentator has suggested of the AVMSD that 'part of the Directive's strategy is to…propagate[s] a new role for viewers. According to the Directive, viewers are not as helpless as they used to be. Modern market developments that give viewers more choice also enable them to take the protection of their interests and concerns into their own hands'.[136] The 'media-literate' viewer is defined in the Directive as 'able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. They are better able to protect themselves and their families from harmful or offensive material'.[137] Thus, the Directive strives to encourage a society of audiovisual media service viewers who are aware, objective and able to evaluate the things they see a high level of understanding. This recalls quite vividly the standard of the 'average consumer', which forms such a great part of the UCPD. Evidently the concept of an EU consumer who is able to critically assess his or her surroundings using a good level of prior knowledge has pervaded the legislative process since it was introduced in Directives such as the UCPD, and perhaps in the AVMSD we can see another manifestation of this construct, albeit in a different guise.

PART 3 - THE EU ALCOHOL AND HEALTH FORUM, AND THE COMMITMENTS OF INDUSTRY OPERATORS

It is not surprising that given the reluctance of the EU to enact binding legislation on alcohol advertising, and the weaknesses of the applicable legislation already in existence, that it is mainly self-regulation and soft law measures that have been used to put the relevant points of the EU Alcohol Strategy into practice, largely through the EU Alcohol and Health Forum.

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[136] N Helberger, 'The Media-Literate Viewer', Amsterdam Law School Research Paper No. 2012-34, 141

[137] Recital 47, AVMSD

However are these European level solutions any more effective than the AVMSD? The fear is that they may not be.

In the Strategy the Commission envisages that its aim on commercial communication will be to 'work with stakeholders to create sustained momentum for cooperation on responsible commercial communication', and to 'reach an agreement with representatives from a range of sectors (hospitality, retail, producers, media/advertising) on a code of commercial communication implemented at national level and EU level'. The main vehicle for achieving this at present is the EU Alcohol and Health Forum,[138] which gathers together various 'umbrella organisations operating at a European level, capable of playing an active role in reducing alcohol-related harm in the EU',[139] in order to 'seek close coordination with all other actors, so that successful endeavours can be more promptly shared with potential partners and emulators across the European Union as a whole'.[140] The main action coming from the Forum to tackle irresponsible advertising and in the process bring down levels of alcohol related harm takes the form of commitments by the Forum Members, of which for commercial communications there are 33 separate commitments. Although the initiatives of the Forum should be welcomed, in terms of the impact it can have on tackling irresponsible alcohol advertising, there is cause to feel more sceptical. This is down to two factors – the subject matter of the pledges and the prevalence of alcohol producers in the forum's membership.

Of the 108 commitments made by Forum members, 33 (22%) are on the subject of responsible commercial communication and sales. However, a detailed examination of these commitments reveals that a good number, at least 12, can be said to relate mainly to educational and information aims, rather than any concrete improvement on the self regulatory codes. This reflects the wider trend within the Forum as a whole, where 46% of all commitments are related to information and education programmes.[141] These facts about the content of commitments supposedly aimed at improving responsible marketing alcoholic beverages do not immediately suggest that they will have a great level of effectiveness. It has been recognised that 'education is a weak instrument to tackle alcohol-related problems',[142] with numerous reviews, studies and publications concluding that there is little evidence that educational programmes are effective in reducing the level of alcohol

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[138] The Forum can be found at http://ec.europa.eu/health/alcohol/forum/index_en.htm (accessed 31/08/2012)

[139] Charter establishing the European Alcohol and Health Forum, 4, available at http://ec.europa.eu/health/ph_determinants/life_style/alcohol/documents/Alcohol_charter2007.pdf (accessed 31/08/2012)

[140] Charter establishing the European Alcohol and Health Forum, 2, available at http://ec.europa.eu/health/ph_determinants/life_style/alcohol/documents/Alcohol_charter2007.pdf (accessed 31/08/2012)

[141] Summary Report of Commitments made by members of the European Alcohol and Health Forum, 10, available at http://ec.europa.eu/health/archive/ph_determinants/life_style/alcohol/forum/docs/report_commitments_en.pdf (accessed 31/08/2012)

[142] A de Bruijn, 'No reason for optimism: the expected impact of commitments in the European Commission's Alcohol and Health Forum', (2008) Addiction, 103, 1588, 1589

related harm.[143] A such, it must be wondered how far the commitments of the Forum relating to commercial communications will actually go in contributing towards reducing the levels of alcohol related harm.

The other area of concern is the fact that of the 33 commitments relating to commercial communications, 31 have been made by economic operators, and of these 25 are from producers of alcoholic beverages.[144] This reflects the balance of membership within the Forum, where of the 9 groups of stakeholders the alcohol producers are the largest with 17 Forum members, and account for 63 of the 108 commitments made in total within the Forum. This does not suggest that the work of the Forum in combatting the level of alcohol related harm as a consequence of alcohol advertising will be as effective as it could be for two reasons.

Firstly, it is questionable to what extent the alcohol companies are 'capable of playing an active role in reducing alcohol-related harm', as the establishing Carter requires. The aims of all commercial enterprises are first and foremost to make profit, and alcohol companies are no different. Thus to participate effectively in an initiative such as the Forum would seem counter intuitive for the alcohol producers. It has been highlighted by one American author that 'if every adult in North America drank according to the US federal guidelines of what is low risk drinking… alcohol industry sales would be cut by 80 per cent. Although the alcohol companies claim that they want people to drink "responsibly", the truth is that "responsible" drinking would destroy them'.[145] There is simply no incentive for alcohol companies to deliberately work to reduce the amount that people drink, so how then can they be relied upon by the Forum to truly work towards disrupting the (what has been shown to be) effective sales generating ability of their marketing strategies.

Secondly, it can be observed that the alcohol producers in fact, under the auspices of encouraging behaviour designed to reduce alcohol related harm, actively argue in favour of strategies that in actuality perpetuate the irresponsible advertising of alcohol. An example drawn from the 'Targeting/Not Targeting Youth' Mapping Exercise report of the Task Force

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[143] For example, see W Mistral, 'Effectiveness of national policies and initiatives to reduce alcohol-related harm among young people', Young People and Alcohol Project 2009; L Jones et al, 'A Review of the Effectiveness and Cost-Effectiveness of Interventions Delivered in Primary and Secondary Schools to Prevent and/or Reduce Alcohol Use by Young People under 18 Years Old', (2007), available at: http://www.nice.org.uk/nicemedia/pdf/AlcoholSchoolsConsReview.pdf; R Gordon and P Anderson, 'Science and alcohol policy: a case study of the EU strategy on Alcohol', (2011) Addiction, 106, 55;

[144] Summary Report of Commitments made by members of the European Alcohol and Health Forum, 10 available at http://ec.europa.eu/health/archive/ph_determinants/life_style/alcohol/forum/docs/report_commitments_en.pdf (accessed 31/08/2012)

[145] J Kilbourne, 'Deadly Persuasion:7 Myths Alcohol Advertisers Want You to Believe', http://www.medialit.org/reading-room/deadly-persuasion-7-myths-alcohol-advertisers-want-you-believe (accessed 8/01/12)

on Marketing Communication established under the Forum, is the debate on whether the common standard for the percentage of minors in an audience that should not be exceeded if alcohol is to be advertised to that audience should be 30% or 20%. Many industry stakeholders have weighed in on the debate, and interestingly Diageo have actually submitted a commitment that aims to 'promote the integration of the 70/30 rule into national self-regulatory codes and system'.[146] This official commitment of the Forum actually working against the overall aim to reduce alcohol related harm because, as the Task Force Mapping Exercise document point out, if any percentage of the audience are minors this will fall short of achieving one of the core aims of the EU Alcohol Strategy to 'protect young people, children and the unborn child'. If such a commitment were to succeed, national laws across the EU would entrench the principle that alcohol producers would be legitimately advertise alcohol to a not insignificant number of children in any given audience.

In summary, the EU Alcohol Forum, while its intentions are in the right place, is also flawed in that relying on a system of voluntary commitment making is unlikely to result in positive action by the industry to put in place effective solutions that have been proven to reduce the levels of harm that can result from irresponsible alcohol advertising.

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CONCLUSION

The AVMSD and the UCPD are two directives that should be seen as two missed chances when it comes to the effective regulation of alcohol advertising. It might have been thought that due to the striking differences between them – the UCPD 'focuses exclusively on consumer's economic interests…even when the consumer is a child',[147] whereas the AVMSD 'protects health and safety concerns'[148] – that the resulting regulatory coverage would have

[146] An overview of this commitment can be found at http://ec.europa.eu/eahf/index.jsp?pageNumber=&clear=&comparatorSubmitBeforeAfter=%3C%3D&comparatorSubmitBeforeAfter=%3C%3D&submitDate=&comparatorBeforeAfter=%3C%3D&comparatorBeforeAfter=%3C%3D&finalDate=&commitmentTitle=&commitmentSummary=&objective=&baseline=&activities=1&countries=0&forumMembers=49&priorityAreas=All&targetGroups=All&onGoingOrFinal=all&_includeArchive=on (accessed 31/08/2012)

[147] A Garde, 'EU Law and Obesity Prevention', Kluwer Law International 2010, 222

[148] A Garde, 'EU Law and Obesity Prevention', Kluwer Law International 2010, 223

provided a broad protective blanket against irresponsible alcohol advertising. However this is not the case, as each Directive contains sufficient loopholes and weak drafting to ensure that any benefits provided by increased scope are negated.

Neither Directive really uses its harmonisation strategy to its full potential. The flexibility of a minimum harmonisation approach is not exploited in the AVMSD as, unlike the Tobacco Directive, the minimum standard is set too low, and the flexibility advantage is actually turned into a disadvantage. The unifying features of maximum harmonisation are equally not exploited properly in the UCPD, since in practice 'it can be anticipated that the black list will be the first port of call for most courts and administrators when applying the new legislation',[149] and so the limited number of 'unfair' practices in the Annex will exclude the adoption by Member States of legitimate consumer protection schemes before they have a chance to be assessed against the general clauses. In fact, it is clear that 'the level of detail and specificity [in the UCPD]…only leaves a few areas where the national courts have much scope for striking out in different directions'.[150] In contrast, the AVMSD arguably leaves too much scope to national legislators.

In summary, to solve the problem of insufficient control of alcohol advertising regulation at EU level, there must be new legislation enacted that will take a tighter grip on irresponsible advertising. As the following Chapter will demonstrate, relying on national law and the supervision thereof by the ECJ is not sufficient to ensure that a stable and effective regulatory scheme exists in Europe.

[149] H Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices', (2010) 73(1), 89-118, 117

[150] H Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices', (2010) 73(1), 89-118, 110

CHAPTER 3 - REGULATION AT NATIONAL LEVEL

INTRODUCTION

In the previous chapter we saw that the current level of protection established by EU law is not sufficient to curb irresponsible alcohol advertising practices and that as a result advertisers are allowed to encourage consumers to drink at unsafe levels, maintaining the link between advertising and consumption. In this Chapter we will examine how national law attempts to regulate alcohol advertising where EU law has arguably failed.

The ECJ has repeatedly held in its case law that, in the absence of harmonised rules at EU level, it will fall to the Member States to regulate alcohol advertising as they see fit, within the limits imposed by the Treaties. In *Cassis de Dijon*[151] the Court stated very clearly that 'in the absence of common rules relating to the production and marketing of alcohol … it is for the member-States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory'. [152] Furthermore the Court in *Aragonesa* said that 'in the present state of Community law, in which there are no common or harmonised rules governing in a general manner the advertising of alcoholic beverages, it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, comply with the principle of proportionality'.[153]

Since alcohol advertising regulation at EU level is frail to say the least, the Member States must take up the regulatory burden instead to ensure that alcohol advertising is subjected to a meaningful level of control, which has led to a proliferation of diverse national rules. The ECJ must ensure that these national rules comply with the general Treaty provisions on the free movement of goods and the freedom to provide services. This section will seek to argue that the application of the ECJ's jurisprudence on free movement to divergent Member States rules on alcohol advertising in order to ensure their compliance with the general Treaty provisions has led to two problems – the

[151] Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECR-00649

[152] Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECR-00649, para 8

[153] Joined cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior SA and Publivia SAE v Departmento de Sanidad y Seguridad Scial de la Generalitat de Cataluna* (1991) ECR I-04151, para 16

disruption of how Member States intend to protect their citizens from irresponsible advertising and the creation of unsatisfactory law by the ECJ, both of which prejudice the effective protection of public health. It will do this by firstly identifying the disparities between national laws. The case law of the Court will then be examines to determine when a measure is considered to be an obstacle to free movement. The Chapter will finish by considering how national measures constituting obstacles to trade can be justified, looking first at the Treaty derogations and then at the proportionality assessment.

THE DIVERSITY IN NATIONAL LAW

Before embarking on an analysis of the Court's case law, it is necessary to provide an overview of just how diverse national alcohol advertising laws have become in the absence of any meaningful harmonisation at EU level.

The First Application Report of the AVMSD[154] reveals that 22 Member States have put in place stricter rules than required by the AVMSD.[155] A Contact Committee document[156] supporting the Report shows at a basic level the differences in how each Member State has implemented the Directive. Firstly there are five states that have not enacted any additional prohibitions. There are then two States that have enacted what could be described as minor advances on the AVMSD standard, for instance the UK being one that has merely stipulated that there must be no advertising adjacent to programmes for young audiences. Fourteen Member States have implemented watersheds, where alcohol cannot be advertised within a certain time period, with no two being exactly the same, some being for spirits advertising only such as Italy (16.00-19.00), and some being for all advertising such as Finland (07.00-21.00). Some Member States have banned only a type of alcohol advertising, such as spirit advertising in Austria and Latvia, and three Member States have gone the furthest possible and implemented a total ban on alcohol advertising (Sweden, France and Slovenia).

At a detailed level, Member States appearing to have similar standards of regulation from the Contact Committee document in fact have very different provisions in their alcohol

[154] First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee ad the Committee of the Regions on the application of Directive 2010/13.EU "Audiovisual Media Services Directive", COM(2012) 203 final, 7

[155] First Application Report Page 7

[156] Available at http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact_comm/35_table_1.pdf (accessed 03/09/12)

advertising codes. Taking France and Sweden as examples, it is observable from a distance that both appear to have implemented a total ban on alcohol advertising. However these total bans are in fact different in substance. French legislation bans alcohol advertising outright only on television and in cinemas, and also entirely prohibits sponsorship of sporting and cultural events. However advertising in the adult press, on billboards, and on radio channels in specific circumstances. In contrast, Swedish legislation the ban extends not just to television and cinema, but also to advertising in public places such as billboards, and to the press. In Member States that do not impose general bans, the differences are even greater. Spain prohibits advertising on television only for alcoholic beverages that contain in excess of 20% abv, yet in the Netherlands the partial ban comes in the form of a watershed time restriction, so alcohol cannot be advertised between 06.00 and 21.00. Lastly, it is interesting to point out that the entire philosophy with which a Member State can approach the advertising of alcohol differs greatly. In Sweden, any alcohol advertisements that are permitted are required to show 'particular moderation', whereas in the Netherlands, alcohol advertising is required to show only 'restraint'.

It should be evident from above then, that no two Member State regulatory schemes for alcohol advertising are the same, with a multiplicity of different content restrictions, volume restrictions, bans and partial bans. There are large difference in where, when and how alcohol advertisements can appear in each Member State, and even similar types of restriction vary between States. This makes the job the ECJ has of trying to establish a workable approach for testing the compatibility of national rules with the general Treaty provisions, which is able to be applied to all national rules, very difficult indeed.

HOW HAS THE COURT ASSESSED COMPLIANCE OF MEMBER STATE LAWS WITH THE GENERAL TREATY PROVISIONS?

This section will argue that due to the development of the Court's case law, both in cases relating directly to Member State alcohol advertising laws and to advertising laws more generally, national measures that come before the Court face are likely to be declared restrictions on the free movement of traders, and thus will have to be justified. A mere hindrance to the ability of the trader to put a good or a service onto the market of another Member State is sufficient to trigger the relevant Treaty provision, and given that the whole objective of advertising restrictions is to prevent more of the product from being sold or make the provision of the product more difficult, then only when measures have an extremely remote impact on trade will an advertising restriction escape being caught by the Treaty.

If this is the case, then justification will entail a two-stage process. Firstly, the measure must pursue one of the public interest grounds recognised by the Treaty as capable of justifying restrictions on the fundamental freedoms. Secondly, the measure must be proportionate. In the vast majority of cases, national alcohol advertising laws will pursue a public interest ground and thus be justifiable under the Treaty derogations, so it will therefore be the proportionality assessment that is 'the most important judicial tool for drawing the distinction between lawful and unlawful impediments to free movement'.[157]

BARRIERS TO TRADE

The provisions of the Treaty regarding the free movement of goods and the free provision of services are Articles 34 TFEU and 56 TFEU respectively.

Goods

Article 34 TFEU provides that:

'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'

In the absence of any guidance in the Treaty on how to interpret this requirement, the Court created a test in *Dassonville* to determine when a national measure on alcohol advertising constitutes a measure having equivalent effect to a quantitative restriction (MEE). This was that 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restriction.'[158]

An important case in this process was the *Keck*[159] decision. In *Keck* the Court expressed its dismay at how the original formulation of an MEE in had become so broad that it encompassed national laws that had no real bearing on inter-state trade. The Court in *Keck* felt the need to act against 'the increasing tendency of traders to invoke Article 30 [34 TFEU] of the Treaty as a means of challenging any rules whose effect is to limit their

[157] T Tridimas, 'The General Principles of EU Law' (2nd Ed) OUP, Oxford 2006, 207

[158] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 00837, para 5

[159] Joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-06097

commercial freedom',[160] the effect of which the Court felt was to subject too many policy choices by the Member States to an unnecessary justification process. *Keck* intended to correct this by 'transparently aiming to fix a sharper outer limit to the scope of application of EC trade law'.[161] The Court proclaimed that:

'contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States'.[162]

The laudable aim of the *Keck* judgement was therefore to establish a better balance between the rights to free movement and the ability of the Member States to regulate without having to justify every policy choice they make. However the test *Keck* created was far too formalistic, and in the case of advertising occasionally caused the exact opposite of what the Court originally intended to occur, namely to place some measures that should rightly be held up for justification outside the reach of Article 34.

The *Keck* test does not seem to take into account that 'products are often distributed in a marketing mix',[163] and that marketing strategies today revolve around a 'uniform concept of product presentation, advertising and sales promotion'.[164] When applied, *Keck* therefore places some national laws controlling certain types of advertising outside the scope of Article 34 and some within. For instance measures relating to packaging and labelling, which affect the product itself, are categorised as product requirements, and are always caught by Article 34.[165] However measures relating to other forms of advertising may not be caught, as they may be categorised as a selling arrangement, as was the case in *Leclerc-Siplec* regarding television advertising.[166] In this was *Keck* does

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[160] Joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-06097, para 14

[161] S Weatherill, 'After Keck: Some thoughts on how to clarify the clarification, (1996) CMLR, 33, 885-906, 886

[162] Joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-06097, para 16

[163] WH Roth, 'Joined Cases C-267 and C-268/91, *Bernard Keck and Daniel Mithouard*, Judgement of 24 November 1993, [1993] ECR I-6097; Case C-292/92, *Ruth Hunermund et al* v *Landesapothekerkammer Baden-Wurttemberg*, Judgement of 15 December 1993, [1993] EECR I-6787', (1994) CMLR 31 845-855, 852

[164] N Reich, 'The "November Revolution" of the European Court of Justice: *Keck*, *Meng* and *Audi* revisited', (1994) CMLR 31, 459-492, 471

[165] Case C-368/95 *Familiapress* [1997] I-03689, para 7

[166] Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, para 22

'artificially separate product and marketing rules',[167] which would not only have an adverse impact upon the attempts of economic operators to come up with an efficient marketing strategy, but would also disrupt the attempts of the Member States to come up with an efficient regulatory scheme.

By introducing the selling arrangement criterion in the first place, *Keck* arguably precipitates arbitrary decisions as to what advertising bans are restrictive of trade and which are not. The cases of *Leclerc-Siplec* and *Karner* are good examples of this. In *Leclerc* the Court insisted that 'a provision such as that at issue in the main proceedings concerns selling arrangements since it prohibits a particular form of promotion…those provisions…affect the marketing of products from other Member States and that of domestic products in the same manner… [and therefore] on a proper construction Article 30 of the Treaty does not apply where a Member State, by statute or by regulation, prohibits the broadcasting of televised advertisements for the distribution sector'.[168]

In *Karner* the Court examined a ban on making references in advertisements to the commercial origin of goods from an insolvent estate. Because 'such a provision does not relate to the conditions which those goods must satisfy, but rather governs the marketing of those goods',[169] it was therefore a selling arrangement, and consequently because it did 'not affect the marketing of products originating from other Member States more than it affects the marketing of products from the Member States in question',[170] and applied equally to all traders, it fell outside Article 34.

Decreeing that measures will never have an effect on inter-State trade such as to merit being caught by Article 34 should they meet the *Keck* criteria represents extreme arbitrariness. Advocate General Jacobs rightly points out in *Leclerc* that 'the central concern of the Treaty provisions on the free movement of goods is to prevent unjustified obstacles to trade between Member States. If an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade'.[171] The *Keck* approach not only fails to consider that 'measures affecting selling arrangements may create extremely

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[167] N Reich, 'The "November Revolution" of the European Court of Justice: *Keck*, *Meng* and *Audi* revisited', (1994) CMLR 31, 459-492, 471

[168] Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paras 22-24

[169] CaseC-71/02 *Karner* [2004] ECR I-03025, para 39

[170] CaseC-71/02 *Karner* [2004] ECR I-03025, para 42

[171] Case C-412/93 Opinion of Advocate General Jacobs delivered 24th November *Leclerc-Siplec* [1995] ECR I-179, para 39

serious obstacles to imports',[172] but also 'wrongly induces focus on the form of a measure, instead of its effect on trade',[173] since according to *Dassonville* the enquiry into whether a measure is an MEE should 'refer[s] exclusively to the effects of a measure, not its purpose'.[174] By interpreting the point of *Dassonville* and indeed of Article 34 wrongly, *Keck* has created a test that, when applied to advertising measures, can prevent marketing bans which have a clear effect on inter-State trade from being checked by Article 34 and held up for justification.

As a result, the Court has begun to sidestep the *Keck* test in many cases, focussing not on classifying the measure but on assessing access to the market and the question of remoteness. *Gourmet* is an example of this – following *De Agostini*, the Court held in relation to the Swedish ban on the advertising of alcoholic beverages that 'in the case of products like alcoholic beverages…a prohibition of all advertising directed at consumers…is liable to impede access to the market by products from other Member States more than it impedes access by domestic products'.[175] Advocate General Jacobs went even further in his Opinion and concluded that it is 'inherent in any rule which prevents producers from advertising directly to the public that it will disproportionately affect imported products'.[176]

Recent cases show the return to this reasoning and the application of *Dassonville*. In *ANETT*, *Keck* was not even mentioned in a judgement where the Court reasoned that 'nothing indicates that the national legislation at issue has the object or effect of treating tobacco coming from other Member States less favourably…However it is still necessary to examine whether this legislation hinders the access of tobacco products coming from other Member States into the Spanish market'.[177]

This does not mean to say though that any rule on advertising will now fall within Article 34. In *Peralta* we see the Court refer to the fact that 'the restrictive effects which [the measure] might have on the free movement of goods are too uncertain and indirect

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[172] Case C-412/93 Opinion of Advocate General Jacobs delivered 24th November *Leclerc-Siplec* [1995] ECR I-179, para 38

[173] S Weatherill, 'After Keck: Some thoughts on how to clarify the clarification, (1996) CMLR, 33, 885-906, 896

[174] P Oliver, 'Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?', (2001) 33, 5, 1423-1471, 1428

[175] Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR 1-01795, para 21

[176] Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR 1-01795, AG para 34

[177] Case C-456/10 *ANETT* [2012] Judgement 26 April 2012 (not yet published), paras 36-37

for the obligation which it lays down to be regarded as being of a nature to hinder trade between Member States'.[178]

Thus now it seems that 'a ban on advertising such as the one imposed by the Swedish legislation is a restriction on the free circulation of goods per se',[179] but that if the ban has too uncertain and indirect an effect on intra-Community trade it will fall outside Article 34. It might be said that we have returned to the application of the original sweeping *Dassonville* formula, reaching conclusions similar to pre-*Keck* cases such as *Aragonesa*, where a 'national legislation such as that at issue…may constitute a hindrance to imports from other Member States and, therefore must in principle be regarded as a measure having equivalent effect'.[180] This arguably leaves us no closer to establishing a more refined test for determining when national rules on advertising have breached Article 34 and thus require justification, although the development of the doctrine of too uncertain or indirect an effect has might now act in the space that *Keck* was trying to fill of confining the scope of Article 34 to those national measures that actually affect trade.

Services

The development of the case law on Article 56 TFEU means that alcohol advertising measures challenged as a restriction on the freedom to provide services will similarly stand a good chance of triggering the need for justification, since any hindrance to the ability of a service provider to access the market of another Member State is interpreted as a restriction on the freedom to provide services. Article 56 provides that:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended'

In *Säger* the Court considered a practice restrictive 'when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services'.[181] Thus the test is broader even than market access,

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[178] Case C-379/92 *Peralta* [1994] ECR I-03453, para 24

[179] A Biondi, 'Advertising alcohol and the free movement principle: the Gourmet decision', (2001) EL Rev, 26(6), 616-622, 620

[180] Joined Cases C-1/90 & C-176/90 *Aragonesa de Publicidad Exterior SA and Publivia SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluna* (1991) ECR I-04151, para 11

[181] Case C-76/90 *Säger* [1991] ECR I-04221 para 12

encompassing anything that simply makes it more difficult to provide services in another Member State.

Challenges to two national alcohol advertising laws illustrate this. In a challenge to the French Loi Evin, which involved a total ban of television advertising for alcoholic beverages, the Court observed that as a result of the national measure 'the owners of the advertising hoardings must refuse, as a preventative measure, any advertising for alcoholic beverages if the sporting event is likely to be retransmitted in France. They also impede the provision of broadcasting services for television programmes. French broadcasters must refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic beverages marketed in France may be visible'.[182] From these facts the Court concluded that there was consequently a restriction on the freedom to provide services within the meaning of Article 56. Similarly, in *Gourmet*, with regard to the Swedish ban on alcohol advertising, 'a measure such as the prohibition on advertising at issue…even if it is non-discriminatory, has a particular effect on the cross border supply of advertising space, given the international nature of the advertising market in the category of products to which the prohibition relates, and thereby constitutes a restriction on the freedom to provide services within the meaning of Article 59 [56 TFEU] of the Treaty'.[183]

However the extent to which alcohol advertising laws are caught by Article 56 will again depend on whether the impact the rule has on the provision of services is too remote.

Outside the specific sphere of alcohol advertising, there is further case law to demonstrate that the threshold at which Member State laws restricting advertising and promotional activity have been found to constitute a restriction on the freedom to provide services is merely that of acting as a hindrance to the provision of cross-border services. For instance in *Alpine Investments* the Court held that the ban on cold calling 'deprives the operators concerned of a rapid and direct technique for marketing',[184] and as such although the ban 'is general and non-discriminatory and neither its object nor its effect is to put the national market at an advantage over providers of services from other Member States, it can none the less…constitute a restriction on the freedom to provide cross-border services',[185]

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[182] Case C-262/02 *Commission v France* [2004] ECR I-06569 para 26

[183] Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR 1-01795, para 39

[184] Case 384/93 *Alpine Investments* [1995] ECR I-1141, para 28

[185] Case 384/93 *Alpine Investments* [1995] ECR I-1141, para 35

because it 'directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade'.[186]

Thus, in both the fields of goods and services, as a result of the development of the Court's case law in relation to both alcohol and advertising more generally, national laws on alcohol advertising that come before the Court will very easily be found to constitute a restriction on the free movement of goods or services or both, and will therefore have to be subjected to the process of justifying why that law should not be considered a violation of the Member State's obligations under the Treaties.

THE TREATY DEROGATIONS

As examined above, measures that restrict the advertising of alcohol are likely to be declared restrictions on the free movement of goods or services. However, due to the importance of protecting certain public interests of great importance, one of which we shall see is the protection of public health, the EU Treaties recognise that Member States should in some situations be allowed to legitimately restrict the free movement of goods or services in order to see that the public interests are protected.

The Treaty derogations are contained in Articles 36 for goods and 62 for services, and work in a similar fashion. Both contain an exhaustive set of specific pubic interests that justify restrictions being placed upon the relevant freedom. Article 36 states that:

> '*The provision of Articles 34 and 35 shall not preclude prohibitions on imports exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants… Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States*'

Article 62 for services states that Article 52 on establishment shall also apply to services. Article 52 provides that:

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[186] Case 384/93 *Alpine Investments* [1995] ECR I-1141, para 38

> *'The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health'.*

The first case to recognise that measures restricting alcohol advertising were capable of constituting measures that served the protection of public health was *Commission v France (alcohol advertising)*.[187] The Court held that 'it must be recognised that the connection made by the French Government between the control of advertising in respect of alcoholic drinks and the campaign against alcoholism does exist. It is in fact undeniable that advertising acts as an encouragement to consumption and that the disputed rules are not therefore a matter of indifference from the point of view of the requirements of public health recognised by Article 36 [36 TFEU] of the Treaty'. Thus alcohol advertising measures had been accepted by the Court as measures that would serve the public health derogation, however in that case the measure was eventually found in breach of the Treaty as it constituted arbitrary discrimination.

The case of *Aragonesa*[188] then was the one in which alcohol advertising measures were first held to fulfil all the requirements for recourse to the public interest derogations. The Court noted first that 'the protection of public health is expressly mentioned amongst the grounds of public interest which are set out in Article 36 [Art 36 TFEU] and enable a restriction on imports to escape the prohibition laid down in Article 30 [Art 34 TFEU]'.[189] When it went on to assess whether the national measure was of such a nature as to protect public health, the Court recalled the judgement in *Commission v France* by stating that 'advertising acts as an encouragement to consumption and the existence of rules restricting the advertising of alcoholic beverages in order to combat alcoholism reflects public health concerns'.[190] In the absence of arbitrary discrimination or a disguised

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[187] Case 152/78 *Commission v France* [1980] ECR 2299

[188] Joined Cases C-1/90& C-176/90 *Aragonesa de Publicidad Exterior SA and Publivia SAE v Departamento de Sanidad y Seguridad Social de a Generalitat de Cataluna* [1991] E.C.R. I-4151

[189] Joined Cases C-1/90& C-176/90 *Aragonesa de Publicidad Exterior SA and Publivia SAE v Departamento de Sanidad y Seguridad Social de a Generalitat de Cataluna* [1991] E.C.R. I-4151, para 13

[190] Joined Cases C-1/90& C-176/90 *Aragonesa de Publicidad Exterior SA and Publivia SAE v Departamento de Sanidad y Seguridad Social de a Generalitat de Cataluna* [1991] E.C.R. I-4151, para 15

restriction on trade, the resulting conclusion was that this national alcohol advertising law was justified according to the Treaty derogations.

Future Member State measures on alcohol advertising that came before the Court were consequently easily shown to constitute measures that served the protection of public health under Article 36 or 52. For instance, in *Commission v France (Loi Evin)*,[191] after noting that 'the freedom to provide services may, however, in the absence of community harmonisation measures, be limited by national rules justified by the reasons mentioned in Art 56(1) of the EC Treaty, read together with Art 66 [now Arts 52 and 62]',[192] the Court made short work of holding that 'the French rules on television advertising pursue an objective relating to the protection of public health within the meaning of Art 56(1) [now Art 52(1)] of the Treaty, as the Advocate General stated at point 69 of his Opinion. Measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflect public health concerns'.[193]

In conclusion, since the first cases establishing alcohol advertising restrictions as a legitimate method of protecting public health and thus serving the requirement of protecting a public interest necessary for justifying a measure under the Treaty derogations, most alcohol advertising laws will not have a problem in showing that they are worthy of justification under the Treaty. The trickier proposal, as stated at the start of this section, is showing that the measure is proportionate, the last stage of the process that a national measure on alcohol advertising must pass through before being upheld by the Court as compatible with the general Treaty provisions.

THE PROPORTIONALITY ASSESSMENT

Gourmet

[191] Case C-262/02 *Re Loi Evin: Commission of the European Communities v French Republic* [2004] E.C.R. I-6569

[192] Case C-262/02 *Re Loi Evin: Commission of the European Communities v French Republic* [2004] E.C.R. I-6569, para 23

[193] Case C-262/02 *Re Loi Evin: Commission of the European Communities v French Republic* [2004] E.C.R. I-6569, para 30

A good starting point in analysing the Court's approach to the proportionality of national alcohol advertising measures is the *Gourmet*[194] decision. The importance of this case lies in that the Court was in fact silent on the cruicial question of the proportionality of the national measure, an omission that has created great uncertainty as to just how far a Member State can go in restricting alcohol advertising. If the measure had been declared disproportionate and dis-applied, the implication would have been that national alcohol advertising laws might not ever be able to reach the levels of protection offered against tobacco advertising, which involves a total ban at EU level. To attempt to alleviate this uncertainty, this section will begin with an analysis of *Gourmet* and will conclude by returning to the same case to try and offer a solution as to what the Court might have said had it chosen to engage with an analysis of the proportionality of the national legislation.

Gourmet itself concerned the Swedish total ban on advertising alcoholic beverages. GIP published the magazine Gourmet, one issue of which contained three pages of adverts for alcohol. The Consumer Ombudsman applied for an injunction restraining GIP from contributing to the marketing of alcohol to consumers. GIP contested this on the basis that the Swedish law on which it was based was contrary to EU law. After both finding a restriction on the free movement of goods and services, the Advocate General and the Court then took quite different views on the question of proportionality. The Advocate General did engage in an assessment of the proportionality of the ban compared to the aims sought, and concluded that the public health aims sought 'could be achieved just as effectively by measures less restrictive than a ban imposed on all such advertising in all sections of the media'.[195] The Court though was far more guarded in its approach. It could have reasonably been assumed that in such a 'classic hard case'[196] the Court would provide some guidance on how to interpret the tricky issue of proportionality. However the Court simply stated that the decision 'calls for an analysis of the circumstances of law and fact which characterise the situation in the Member States concerned, which the national court is in a better position than the Court of Justice to carry out'.[197]

The Court appears to favour a realist approach, whereby the Court 'keeps away from the formalist method and pays more attention to the real facts of the whole case'.[198] However, there is a difference between being realistic and being deferential, and the

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[194] Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR 1-01795

[195] Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR 1-01795, AG para 64

[196] A Biondi, 'Advertising alcohol and the free movement principle: the Gourmet decision', (2001) EL Rev, 26(6), 616-622, 619

[197] Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR 1-01795, para 33

[198] X Li and L Jiang, 'Market Access and Proportionality: Lessons from Gourmet', (2011) Asian Social Science, Vol 7, No 12, 56-67, 60

Court seems to fall into the latter category. Rather than being truly unable to decide the proportionality question, the outcome of *Gourmet* may alternatively be seen as 'the unwillingness of the Court to interfere with Member States' policies in certain delicate areas'.[199]

It is possible to argue that this 'judicial solution of dumping everything on the national court is very disappointing'.[200] This approach should be contrasted with that of the US Supreme Court in *44 Liquormart*, where it was confidently concluded that 'when a State entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from a rigorous review'.[201] This echoes the opinions of Advocate General Jacobs that when considering a total ban it is necessary to exercise the utmost judicial care in assessing the proportionality of the measure, so that ineffective blanket prohibitions do not escape the test. Had the Court taken this more rigorous approach it is entirely possible that the case would have been decided quite differently.

Whatever view one takes of the outcome of *Gourmet,* it is certain that there is no lack of evidence, both legal and scientific, on which the Court could have based a proportionality assessment. The remainder of this section will uncover this evidence, before returning to *Gourmet* to attempt to provide the answer that the Court did not.

The Standard of Review

The first aspect of proportionality to consider is how stringent the Court has been in applying the principle of proportionality to national measures restricting the free movement of goods and services - the standard of review.

A good example of the Court deploying a softer standard of review is where the precautionary principle has been applied. In *United Kingdom v Commission*, the Court said that 'where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent'.[202] This principle 'allows action to be taken not only where the extent of the risk is uncertain, but also where there is doubt as to its very existence'.[203]

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[199] A Biondi, 'Advertising alcohol and the free movement principle: the Gourmet decision', (2001) EL Rev, 26(6), 616-622, 621

[200] A Biondi, 'Advertising alcohol and the free movement principle: the Gourmet decision', (2001) EL Rev, 26(6), 616-622, 620

[201] *44 Liquormart Inc v. Rhode Island*, 517 U.S. 484, 134 Led 2d 711 (1996), 726

[202] Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265

[203] P Oliver (Ed), 'Oliver on Free Movement of Goods in the European Union' (5th Edition) Hart Publishing, Oxford 2010, 258

In contrast to this, a excellent example of a hard standard of review can be seen in *Mars*.[204] German legislation prevented Mars from using a +10% promotional flash on the packaging of certain ice cream bars on the grounds that it would mislead consumers. The Court held that this was disproportionate since, 'reasonably circumspect consumers are supposed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of that increase'.[205] This standard of review may be considered unjustifiably high, since it assumes that the average consumer is in fact always reasonably circumspect where in fact this is not always the case.

Although the wording of the test is 'reasonably', in reality the Court bases its decisions on the ideal that every consumer is 'able to analyse, critically and discerningly, the messages behind advertising and commercial practices in general'.[206] However, this test assumes too much since 'it is unrealistic to expect the ordinary consumer to carry out an extensive, multi-dimensional advantage-disadvantage analysis each time a decision needs to be made'.[207] Often consumers have many other pressing concerns on their minds and 'may not notice or read information and products' warnings because they have very limited resources and cannot hear and see everything that surrounds them'.[208] Thus, there is a deficit between the standard the test expects and the standard that most people are capable of.

The notion of the average or reasonably circumspect consumer in the Court's judgements has thus led to so high a standard of review that 'the risk of misleading consumers cannot override the requirements of the free movement of goods and so justify barriers to trade, unless that risk is sufficiently serious'.[209] This is because in the estimations of the Court the average European consumer is an exceptionally self aware and observant person, with powers of analysis such that they would prefer to be guaranteed increased choice and a free flowing market in consumer goods by the Court, rather than be protected against irresponsible practices. As a result, much consumer protection legislation designed to protect people of lesser stature has been rendered disproportionate.

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[204] Case C-470/93 *Verein gegen Unwesen in Handel un Gewerbe Koln eV v Mars GmbH* [1995] ECR I-1923

[205] Case C-470/93 *Verein gegen Unwesen in Handel un Gewerbe Koln eV v Mars GmbH* [1995] ECR I-1923, para 24

[206] R Incardona and C Poncibò, The average consumer, the unfair commercial practices directive and the cognitive revolution', (2007) J Consum Policy, 30, 21-38, 30

[207] R Incardona and C Poncibò, The average consumer, the unfair commercial practices directive and the cognitive revolution', (2007) J Consum Policy, 30, 21-38, 33

[208] R Incardona and C Poncibò, The average consumer, the unfair commercial practices directive and the cognitive revolution', (2007) J Consum Policy, 30, 21-38, 32

[209] Case C313/94 *Fratelli Graffione* [1996] ECR I-6039, para 24.

So the standard of review can either be high or low, depending on the context in which the national rule is assessed. For alcohol advertising restrictions, this is still not entirely clear. The apparent adoption of a broad market access test to replace the *Keck* selling arrangement distinction has, according to some commentators, caused the Court to 'compensate…with a lighter touch both to judicial review of the justification put forward…and proportionality'.[210] There are reasons to suspect that this may not always be the case however - the judgement in *Commission v Portugal*[211] contains a thorough proportionality review which led to the measure in question, a ban on the use of self-applied tinted window screens, being declared disproportionate. Finally, the words of the US Supreme Court in *44 Liquormart* should be recalled – 'when a State entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from a rigorous review'.[212] In other words, a total ban on advertising should merit a higher standard of review.

Suitability

The second aspect of proportionality is suitability. This element is supposed to ensure that national measures are 'appropriate to protect the interest in question and presupposes a degree of causal relationship between the measure and the objective pursued'.[213]

For a start, the Loi Evin cases showed that the 'inconsistencies in the legislation do not prevent that legislation from being appropriate to attain its purpose'.[214] The Court pointed out that should the Member States wish to prohibit some practices but not others, then 'that option lies within the discretion of the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved'.[215]

The case of *Rosengren* illustrates the suitability principle at work. The national measure at issue was the Swedish alcohol monopoly, secifically the ban on private imports. The Court was of the view that 'in the light of the alleged objective, that is to say, limiting generally the consumption of alcohol in the interest of protecting the health and life of humans, that prohibition, because of the rather marginal nature of its effects in that

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[210] C Barnard, 'Trailing a new approach to the free movement of goods', (2009) CLJ, 68(2), 288, 290

[211] Case C-265/06 *Commission v Portugal* [2008] ECR I-02245

[212] *44 Liquormart Inc v. Rhode Island*, 517 U.S. 484, 134 Led 2d 711 (1996), 726

[213] J Jans, 'Proportionality Revisited', (2000) Legal Issues of Economic Integration, 27(3) 239-265, 243

[214] J Stuyck, 'Case C-262/02, *Commission* v. *France* and Case C-429/02, *Bacardi France SAS and Télévision française 1 SA (TF1) et al.,* judgments of the Grand Chamber of the Court of Justice of 13 July 2004', (2005) CMLR 42, 783-801, 789

[215] Case C-429/02 *Bacardi France SAS v Television Francaise 1 SA (TF1) and Others (Loi Evin)* [2004] ECR I-06613, para 40

regard, must be considered unsuitable for achievement of that objective'.[216] The Court therefore reveals that indiscriminate bans are unlikely to be suitable to achieve specific objectives, since there is 'no objective or rational basis'[217] on which such a measure could be appropriate for preventing alcohol abuse.

The judgement in *Commission v France (alcohol advertising)* shows us the extreme end of how the Court interprets suitability. In this case the challenge was to a French regulation that applied advertising restrictions to alcoholic beverages depending on which of the five groups within the regulations they fell into. Beverages in some categories were more strictly regulated than those in other categories. The Court in assessing the justifications put forward came to the conclusion that the measure was not justified because it 'constitutes arbitrary discrimination in trade between member-States to the extent to which it authorises advertising in respect of certain national products whilst advertising in respect of products having comparable characteristics but originating in other member-States is restricted or entirely prohibited'.[218] Elements of arbitrariness in any regulation on alcohol advertising may therefore be a decisive factor in leading the Court to conclude that the measure is unsuitable for its purpose and therefore disproportionate, since it 'may be said that the determination of suitability is tantamount to assessing whether or not the measure was taken arbitrarily'.[219]

Necessity

The third aspect of proportionality to consider is necessity, and it is again possible to identify a clear trend in the judgements.

In the cases of *Commission v France (Loi Evin)* and *Bacardi France*, the French Loi Evin on the advertising of alcoholic beverages on television was examined. The national legislation prohibited direct and indirect television advertising of alcoholic beverages, which in this case prevented the transmission of sports events by French broadcasters if the advertising hoardings in the stadium in which the event was taking place carried advertisements for alcoholic beverages. In both cases it was alleged that the operation of the Loi Evin thus prevented the free provision of services and was thus a breach of Article 56 TFEU.

This case is an example of how the Court can engage with the question of proportionality in difficult circumstances. Firstly, arguments that the broadcasters could prevent sporadic alcohol advertising through selectively masking the images on screen were rejected. The Court followed the AG who was of the opinion that 'modern

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[216] Case C-170/04 *Rosengren* [2007] ECR I-04071, para 47

[217] P Oliver (Ed), 'Oliver on Free Movement of Goods in the European Union' (5th Edition) Hart Publishing, Oxford 2010, 229

[218] Case 152/78 *Commission v France (alcohol advertising)* [1980] ECR E-2299, para 18

[219] X Groussot, 'Proportionality in Sweden: The Influence of European Law', (2006) Nordic Journal of International Law, 75, 451-472, 454

techniques for masking television images, which would permit this less restrictive solution, cannot be used by broadcasters on account of their excessive cost'.[220] Thus it seems that in the area of alcohol policy the Court only asks that 'another equally effective, but significantly less restrictive measure, could not have been chosen',[221] and not simply that a less restrictive measure exists.

Secondly, the Court rather firmly held that 'limiting the prohibition at issue to advertising for products which are marketed in France, and thus restricting the scope of that prohibition, reduces the impediment to the freedom to provide services and makes it therefore more proportionate to the objective pursued'.[222] This is a clear indication that the Court will look favourably on a Member State's choice of regulation when they have recognised that 'less drastic means will suffice'.[223] Therefore in this case the Loi Evin was proportionate because the measures were limited to what was necessary in order to achieve the objective pursued.

In contrast to this, the Court has in other cases found that the particular measures chosen by the Member State have been unnecessary. In *Franzen* a prosecution for selling imported wine without a licence was challenged on the basis that the Swedish Alcohol law on which the prosecution was based (the same law as in *Gourmet*) was incompatible with Article 30 EC [34 TFEU] on the free movement of goods. The Court found that 'the Swedish Government has not established that the licensing system set up by the Law on Alcohol, in particular as regards the conditions relating to storage capacity and the high fees and charges which licence-holders are required to pay, was proportionate to the public health aim pursued or that this aim could not have been attained by measures less restrictive of intra-Community trade'.[224]

Member Sates must demonstrate that they have used the least restrictive measure that is necessary to achieve the aim sought, and the *Phillip Morris* case has highlighted that 'the burden of proof can vary depending on the sector and case concerned'.[225] When the case concerns such extreme restrictions as in *Franzen* the burden on the state to show that such measures are necessary will obviously be higher. *Franzen* shows blanket measures which go too far beyond the accomplishment of their specific aim will be considered unnecessary as they are not the least restrictive measure which could be used to achieve the stated objective. This is backed up by the judgement in *Rosengren*,

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[220] Case C-262/02 *Commission v France (Loi Evin)* [2004] ECR I-6569, AG para 103

[221] J Stuyck, 'Case C-262/02, *Commission* v. *France* and Case C-429/02, *Bacardi France SAS and Télévision française 1 SA (TF1) et al.,* judgments of the Grand Chamber of the Court of Justice of 13 July 2004', (2005) CMLR 42, 783-801, 795

[222] Case C-262/02 *Commission v France (Loi Evin)* [2004] ECR I-6569, para 36

[223] J Jans, 'Proportionality Revisited', (2000) Legal Issues of Economic Integration, 27(3) 239-265, 245

[224] Case C-189/95 *Franzen* [1997] ECR I-05909, para 76

[225] Case E-16/10 *Philip Morris* Judgement 12 September 2011, Not yet published

where the same Swedish laws were challenged, this time in reference to the ban on private imports. The ban applied to everyone irrespective of their age, and in light of the legal drinking age of 20 in Sweden, the Court considered that the ban 'goes manifestly beyond what is necessary for the objective sought, which is to protect younger persons against the harmful effects of alcohol consumption'.[226] The conclusion to be drawn from these two cases is that in the area of alcohol policy, where protecting young people from harm is a rather specific aim, 'proportionality is only clear for targeted advertising restrictions and is less certain for broad-brush ones'.[227]

Manifest unreasonableness or proportionality *sensu stricto*

A measure will violate proportionality *sensu stricto*, or proportionality in the strict or narrow sense, when 'the restriction it causes intra-Community trade is out of proportion to the intended objective or the result achieved'.[228]

This sometimes arises when the Court frames its judgement in terms of manifest unreasonability, as it did in *Aragonesa,* the first case in which the Court has 'invoked the test of manifest unreasonableness in the context of the principle of proportionality'.[229] The Court held that a Catalan law prohibiting the advertising of alcoholic beverages with a strength of more than 23 degrees in outdoor public spaces 'restricts freedom of trade only to a limited extent…In principle, the latter criterion does not appear to be manifestly unreasonable as part of a campaign against alcoholism'.[230] Particularly, 'the measure at issue does not prohibit all advertising of such beverages but merely prohibits it in specified places some of which…are particularly frequented by…categories of the population in regard to which the campaign against alcoholism is of quite special importance. It thus cannot in any event be criticised for being disproportionate to its stated objective'.[231] Again, it can be seen that limited bans are more likely to be proportionate than more extensive ones.

A solution to Gourmet?

Bearing in mind the evidence uncovered above, could the Court have given a definitive opinion on proportionality? It is submitted here that they certainly could have done.

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[226] Case C-170/04 *Rosengren* [2007] ECR I-04071, para 51

[227] B Baumberg and P Anderson, 'Health, alcohol and EU law: understanding the impact of European single market law on alcohol policies', (2008) European Journal of Public Health, 18(4), 392-398, 395

[228] J Jans, 'Proportionality Revisited', (2000) Legal Issues of Economic Integration, 27(3) 239-265, 241

[229] KPEL, 'Case Comment: Advertising restrictions - public health protection', (1991) ECLR, 12(5), 159-160, 160

[230] Joined Cases C-1/90 & C-176/90 *Aragonesa de Publicidad Exterior SA and Publivia SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluna* (1991) ECR I-04151, para 17

[231] Joined Cases C-1/90 & C-176/90 *Aragonesa de Publicidad Exterior SA and Publivia SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluna* (1991) ECR I-04151, para 18

First we must recall the exact nature of the national measure in question. The Swedish alcohol law requires that 'alcoholic beverages should be marketed with particular moderation'.[232] It also prohibits the advertising of all alcoholic beverages on radio or television and the advertising of spirits, wines or strong beers in periodicals or similar publications.

There is little reason for to Court to apply anything other than a rigorous standard of review. The consequences of alcohol advertising from a scientific perspective are far from uncertain[233] and furthermore the Swedish measure 'in reality prohibits producers and importers from directing any advertising messages at consumers, with a few insignificant exceptions'.[234] Such a prohibition should be examined carefully, as the stakes are considerably higher when a ban is total.

We can identify that the 'specific purpose of the Swedish legislation is to reduce the consumption of alcohol'[235] and that the 'Swedish Government maintains that the legislation at issue…constitutes an essential component of its alcohol policy'.[236] The suitability of the measure in question for achieving such an aim was questioned in the judgement itself, one argument making the case that 'the Swedish policy on alcoholism is already catered for by the existence of the monopoly on retail sales, by the prohibition on sales to persons under the age of 20 years and by information campaigns'.[237] *Rosengren* found a separate part of the Swedish alcohol policy involving its ban on retail sales unsuitable due to the marginal nature of its effects. Furthermore the Commission submitted in the judgement that 'the prohibition does not seem to be particularly effective, owing in particular to the existence of

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[232] Article 2, Lagen 1978:763 med vissa bestämmelser om marknadsföring av alkoholdrycker (Swedish Law 1978:763 laying down provisions on the Marketing of Alcoholic Beverages)

[233] See for instance A Wyllie et al, 'Positive responses to televised beer advertisements associated with drinking and problems reported by 18 to 29-year-olds', (1998) Addiction, 93(5), 749, a study conducted in New Zealand which found 'support for the hypothesis that positive responses to televised beer advertisements (as measured by liking) contributed to the quantities of alcohol being consumed by 18-29 year old New Zealanders, which in turn contributed to the level of problems they reported from their own drinking', at 758

[234] Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR 1-01795, para 20

[235] Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR 1-01795, para 14

[236] Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR 1-01795, para 29

[237] Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR 1-01795, para 30

"editorial publicity" and the abundance of indirect advertising on the internet'.[238] However, if we are to assess the suitability of a measure by evaluating its effectiveness against the aim sought, then despite the Commission's submission, the evidence suggests that advertising bans do decrease alcohol consumption. For instance studies have found that each additional alcohol advertising ban could reduce consumption by up to 8 per cent.[239] Therefore the Court could reasonably reach the conclusion that at total ban would be a suitable measure to use in order to reduce alcohol consumption for the protection of public health.

In terms of necessity though, the measure seems to go well beyond what would be considered necessary to accomplish the aim above. The law already requires alcohol advertisements to display 'particular moderation', so to also require the prohibition of all advertisements seems to suggest that the measure is actually aimed towards eradicating the drinking of alcohol rather than combating the harm that results from the drinking of alcohol. Although the evidence is conclusive that there is a link between alcohol advertising and consumption, this has only been conclusively proven for certain types of alcohol, and certain types of media, such as television. The link for some beverages and advertising media is less certain. For instance, a recent review of studies noted at its time of writing that 'no study has addressed the potential effects on consumption by youth of exposure to alcohol portrayals and promotion on the Internet'.[240] Given this, it would be reasonable to think that the requirement to exercise particular moderation in advertising would have been sufficient. The Loi Evin escaped being declared disproportionate in *Commission v France (Loi Evin)* precisely because it was limited to television and cinema, and allowed advertising in the adult press for instance. The Swedish measure though prohibits alcohol advertising in all media, and for all beverages, so it seems to have gone well beyond what is necessary to counter the known effects of alcohol advertising.

In conclusion, the Court should have declared the Swedish prohibition on alcohol advertising in *Gourmet* disproportionate. What might we take from this? If the Court should have found the national measure in *Gourmet* disproportionate, then this adds further emphasis to the fact that subjecting national alcohol policies to the scrutiny of the Court can lead to deregulation, which in light of the fact that there are no strong alcohol laws at EU level, has the potential to be very damaging. National legislators must try, in the absence of harmonisation, to create a regulatory scheme that actually prevents irresponsible alcohol advertising from occurring. The logical decision for the Court to reach in *Gourmet* based on the available evidence shows us that there will be a definite limit to how tough national governments can get on alcohol advertising. Given the total ban on all cross-border advertising of tobacco at EU level, this potentially

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[238] Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR 1-01795, para 31

[239] H Saffer and D Dave, 'Alcohol consumption and alcohol advertising bans', (2002) Applied Economics, 1325, 1325-1334, 1333

[240] P Anderson 'The Impact of Alcohol Advertising: ELSA Project report on the evidence to strengthen regulation to protect young people' (2007) Utrecht, National Foundation for Alcohol Prevention

means that alcohol control at national level will never reach a comparable level of protection to that given against tobacco advertising.

SHOULD THE ECJ BE LEFT TO DECIDE WHICH ALCOHOL ADVERTISING LAWS ARE ACCEPTABLE?

In view of the analysis above, which has revealed how the Court's assessment of compatibility with the general Treaty provisions can have a de-regulating effect on national alcohol advertising legislation that is at times very uncertain, the final section of this Chapter will reflect on how this de-regulatory power impacts upon the creation of an effective alcohol advertising regulatory scheme.

To decide or not to decide

The Court faces more decisions than just determining whether the Treaty provisions have been broken or not. Like all courts the ECJ and its Advocate General 'must also decide whether they should decide'.[241] Strictly, the Court cannot actually decide cases that come before it at all, since 'the court has no jurisdiction either to apply the Treaty to a specific case, or to decide upon the validity of a provision of domestic law in relation to the Treaty'.[242] In this respect, the Court can decide to pitch its ruling at several particular levels of detail, ranging from leaving the national court in no doubt as to the eventual outcome to leaving them completely in the dark. This creates a problem because the Court does not seem to stick to one consistent line in the field of advertising, either giving judgements that are 'so specific that the case is effectively decided'[243] or not giving a judgement on some aspects at all. For instance contrast *Commission v France* where 'in view of the existence of a direct action by the Commission, the Court could not avoid examining whether the legislation was appropriate and proportionate'[244] with *Gourmet* where 'the Court avoided this delicate question, since it could leave it to the national court'.[245] Cases involving preliminary references do not always mean though that the Court will not offer an opinion. In *Aragonesa* the Court undertook a relatively

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[241] G Davies, 'The Division of Powers between the European Court of Justice and National Courts' in 'N Shuibne(ed), 'Regulating the Internal Market', Edward Elgar 2006, 1

[242] Case 6/64 *Costa v Enel* [1964] ECR 585

[243] G Davies, 'The Division of Powers between the European Court of Justice and National Courts' in 'N Shuibne(ed), 'Regulating the Internal Market', Edward Elgar 2006, 6

[244] J Stuyck, 'Case C-262/02, *Commission* v. *France* and Case C-429/02, *Bacardi France SAS and Télévision française 1 SA (TF1) et al.,* judgments of the Grand Chamber of the Court of Justice of 13 July 2004', (2005) CMLR 42, 783-801, 793

[245] J Stuyck, 'Case C-262/02, *Commission* v. *France* and Case C-429/02, *Bacardi France SAS and Télévision française 1 SA (TF1) et al.,* judgments of the Grand Chamber of the Court of Justice of 13 July 2004', (2005) CMLR 42, 783-801, 794

thorough proportionality review, giving a judgement that would have left the national court with not much choice other than to apply the ECJ's assessment that the measure was proportionate. This uncertainty as to what kind of judgement the Court will give cannot be conducive to developing a consistent set of precedents. In cases such as *Gourmet* the 'decision *not to decide* does little to resolve this conflict and leaves to the national court a very delicate task to perform'.[246] If the national courts are not certain as to how they should interpret the Treaties, and then possibly develop different lines of interpretation, there is unlikely to be a conclusive answer to the question of how far a Member State can go before an alcohol advertising restriction becomes unacceptable.

The ECJ or the National Courts

Should it be the ECJ or the national courts that take the lead in controlling the alcohol advertising laws of the Member States? Or should control instead be instigated in the first instance by other EU institutions through harmonisation.

The evident disadvantage of allowing the ECJ to have such power in the field of alcohol advertising policy is that, through the de-regulatory effect the Court's judgements have, there is the potential for an uncertain and dis-unified legal landscape to emerge. It is a fact that although the EU 'entrusts the Court…with the purposes of the Community'[247] and to this end the Court is 'clearly encouraged to take sides',[248] the Court cannot ensure that its own policy preferences for alcohol advertising regulation are applied uniformly, as 'it has no agenda setting power, that is, it cannot initiate policy but can only rule on those cases brought before it'.[249] Thus, where one national law might be challenged and face being declared unlawful, another national law might never be brought before the Court to face the same scrutiny. For example, although it was later challenged in *Gourmet* the Court might have had the chance to rule on the Swedish alcohol advertising law much earlier in *Frazen*, however they were prevented from doing so as 'the validity of [the ban] has not been called in question by the national court nor challenged by Mr Franzén'.[250]

The relationship the national courts have with the ECJ also makes the process of ensuring the compatibility of national alcohol advertising measures with the obligations imposed by

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[246] A Biondi, 'Advertising alcohol and the free movement principle: the Gourmet decision', (2001) EL Rev, 26(6), 616-622, 619

[247] G Davies, 'The Division of Powers between the European Court of Justice and National Courts' in 'N Shuibne(ed), 'Regulating the Internal Market', Edward Elgar 2006, 14

[248] G Davies, 'The Division of Powers between the European Court of Justice and National Courts' in 'N Shuibne(ed), 'Regulating the Internal Market', Edward Elgar 2006, 15

[249] G Tridimas and T Tridimas, 'National Courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure' (2004) International Review of Law and Economics, 24(2), 137

[250] Case C-189/95 *Franzen* [1997] ECR I-05909, para 61

the general Treaty provisions even more uncertain. For a start, there is no guarantee that a national rule suspected of violating the Treaty provisions will even make it to the ECJ through the preliminary reference procedure, as 'lower national courts, from which the overwhelming majority of references originates, enjoy discretion whether to make a reference. Also, even in courts of last instance which are in principle under an obligation to refer, in fact enjoy some discretion since there are certain exceptions from this obligation'.[251] These exceptions include when the ECJ has already ruled on the point of community law in question and when the issue is 'acte clair', ie when the correct application of EU law is so obvious as to leave no reasonable doubt as to the resolution of the issue. If this does happen, then different outcomes may be reached in different Member States, leaving some alcohol advertising rules intact and other similar rules unlawful. Not only could national Courts apply previous decisions of the ECJ differently in different Member States, since 'the Court's view on the meaning of the Treaty and other EU law is binding, but its comments on how these apply to a particular case, while often helpful, are not',[252] but also 'the preferences of lower courts regarding policy outcomes may differ from those of higher national courts and/or the national political authorities, leading them to seek opportunities for pursuing their own most preferred policies',[253] which could also lead to different outcomes in different Member States.

The preliminary reference procedure, which was originally intended to provide the ECJ with 'an opportunity to interpret the meaning of the treaties and rule on the validity of national law',[254] has furthermore been gradually 'transformed into a decentralised enforcement mechanism, where national laws were challenged for their compatibility with EC obligations'.[255] The ECJ is not an appeal court, however with increasing numbers of references and the complexity of the law surrounding them it is arguable that the Court has initiated an 'attempt to reform the whole legal system',[256] by 'intervening to a high degree in

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[251] G Tridimas and T Tridimas, 'National Courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure' (2004) International Review of Law and Economics, 24(2), 125

[252] G Davies, 'Activism relocated. The self-restraint of the European Court of Justice in its national context', (2012) Journal of European Public Policy, 19(1), 76-91, 79

[253] G Tridimas and T Tridimas, 'National Courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure' (2004) International Review of Law and Economics, 24(2), 135

[254] M Gabel, 'The European Court of Justice as an Engine of Economic Integration: Reconsidering evidence that the ECJ has expanded economic exchange in Europe',

[255] M Gabel, 'The European Court of Justice as an Engine of Economic Integration: Reconsidering evidence that the ECJ has expanded economic exchange in Europe',

[256] G Davies, 'The Division of Powers between the European Court of Justice and National Courts' in 'N Shuibne(ed), 'Regulating the Internal Market', Edward Elgar 2006, 15

national cases, and giving full answers to questions'.[257] The truth in this in the case of alcohol advertising is surely limited, and due to the sensitive nature of the area it is doubtful that the Court is entirely trying to 'recast itself in the mould of an appeal court',[258] however we cannot escape the fact that the Court has given comprehensive rulings on the justification of national measures on several occasions. Thus, does the fact that the ECJ is increasingly viewed as the final arbiter in disputes over restrictions on free movement prevent it from being a suitable body to ensure a consistent line on alcohol advertising? Given that there is no way to ensure that national courts apply its decisions uniformly, then probably not.

Allowing he ECJ to negatively harmonise the laws of the Member States, and even then only those that are brought before it, can have consequences that could work against the creation of truly strong alcohol advertising regulatory regimes in the Member States. Is there then a more effective way of controlling alcohol advertising? So far we have considered only statutory bans that have been brought before the Court. Could self-regulation in the Member States perform any better in defining a strong and coherent regulatory scheme, and in particular in enforcing it? The next section will consider the power of self-regulatory schemes using the unique system currently in place in the UK as a case study.

DOES SELF-REGULATION WORK INSTEAD? A CLOSER LOOK AT THE UK EXAMPLE

So far we have looked solely at national measures that have come before the ECJ, by virtue of the fact that their legitimacy has been contested by either a private party or the Commission. These measures have either been contentious to say the least, by mere virtue of their challenge before the courts, or are ineffective if they have been found to breach the general Treaty provisions. They have also tended to be legislative measures. Does this mean however that national rules that do not come before the Courts, and in particular national self-regulatory schemes are any better? This section demonstrates that in fact self-regulation of alcohol advertising in the Member States also leaves a lot to be desired, firstly by identifying some of the advantages and disadvantages of self-regulation in general and then by analysing the regulatory scheme from the UK, which has not been challenged before the Court.

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[257] G Davies, 'The Division of Powers between the European Court of Justice and National Courts' in 'N Shuibne(ed), 'Regulating the Internal Market', Edward Elgar 2006, 15

[258] G Davies, 'The Division of Powers between the European Court of Justice and National Courts' in 'N Shuibne(ed), 'Regulating the Internal Market', Edward Elgar 2006, 15

Self-regulation as a method of controlling irresponsible alcohol advertising has both advantages and disadvantages. Self-regulation is the control of advertising through a series of codes that have been designed primarily at the hands of the alcohol industry itself, who then agree to abide by this Code, as interpreted and enforced by an independent regulatory authority.

Self-regulation is 'unsurprisingly the preferred industry option',[259] and on a basic level it works because the industry know that the alternative is to be governed by legislation. Self-regulation had many advantages. It is quicker and more flexible than statutory regulation in many senses. From an enforcement point of view 'self regulation may reduce the need for legislation and provide an easier way to resolve disputes and protect consumers than civil litigation or criminal prosecution'.[260] The speed of decision making is far greater for self-regulatory codes than it is for statutory regulation. Furthermore, unlike statutory measures which require the full legislative apparatus to be deployed even for small changes, self-regulatory codes 'are more adaptable than laws, to changing moral standards, and changes in technology'.[261] A further benefit of using codes instead of legislation is that 'industry-financed self-regulation has the advantage that it costs the taxpayer less than direct government financed statutory regulation'.[262]

The main disadvantages of self-regulation centre around enforcement and the sheer fact that the rules have been written by the industry itself. There is no legal force behind a self-regulatory code in itself, so unless it is backed up by statutory enforcement mechanisms, then it will have no real punitive power. The problems with enforcement are compounded by the fact that the self-regulatory systems in many Member States rely on a complaints based system in order to deal with irresponsible advertising, rather than employing a specific government agency to systematically check advertising for rule breaches. With reference to the Italian self-regulatory code, Beccaria writes that 'the relatively small number of complaints doesn't mean that alcohol advertising respects the rules in a rigorous way, but more probably that there is a low level of attention to this issue'.[263] Thus, self-regulatory systems are not only less well equipped to punish breaches of

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[259] R Gordon, G Hastings and C Moodie, 'Alcohol marketing and young people's drinking: what the evidence base suggests for policy', (2010) J Public Affairs, 10, 88-101, 95

[260] G Crown, O Bray and R Earle, Advertising Law and Regulation', (2nd Ed), Bloomsbury Professional Ltd, 2010, 803

[261] G Crown, O Bray and R Earle, Advertising Law and Regulation', (2nd Ed), Bloomsbury Professional Ltd, 2010, 803

[262] G Crown, O Bray and R Earle, Advertising Law and Regulation', (2nd Ed), Bloomsbury Professional Ltd, 2010, 803

[263] F Beccaria, 'Italian alcohol advertising regulation and enforcement', (2007) Contemp Drug Probs, 34, 25, 46

the code, but they are also less able to identify them. Since the codes are written with a significant amount of industry input, there will furthermore be a question mark over the levels of control they can achieve. Many self-regulatory schemes in the Member States do not 'limit the quantity of advertising, instead focussing on content and scheduling',[264] which reflects the industry involvement.

In light of these advantages and disadvantages, we turn now to analyse the UK's self-regulatory system. The UK is an interesting example, since it is the only EU Member State to employ a system of co-regulation. This involves the statutory regulator and independent self-regulatory bodies working together in order to create and administer the regulatory scheme. Ofcom, the statutory regulator, described co-regulation as 'schemes that involved elements of self- and statutory regulation, with public authorities and industry collectively administering a solution to an identified issue. The split of responsibilities may vary, but typically government or regulators have legal backstop powers to ensure the desired objectives'.[265] This last point is the advantage of co-regulatory systems, since this 'legal backstop when the self regulation code is (possibly) violated',[266] makes it 'easier to sanction violations'.[267] However despite this distinct advantage, even a system as flexible as co-regulation does not work as effectively as might be imagined.

The self-regulatory codes, while having the advantage of being flexible, contain inherent weaknesses. There are essentially three codes that apply to alcohol advertising in the UK. These are the two general advertising codes, the CAP and BCAP codes for non-broadcast and broadcast advertising respectively, and a specific code covering alcohol brand presentation, the Portman Group code. All three codes are produced by an association of stakeholders in the alcohol and advertising industries.

The Portman group was established in 1989 by the UK's leading alcohol producers to 'promote sensible drinking; to help prevent alcohol misuse; and to foster a balanced understanding of alcohol related issues'.[268] Its Code of Practice, introduced in 1996, 'seeks to ensure that drinks are marketed in a socially responsible way and to an adult

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[264] R Gordon, G Hastings and C Moodie, 'Alcohol marketing and young people's drinking: what the evidence base suggests for policy', (2010) J Public Affairs, 10, 88-101, 95

[265] Ofcom Statement, 'Identifying appropriate regulatory solutions: principles for analyzing self- and co-regulation', available at http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/statement/statement.pdf (accessed 15/08/2012), 7

[266] A de Bruin, I Johansen and A van den Broeck, 'Effective Alcohol Marketing Regulations: A proposed framework to evaluate existin alcohol marketing regulations', July 2010, 28

[267] A de Bruin, I Johansen and A van den Broeck, 'Effective Alcohol Marketing Regulations: A proposed framework to evaluate existin alcohol marketing regulations', July 2010, 28

[268] http://www.portmangroup.co.uk/?pid=14&level=2 (accessed 27/02/12)

audience only'.[269] The Code 'applies to all pre-packaged alcoholic drinks and covers the drink´s naming, packaging, point-of-sale advertising, brand websites, sponsorship, branded merchandise, advertorials, press releases and sampling'.[270] The downside of this system is that unlike the ASA codes the Portman Group code is completely voluntary, with 'no statutory requirement for retailers to follow any of this advice'.[271] Membership is currently comprised of nine multi-national drinks companies, which according to the Portman Group website 'account for more than half the UK alcohol market'.[272] This means that a substantial proportion of the UK alcohol market goes unregulated by the Portman Code. Since the UK has hardly any rules governing the promotion of alcohol in statutes, this makes the protection offered by this particular part of the regulatory scheme far weaker than the ASA codes, since there is no legal backstop to remedy breaches. However, there are now 140 signatories to the Code, which was primarily intended to play a supporting role to the ASA's Codes at any rate. As such it does not apply within the scope of the CAP Code, meaning its inherent weaknesses will not overly compromise the overall scheme.

The other two self-regulatory codes in the UK are written by the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP), which are then administered by the Advertising Standards Authority (ASA), which adjudicates on any complaints that are made to it.

The three codes focus overwhelmingly on content regulation. The vast majority of provisions stipulate what can or cannot be shown in an advertisement, who can or cannot appear in an advertisement, and what the advert can or cannot suggest. Themes covered by the rules include alcoholism, dangerous activities, sexuality, socialising and several specific rules on the protection of children. While this does go into more detail than the AVMSD, there are sadly still no outright bans to be found anywhere within the code. It is impractical to go through the entire body of rules here, so let us focus on a few examples.

An interesting provision relates to advertising the alcoholic strength of beverages. The CAP and BCAP codes say almost identical things, and the CAP version provides that 'marketing communications may give factual information about the alcoholic strength of a drink. They may also make a factual alcohol strength comparison with another product, but only when the comparison is with a higher strength product of a similar beverage'.[273] Thus, producers are legitimately allowed to include facts about the

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[269] http://www.portmangroup.co.uk/?pid=3&level=1 (accessed 27/02/12)

[270] http://www.portmangroup.co.uk/?pid=3&level=1 (accessed 27/02/12)

[271] Alcohol Concern, 'Advertising Alcohol Factsheet', http://www.alcoholconcern.org.uk/publications/factsheets/advertising-alcohol-factsheet (accessed 27/02/12)

[272] http://www.portmangroup.org.uk/?pid=15&level=2 (accessed 15/08/2012)

[273] CAP Code, Rule 18.9

alcoholic strength of their products in advertisements. In general the Codes contain obvious and sensible provisions which most people would reasonably expect of an alcohol advert, however this is an example of a point in the Codes which is not altogether well thought through and indicates a missed opportunity to tighten the protection we give to public health. It has been well documented, in particular by a Home Office Report on the drinking habits of 18-24 year olds, that 'young people often go out with the definite intention of getting drunk, and that many deliberately accelerate or intensify their drunkenness by mixing drinks, drinking before they go out, or drinking beverages that they know have a strong effect on them'.[274] In light of this it seems misguided to allow advertisements such as a recent Budweiser poster that stated that 'It's crisp, refreshing & 5%'.[275] The ASA allowed this advertisement on the basis that 'it was simply a factual statement of the alcohol content'.[276] However the fact is that many experts have identified that for many young people 'the central aim of consuming alcohol is to get drunk',[277] and hence young people are likely to chose alcoholic beverages based on which has the highest alcohol content. Allowing the factual advertising of the strength of alcoholic beverages, although consistent with the requirement of the free flow of truthful information, therefore may lead to increased harm among young people who actively seek out beverages with the highest possible strength for the cheapest possible price in order to make the process of getting drunk quicker and more effective.

Another further provision of the Codes states that 'Marketing communications must neither link alcohol with seduction, sexual activity or sexual success, nor imply that alcohol can enhance attractiveness'.[278] Controls on advertisements linking alcohol to sexual success or physical attractiveness should be at the core of any set of alcohol advertising regulation, as they seek to prevent consumers from making the false link that alcohol can improve personal qualities such as sexual attractiveness, social prowess, sporting ability and the like. The provisions contained in the UK Codes may be noted as distinctly similar to those contained in the AMVSD, but seem to work well in preventing alcohol adverts from crossing the line between light hearted entertainment and subliminally making the link between alcohol and sex. A couple of examples that fall either side of the line are advertisements for Belvedere Vodka and Stella Artois Beer. The Belvedere advertisement pictured a man with his shirt undone, surrounded by two women, with a half empty bottle of Belvedere and glasses in close proximity, accompanied by the text 'Luxury Reborn'. A complaint that the ad linked alcohol to sexual success was upheld, with the ASA noting that 'the image implied that Belvedere

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[274] R Engineer, A Phillips, J Thompson and J Nicholls, 'Drunk and disorderly: A qualitative study of binge drinking among 18-24-year-olds', (2003) Home Office Research Study 262, London:Home Office

[275] Example taken from G Crown, O Bray and R Earle, 'Advertising Law and Regulation', 326

[276] G Crown, O Bray and R Earle, 'Advertising Law and Regulation', 326

[277] M Fry, 'Seeking the pleasure zone: Understanding young adult's intoxication culture', (2011) Australasian Marketing Journal, 19, 65, 66

[278] CAP Code, Rule 18.5

had enhanced the man's attractiveness'.[279] This was clearly a violation of the requirement not to link alcohol to sex. The Stella Artois advertisement on the other hand was a TV commercial featuring a man rubbing suncream into a woman's back, who was then confronted by the woman's husband, a series of comical events ensued to leave the man in a bar ordering a Stella, with the voice over 'triple filtered for a smooth outcome'. The ad was partly challenged on the basis that it linked alcohol to sexual success or seduction, however the ASA dismissed this, stating that while the man's actions could be 'deemed mildly flirtatious', they 'did not consider that the "smooth outcome" referred to the success of his encounter with the woman'. It was also noted that no alcohol was consumed, or was suggested to have been consumed by any of the characters before or during the events taking place. These two examples show a stronger side of the Codes' application.

Lastly there are further points in the Codes where the rules are neither weak nor strong, but cover a middle ground of ambiguity where their interpretation can lead to extremely close calls on the suitability of an alcohol advert. Some examples of this are as follows. Rule 19.13 of the BCAP Code states that 'Advertisements must not link alcohol with the use of potentially dangerous machinery or driving'. The ASA did not uphold a complaint about a WKD advert that showed a pair of men doing DIY, one of whom jokingly used a power drill as part of a robotic dance. The ad then cut to a bar scene where the same man reached for a bottle of WKD with the caption 'Have you got a WKD side?'. The ASA considered that due to the clear separation between the two scenes, and that the drill scene did not show the characters drinking or working under the influence of alcohol, there was no beach of the rules. However, the advertisement could clearly be interpreted as linking the kind of person who would fool around with power drills as the kind of person who would have a 'WKD' side, and this clearly encourages those with such a side to drink the brand in question. This is where the ambiguities of the code become clear. The wording 'to link' is in some situations easy to apply as shown above, however in other situations this becomes extremely difficult. Wording along the lines of 'Advertisements must not show alcohol and potentially dangerous machinery in the same advert' or 'Advertisements must not show alcohol and potentially dangerous machinery being used together', would be clearer. There are various subconscious levels on which an advertiser can 'link' alcohol to one or more ideas, and modern advertising is sophisticated enough to manage this while staying within both the letter and spirit of the codes. In these situations, outright prohibition becomes a more attractive option for ensuring that alcohol related harm does not ensue from ideas picked up from alcohol advertisements. A further example of this dilemma could be an advertisement for Bacardi rum, which showed the liquid in a bottle of rum transforming into the figures of a man and a woman, who then danced with each other before fusing together into a glass of Bacardi and cranberry. The strap line at the end was 'made to mix' followed by 'with cranberry' after a short pause. The ASA considered that the advertisement was unlikely to interpreted to mean that drinking alcohol would increase popularity and that the tag 'made to mix' would likely be interpreted to indicate the fusion of the liquids.

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[279] http://www.asa.org.uk/ASA-action/Adjudications/2008/12/Moet-Hennessy-UK-Ltd/TF_ADJ_45494.aspx (accessed 28/02/12)

Again, this judgement came down to an interpretation of the rules. The BCAP Code says that 'Advertisements must neither imply that alcohol can contribute to an individual's popularity or confidence nor imply that alcohol can enhance personal qualities',[280] and again the decisive wording is 'imply', which can refer to linking concepts on a number of different levels. The fact that the ad associates alcohol with energetic and youth orientated dancing in an extremely direct way may be enough to form the impression in many viewers minds that Bacardi rum is synonymous with the ability to dance like the figures in the advert.

Overall then, the regulatory contents of the CAP and BCAP codes have their strong points and their flaws. The real question of how good they are at preventing irresponsible alcohol advertising from increasing alcohol related harm comes in assessing their enforcement mechanisms. Self-regulatory codes themselves are useless without some form of enforcement mechanism to back them up, as there is no legal penalty to discourage advertisers from breaking the code. The first thing to be said about the UK self-regulatory system is that its main goal is to 'maintain the integrity of marketing communications so that they are accepted and trusted by their audience'.[281] Even though in the area of alcohol 'the ASA is likely to enforce the rules in this area relatively strictly',[282] the fact is that the enforcement of the UK Codes in the first instance is not as strong as it could be since it 'operates purely in response to public complaints'[283] in order to sanction breaches of the code. When the ASA adjudicate that a provision of the code has been breached, the advertiser is approached first if the matter is able to be resolved informally. If not, a formal investigation takes place where written evidence is required from the advertiser and a judgement on the matter is made by the ASA. If a complaint is upheld the ASA will require the advertisement to be changed or withdrawn, or alternatively can require broadcasters or other media providers to not feature the offending advertisement. All adjudications are published on the ASA website.[284] Thus, the only real outcomes of the enforcement mechanism are requests for the advertiser to cease its code-breaching behaviour and dissuasion through 'naming and shaming'. The problem with this procedure is that 'the rules…have no enforcing character as they bind only the members of an association',[285] and additionally since complaints are dealt with by the ASA, a non-statutory body, the rules 'being infringed

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[280] BCAP Code Rule 19.3

[281] G Crown, O Bray and R Earle, Advertising Law and Regulation', (2nd Ed), Bloomsbury Professional Ltd, 2010, 803

[282] G Crown, O Bray and R Earle, Advertising Law and Regulation', (2nd Ed), Bloomsbury Professional Ltd, 2010

[283] Alcohol Concern, 'Advertising Alcohol Factsheet', http://www.alcoholconcern.org.uk/publications/factsheets/advertising-alcohol-factsheet (accessed 27/02/12)

[284] http://www.asa.org.uk/ASA-action/Adjudications.aspx

[285] G de Minico, 'A Hard Look at Self-Regulation in the UK', (2006) European Business Law Review, 17(1), 183, 187

does not imply an automatic recourse to a judge'.[286] All in all, the accumulated merits of the UK's self-regulatory system are let down by the fact that although 'a person who has suffered from the violation of a norm of the code can both lodge a complaint with the self-regulation Authority',[287] the Authority 'however, has no power to punish a fault'.[288]

This assessment, which shows that although the Codes can at times do a fairly good job of catching irresponsible advertisements, also demonstrates that the price of flexibility and focussing on controlling the content of advertisements within self-regulatory codes may come with the price of a certain level of ambiguity in assessing alcohol advertising and a lack of teeth when it comes to enforcing breaches of the code.

The Codes are ostensibly supported by 'a legal backstop which is set to action when the self regulation code is (possibly) violated'.[289] This takes the form of the statutory regulator Ofcom. Although Ofcom has contracted out the majority of its functions to the ASA for non-broadcast advertising, and although 'the ASA is responsible on a day-to-day basis for broadcast advertising content standards',[290] Ofcom as statutory regulator 'continues to exercise significant functions in relation to broadcast advertising'.[291] This means that although the self-regulatory bodies might lack the power to sanction recalcitrant advertisers on their own, the power held by Ofcom ensures that serious breaches do not go unpunished. According to the Communications Act 2003 which established it, Ofcom is 'responsible for setting so-called Tier One standards which all broadcasters must observe'.[292] Ofcom is the body responsible for higher-level regulatory activity such as the granting of broadcast licences, and in this way it is able to indirectly secure compliance with the Codes, since 'broadcasters are required by their licences to comply with the ASA directions'.[293] Since the ASA has 'no power to impose fines on a broadcaster',[294] if an advertiser or broadcaster fails to comply with a decision

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[286] G de Minico, 'A Hard Look at Self-Regulation in the UK', (2006) European Business Law Review, 17(1), 183, 187

[287] G de Minico, 'A Hard Look at Self-Regulation in the UK', (2006) European Business Law Review, 17(1), 183, 187

[288] G de Minico, 'A Hard Look at Self-Regulation in the UK', (2006) European Business Law Review, 17(1), 183, 187

[289] A de Bruin, I Johansen and A van den Broeck, 'Effective Alcohol Marketing Regulations: A proposed framework to evaluate existin alcohol marketing regulations', July 2010, 28

[290] A de Bruin, I Johansen and A van den Broeck, 'Effective Alcohol Marketing Regulations: A proposed framework to evaluate existin alcohol marketing regulations', July 2010, 28

[291] G Crown, O Bray and R Earle, Advertising Law and Regulation', (2nd Ed), Bloomsbury Professional Ltd, 2010, 889

[292] H Johnson, 'Television advertising - the Ofcom backstop', (2009) Comms L, 14(1), 24-27, 24

[293] G Crown, O Bray and R Earle, Advertising Law and Regulation', (2nd Ed), Bloomsbury Professional Ltd, 2010, 889

[294] H Johnson, 'Television advertising - the Ofcom backstop', (2009) Comms L, 14(1), 24-27, 24

of the ASA or commits a sufficiently serious breach of the Codes, the self-regulatory body can refer the matter to Ofcom, who 'can then consider the imposition of proportionate sanctions including a formal reprimand, a fine, a warning about possible revocation of the broadcaster's licence and ultimately the actual termination of the licence'.[295] These sanctions are all very well, and can be effective if triggered, however they need the Codes to be violated first before they are of any use, and this stage of the regulatory process seems to let more than a few irresponsible alcohol advertisements go untouched.

It is clear that 'the encouragement of flexible, appropriate and proportionate regulation'[296] has been a hallmark of the UK co-regulatory system for a long time, but is this the most appropriate and effective approach. Certainly co-regulation entails the danger of 'offering either the best or the worst of both worlds, either a system in which private and public interests are effectively reconciled, or one in which neither is respected and any values subjected to unprincipled bargaining between the state and private interests'.[297] It is submitted that the UK avoids falling into the later category, but it cannot be truly said that the UK's scheme as it stands is as effective as it could be.

CONCLUSION

In conclusion, the work of the ECJ in assessing the compliance of divergent national rules with the general treaty provisions has not made the regulation of alcohol advertising within the EU any better or more coherent. The development of the case law has resulted in some unsatisfactory decisions, notably in *Gourmet*, which have created uncertainty as to what is a legitimate restriction on alcohol advertising. Where the Court has gone so far as to offer an opinion, this has sometimes resulted in the disapplication of laws that would otherwise have had a notable effect in protecting public health.

Certainly from the way in which the Court should have decided *Gourmet*, compared to the decisions in *Commission v France (Loi Evin)* and *Aragonesa*, we can not only learn that the that the difference between Member State laws will provoke different responses from the Court when their compatibility with the general Treaty provisions is assessed, but that there is a definite ceiling to the level of protection that national law can ensure.

Self-regulatory regimes arguably perform little better than statutory schemes that must be assessed for compatibility with the general Treaty provisions. By examining the situation in

[295] H Johnson, 'Television advertising - the Ofcom backstop', (2009) Comms L, 14(1), 24-27, 24

[296] H Johnson, 'Television advertising - the Ofcom backstop', (2009) Comms L, 14(1), 24-27, 25

[297] T Prosser, 'Self-Regulation, Co-Regulation and the Audio-Visual Media Services Directive', (2008) J Consum Policy, 31, 99-113, 103

the UK, it is evident that self-regulatory schemes that do too little in regulating alcohol advertising can be just as problematic as statutory schemes that do too much. What then can be done? The next chapter looks at the possibility of creating a harmonised set of rules for alcohol advertising at EU level, which would take the focus away from the national legislators and the ECJ, and offer a common approach to the problem that each Member State has been trying to tackle differently.

CHAPTER FOUR – EU COMPETENCE TO ADOPT FURTHER HARMONISED RULES ON ALCOHOL ADVERTISING

This Chapter will argue that despite the failure of the EU to regulate alcohol advertising effectively, both through EU level legislation and through the ECJ's attempts to keep the Member State's laws in accordance with the general Treaty provisions, it is still possible for the EU to intervene and adopt measures which properly tackle the problems posed by alcohol advertising. It has been argued thus far that disparities between the laws of the Member States have contributed towards the insufficient regulation of alcohol advertising in the EU. Therefore this Chapter will primarily examine the possibility of enacting harmonising measures for alcohol advertising in the form of a Directive. It will address the three stages of the competence enquiry – conferral, subsidiarity and proportionality. The Chapter will also examine alternative regulatory options that the EU could take.

CONFERRAL

The right of the EU to adopt legislation is governed by the principle of conferral, or enumerated powers. This is expressed in Article 5(2) TEU, which states that:

'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.

Thus, the EU must be able to point to a specific legal basis within the Treaties that confers upon it the power to act before it can adopt any piece of legislation.

It has ben argued throughout that it is necessary for the EU to adopt strong harmonised rules for alcohol advertising if consumption rates are to be reduced by in turn reducing the

creation of irresponsible marketing campaigns. Thus, a Treaty basis is required that allows extensive and deep harmonisation of Member States advertising laws.

PUBLIC HEALTH AND ARTICLE 168 TFEU

Hard law measures

It is evident that the reason behind adopting any measure harmonising alcohol advertising laws would be public health. This throws up an initial problem, since although 'the protection of public health is one of the basic requirements that the EU has to take into account in the enactment of any of its policies or activities, Member States remain generally competent to adopt public health measures'.[298]

The Treaty provision that confers competence on the EU to act in the field of public health is Article 168 TFEU. This Article was recently updated by the Lisbon Treaty, so that it now contains a specific reference to alcohol. Paragraph five therefore provides that the EU may adopt the following:

'Incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States'.

Thus the Member States remain generally competent because although the EU is empowered to act in the field of public health the Article 'carefully excludes the harmonization of such laws'.[299] This continued reservation of power to the Member States demonstrates that 'continuity with the previous regime is [also] the hallmark of the

[298] A Alemanno, 'Out of Sight Out of Mind - Towards a New EU Tobacco Products Directive', (2012) Columbia Journal of European Law, 18(2), 208

[299] S Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law has become a "Drafting Guide"', (2011) German Law Journal, 12(3), 828, 831

approach to public health'[300] whereby 'the basic philosophy is that EU action complements Member State action in relation to health'.[301]

It is therefore evident that a harmonisation measure on alcohol advertising seeking to improve public health could not be adopted on the basis of Article 168 TFEU. Therefore it is necessary to seek another Treaty basis on which to found the proposed Directive. Nevertheless, Article 168 does provide some assistance here, in that it 'mainstreams' public health concerns by providing in 168(1) that 'a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities'. Thus simply because certain public health protection measures cannot be adopted under the public health competence, this does not mean that they cannot be adopted under provisions elsewhere in the Treaty.

Although it cannot be used to harmonise, Article 168 TFEU does not explicitly exclude the adoption of all hard law measures. Thus, from the way in which the Article reads, it must be supposed that, at least on the face of it, the Article does not preclude the EU enacting any other measure of hard law as long as it does not involve harmonisation. This at the very least presents an interesting possibility to explore.

Article 168(5) gives the EU the power to adopt 'measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol'. There is debate as to exactly what 'measures' mean in the context of Article 168, however one commentator has speculated that 'whatsoever the precise terminology, these measures constitute legally binding acts…the EU is legally empowered to take binding measures provided that they fall within the remit of these broadly defined objectives and do not constitute harmonisation of national laws'.[302] If this were the case it would lend EU action increased force in the face of the harmonisation prohibition.

The determining factor of course is the exact meaning of 'harmonisation'. Harmonisation could be understood to mean one of two things – either a purposeful disapplication of existing Member State laws with a view to their re-enactment around a common standard laid down by the EU, or an incidental effect whereby the application of an EU measure causes the national laws to necessarily work around the European standard. From the way in which Article 168(5) is drafted – 'excluding any harmonisation of the laws and regulations of

[300] P Craig, 'The Lisbon Treaty: Law, Politics and Treaty Reform', OUP Oxford 2010, 325

[301] P Craig, 'The Lisbon Treaty: Law, Politics and Treaty Reform', OUP Oxford 2010, 325

[302] P Craig, 'The Lisbon Treaty: Law, Politics and Treaty Reform', OUP, Oxford 2010, 175

the Member States' – it could reasonably be surmised that the former definition should apply, since firstly 'harmonisation of' implies an active intent towards Member State laws and secondly 'excluding' surely implies that there are a number of potential measures that could be taken but one is not permitted, that one being harmonisation. Lenaerts' view appears to support this conclusion, as he writes, in relation to the educational competence which similarly excludes harmonisation, that 'of course the fact that a Community incentive measure may have the indirect effect of harmonising the content of teaching or the organisation of the educational system does not necessarily mean that it conflicts with the prohibition on harmonisation'.[303] He envisages that the exclusion of harmonisation 'amounts to a constitutional guarantee that the educational policy of the Member States and their sub-Member States will not be standardised at the Community level',[304] which again implies active policy intent by the EU, and suggests that if Article 168 provides competence to adopt a binding measure that does not actively attempt to standardise the laws of the Member States, then there is nothing to stop this measure from being taken.

This conclusion may therefore mean that legislative instruments such as Regulations could be used to enact further alcohol advertising laws at EU level. In the *European Cooperative Society* case[305] the ECJ held that Regulations, or at least this particular one, did not have to entail harmonisation of Member State laws, if that was not their primary objective. The Council's argument, which again accords with the view promoted here, was that 'a harmonisation measure must necessarily lead to a result which it would have been possible to achieve by simultaneously adopting identical legislation in each Member State'[306] and this is approved by the Court's finding that 'the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms'.[307]

The counter argument to this would be to support the alternative definition of harmonisation, that any legislative act that has an effect on the operation of national law will have a harmonising impact, by virtue of the fact that they require the national laws to adapt to accommodate a new European standard. Adopting any measure of hard law in an

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[303] K Lenaerts, 'Subsidiarity and Community Competence in the Field of Education' (1994) Colum J Eur L, 1, 1, 15

[304] K Lenaerts, 'Subsidiarity and Community Competence in the Field of Education' (1994) Colum J Eur L, 1, 1, 15

[305] Case C-436/03 *European Cooperative Society* [2006] ECR I-03733

[306] Case C-436/03 *European Cooperative Society* [2006] ECR I-03733, 32

[307] Case C-436/03 *European Cooperative Society* [2006] ECR I-03733, para 44

area such as alcohol advertising where there is already a plethora of national laws is sure to cause a level of disruption and would require that the applicable national law either became redundant or had to be applied differently to avoid conflict with the EU legislation. It is submitted that this cannot be the right way to approach harmonisation, since every EU legislative act causes a measure of disturbance to national law, and no EU intervention in a field is done in a complete vacuum. Therefore if every effect on a national law could be harmonisation, why make the distinction in the EU Treaties? If all EU actions had a harmonising effect then Article 168 would not have allowed EU action in the public health sphere, if harmonisation was not what was desired. Harmonisation must be a characteristic that some EU hard law measures may possess if they choose, and others may not. Therefore it must be seen as plausible that binding measures could be adopted on the basis of Article 168, and that they could directly target alcohol and its promotion.

Soft law measures

In any event, it is certain that 'while harmonization is ruled out, the EU still has significant room for intervention through "persuasive soft law"'[308] as a result of the powers provided by Article 168. Although not a harmonised regime, these measures can constitute 'significant forces in the integration process',[309] and would offer the benefit of enabling the EU to focus directly on tackling the public health issues raised by alcohol advertising without having to tie in other elements.

An examination of the EU Strategy on Alcohol shows that there is evidence of soft law measures already being adopted on the basis of Article 168. However the Strategy recognises that more could be done. Specifically, it notes that 'the Commission services will work with stakeholders to create sustained momentum for cooperation on responsible commercial communication'.[310] Competence to adopt cooperation schemes is provided for in Article 168 – Article 168(2) gives power to 'encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action'. An example of such a scheme being adopted recently on the basis of Article 168 is the European Partnership for Action Against Cancer,[311] which aims to 'support the Member States in their efforts to tackle cancer by providing a framework for identifying and sharing information, capacity and expertise in cancer prevention and control, and by engaging

[308] P Craig, 'The Lisbon Treaty: Law, Politics and Treaty Reform', OUP, Oxford 2010, 175

[309] Hervey TK and McHale JV, 'Health Law and the European Union', CUP, Cambridge 2004, 61

[310] Communication on An EU strategy to support Member States in reducing alcohol related harm COM(2006) 625 final

[311] Communication on Action Against Cancer: European Partnership COM(2009) 291/4

relevant stakeholders across the European Union in a collective effort'.[312] This sets a precedent for the adoption of a similar scheme for responsible commercial communication, following the desire to work with Member States and stakeholders stated in the Alcohol Strategy. One power of such a strategy lies in its potential to 'promote convergence through articulation of agreed statements of good practice and recommendations, against which national policies are measured, eventually prompting voluntary changes to bring national systems in line with an agreed "European norm"'.[313] Despite this commentators still pose the question, 'how will successful soft measures, such as those used in the Europe Against Cancer framework, stand up against existing laws on [for example] tobacco advertising'.[314] It is submitted here that soft law measures can be a useful and effective supplement to legislation, and can even achieve goals that legislation cannot.

As will be demonstrated later in this Chapter, there are some forms of alcohol advertising that the Member States are deemed to be competent to regulate over the EU. However, simply because competence is granted to the Member States in these areas, it does not necessarily follow that they will in fact achieve an optimally efficient regulatory scheme. This is where soft law should be considered useful as a tool to both investigate the areas in which Member States could do better and facilitate the sharing of best practice to allow each Member State to develop the optimum regulatory system. An example approach might be to set up a framework for sharing what does and what does not work regarding self-regulatory regimes governing non-cross-border alcohol advertising, or even for 'the publicizing of best practices as well as the "worst practices" of the least successful member state'.[315] A supranational network facilitating the sharing of best practice could build on the aim of the Alcohol Strategy,[316] and might include 'research and monitoring…mechanisms used to get reluctant member states to adopt a common view on areas not earlier considered important'.[317] The Strategy does in fact seem positive about the possibility of soft law solutions, as it aims to present 'good practices implemented in Member States, and which could inspire similar actions and synergies at national level'.[318] As a consequence of this 'in an area of distinct national paradigms…an institutional structure organised around a

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[312] Communication on Action Against Cancer: European Partnership COM(2009) 291/4, 2

[313] Hervey TK and McHale JV, 'Health Law and the European Union', CUP, Cambridge 2004, 61

[314] E Brooks, 'Crossing borders: A critical review of the role of the European court of Justice in EU health policy', (2012) Health Policy, 105, 33, 36

[315] K Jacobsson, 'Soft regulation and the subtle transformation of states: the case of EU employment policy', (2004) Journal of European Social Policy, 14, 355, 363

[316] See in particular page 17, from 'One aim of this joint effort…'

[317] J Cisneros Örnberg, 'The Europeanization of Swedish Alcohol Policy', 67

[318] Communication on an EU strategy to support member states in reducing alcohol related harm', COM(2006) 625 final

number of discursive regulatory mechanisms has been established in order to ensure implementation at the domestic level'[319] of European policy objectives. Such achievements could be replicated and expanded upon by further soft law strategies. Thus, it can be seen that efforts such as this can in fact 'enable member states to collaborate in areas where the EU system precludes a common policy or legal framework, and areas where national diversities are recognized'.[320] Thus, 'concerted EU actions are possible without interfering with individual member states' legal competences and authorities'.[321]

Soft law solutions could provide a welcome outlet for EU efforts to reduce alcohol related harm resulting from irresponsible advertising, should political unpopularity to harmonising legislation provide too great an obstacle. Soft law is fundamentally an easier fit for the requirement of the Protocol on Subsidiarity and Proportionality that 'care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems'.[322] Even with the presence of EU measures such as the AVMSD, there are still sizeable differences between the national regulatory schemes, even in areas that are already supposedly subject to harmonisation. Commentators point out that 'relying on soft law leaves the effective policy choice to each individual member state'.[323] Thus, should harmonisation prove politically infeasible, soft law should offer a less contentious way for the EU to remain involved in alcohol advertising policy development, since the adoption of soft law is entirely additional to the primary legislative authority of the Member States.

Having considered the possibility of using the specific Treaty provision on public to enact further harmonising measures on alcohol advertising, the next section assesses the possibility of turning to one of the more general Treaty provisions. Of these, there are two candidates, Article 114 TFEU and Article 352 TFEU. Article 352, while being the most general in scope of the pair, is unfortunately extremely unlikely to provide any sort of competence for harmonised legislation, but for the sake of completeness the reason for this shall be addressed briefly before focussing on Article 114.

Article 352 provides the following power:

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[319] Communication on an EU strategy to support member states in reducing alcohol related harm', COM(2006) 625 final

[320] J Cisneros Örnberg, 'Escaping deadlock - alcohol policy-making in the EU', (2009) Journal of European Public Policy', 16(5), 755, 758

[321] J Cisneros Örnberg, 'Escaping deadlock - alcohol policy-making in the EU', (2009) Journal of European Public Policy', 16(5), 755, 758

[322] Protocol on the application of the principles of subsidiarity and proportionality, Article 7

[323] J Cisneros Örnberg, 'The Europeanization of Swedish Alcohol Policy', 67

'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures'.

The use of this most general of powers in the field of alcohol advertising regulation is however curtailed by the third subparagraph of the same Article, which reads:

'Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation'.

Thus, this provision is designed to prevent the EU from using the general power in Article 352 to sidestep the exclusion of harmonisation in Article 168. As long as the specific public health Article excludes the possibility of harmonisation of public health laws, the general provision also excludes the possibility of such harmonisation. This means that another general provision must be found on which to base the proposed measures on alcohol advertising.

ARTICLE 114 TFEU AND THE *TOBACCO ADVERTISING* TEST

The final Treaty Article that could provide the legal basis sought is Article 114 TFEU. It provides that:

'Save where otherwise provided in the Treaties…The European Parliament and Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.

This power to harmonise is 'not aimed at correcting inter-State legislative diversity *per se*. Instead it is explicitly tied to the construction of an internal market'.[324] Thus, in order to have recourse to Article 114 the EU must show that alcohol advertising measures, although motivated by the desire to protect public health, would also serve the objective of 'the establishment and functioning of the internal market'.

[324] S Weatherill, 'Current Developments: European Union Law – Free Movement of Goods', (2012) ICLQ, 61, 541, 547

The test that determines whether or not this rather vague threshold is passed was set out in the notorious *Tobacco Advertising 1* case. It can be summarised from the judgement as follows:

'a measure adopted on the basis of Article 100a [114 TFEU] of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory'.[325]

How did the Court apply the test in *Tobacco Advertising 1*?

In applying this test the Court gave an invaluable illustration of how it is to be met by a measure. The wording suggests that a number of questions must be answered before a measure can legitimately draw power from Article 114 TFEU. Disparities must firstly exist between the laws of the Member States. A mere finding of disparities though is not enough, so the disparities must also cause real and appreciable obstacles to free movement in the internal market. As one commentator puts it, the 'EU may intervene to cure diversity between national laws only where that diversity is shown to be harmful to the achievement of the EU's internal market'.[326] Next, in response to these dangers, the measure in question must genuinely have as its objective the improvement of the internal market. This means that the measure must not only intend to counter the problems identified, but must genuinely intend to do so, by making an actual contribution toward solving the problem. The Court confirmed this in the judgement when it stated that it was 'necessary to verify whether the Directive actually contributes to eliminating obstacles to the free movement of goods and to the freedom to provide services'.[327]

The Court started by finding that the 'Community legislature notes that differences exist between national laws on the advertising and sponsorship of tobacco products'.[328] This immediately sets the tone of the test as lenient and rather deferential, since there is no attempt by the Court to conduct its own analysis of the situation. It was then found in the

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[325] Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para 84

[326] S Weatherill, 'The Limits of Legislative Harmonisation Ten Years after *Tobacco Advertising* : How the Court's Case Law has become a "Drafting Guide", (2011) German Law Journal, 12(3), 830

[327] Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para 95

[328] Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para 90

same paragraph by the same means that the 'differences in question are likely to give rise to barriers to the movement of the products which serve as the media for such activities…thereby impeding the functioning of the internal market'[329] There is, sadly, no further definition of 'likely' in the judgement.

In analysing whether the Directive met the requirement to address internal market issues, the Court 'declined to conclude that the Directive was in essence a public health measure'.[330] Germany contended that 'recourse to Article 100a [114 TFEU] is not possible where the "centre of gravity" of a measure is focussed not on promoting the internal market but on protecting pubic health'.[331] The Court however interpreted the requirement of pursuing internal market objectives to mean that this must be at least one of the measure's objectives and not necessarily its main one. They stated that 'the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made',[332] and in fact specifically noted that 'Article 100a(3) expressly requires that, in the process of harmonisation, a high level of human health protection is to be ensured'.[333] Thus, it can be seen that 'in cases where a harmonising measure serves a genuine internal market approximation aim as well as pursuing health objectives, the Court considers the measure as being adopted within the legitimate limits of art.95 EC [Article 114 TFEU].'[334]

However as the last part of the test requires, the measures must 'genuinely' serve this internal market aim. The Court observed that 'for numerous types of advertising of tobacco products, the prohibition under Article 3(1) of the Directive cannot be justified by the need to eliminate obstacles to the free movement of advertising media or the freedom to provide services in the field of advertising'.[335] They identified principally advertising in static media such as posters that did not cross borders as falling into this category, reasoning that if there is no inter state trade in a particular type of media, then there cannot be an intention by the EU to remove obstacles to its passage around the internal market, and thus a measure attempting to harmonise it cannot be considered to have actually contributed to removing

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[329] Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para 90

[330] M Alegre, 'We've come a long way baby (or have we?): Banning tobacco advertising and sponsorship in the European Union', (2003) BC Int'l and Comp L Rev, 26, 157, 163

[331] Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para 32

[332] Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para 88

[333] Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para 88

[334] T Konstadinides, 'Wavering between centres of gravity: comment on Ireland v Parliament and Council', (2010) EL Rev, 35(1) 88, 94

[335] Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para 99

barriers in the internal market. The Tobacco Advertising Directive in its first incarnation was thus judged to have gone too far, stepping beyond the harmonisation threshold that the *Tobacco Advertising 1* test defines as permissible in order to legitimately act under the power granted by Article 114 TFEU.

What did the outcome of the test's application in *Tobacco Advertising 1* mean for future legislative challenges that came before the Court?

Tobacco Advertising 1 is significant not simply because it was the first time an EU legislative measure was annulled for lack of a legal basis, but more so because it created a standard which was very easy for the legislature to comply with. As one commentator writes, 'that momentous ruling did not herald aggressive judicial control of legislative excess. Rather the reverse. Most comparable attempts to enlist the Court's help in curtailing broad legislative ambition in the name of harmonisation have failed'.[336] Moreover subsequent case law has only served to cement the standard set in *Tobacco Advertising 1*.

The legacy of *Tobacco Advertising 1* was in facilitating the drafting of virtually challenge-proof EU harmonising legislation. No case demonstrates this better than the follow up case of *Tobacco Advertising 2*. In *Tobacco Advertising 1* the Court identified that only measures relating to cross-border media would meet the test for a genuine attempt to improve the internal market, and in the process 'offered guidelines as to what would be acceptable intervention with regard to banning the advertising and sponsorship of tobacco at Community level.'[337] Unsurprisingly, the EU legislature obliged by ensuring that the follow up Directive 'was prepared with a close eye on what the Court in its earlier ruling had indicated would receive the green light',[338] and thus the second incarnation of the Tobacco Directive defined its scope far more tightly, ensuring that only cross-border forms of advertising were covered by the prohibition. The Court was powerless to stop this re-development, conceding at one point that 'the Court has already held that a prohibition on the advertising of tobacco products in periodicals, magazines and newspapers with a view to ensuring free movement of those goods may be adopted on the basis of Article 95 EC [114 TFEU]'.[339] The Court clarified the test even further, stating that 'recourse to Article 95 EC

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[336] S Weatherill, 'Current Developments: European Union Law – Free Movement of Goods', (2012) ICLQ, 61, 541, 547

[337] G Tridimas and T Tridimas, 'The European Court of Justice and the Annulment of the Tobacco Advertisement Directive : Friend of National Sovereignty or Foe of Public Health?', European Journal of Law and Economics, 14

[338] S Weatherill, 'The Limits of Legislative Harmonisation Ten Years after *Tobacco Advertising* : How the Court's Case Law has become a "Drafting Guide", (2011) German Law Journal, 12(3), 827, 839

[339] Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, para 70

[114 TFEU] as a legal basis does not presuppose the existence of an actual link with free movement between the Member States in every situation covered by the measure founded on that basis…what matters is that the measure adopted on that basis must actually be intended to improve the conditions for the establishment and functioning of the internal market'.[340] It seems that the more the Court is called upon to apply the Article 114 test, the further it is clarified and the clearer the legislative properties to be demonstrated become.

Each case that has applied the *Tobacco Advertising 1* test could not help but add to the steadily accumulating 'drafting guide' that has allowed the EU legislature to tailor harmonisation measures with otherwise no apparent legal basis specifically to pass the Article 114 test. The *BAT* case can be seen as an example. The legislature were able to use the drafting guide to ensure that a thinly veiled public health measure was held a legitimate use of the Article 114 power. According to *Tobacco Advertising 1* public health goals can be pursued as long as the measure overall genuinely aims to improve the internal market. Thus the legislature were careful to select those aspects of public health where, in order to protect the imperative requirement of public heath defined in the Treaty derogations, Member States are likely to impose restrictions on fundamental freedoms in order to protect these imperative requirements. Thus an EU harmonising measure in these fields would automatically be a positive step in eliminating barriers to fundamental freedoms, and the internal market requirement would therefore be fulfilled. This was recognised by the Advocate General in his opinion when he said 'In order to set aside this barrier to trade, the Community legislature is entitled to adopt measures by which it takes over from the national legislature the protection of the matter of public interest (*in casu*, public health). In other words, the realisation of the internal market may mean that a particular public interest - such as here public health - is dealt with at the level of the European Union. In this the interest of the internal market is not yet the principal objective of a Community measure'.[341] The cover-up was also noted by the Advocate General - 'the recitals in the preamble refer extensively to the single market: those references are included precisely in order to justify the use of Article 95 EC and not so much in connection with the real purpose of the Directive'.[342] Thus, the *Tobacco Advertising 1* judgement has removed Article 114 from an internal market making power – it does not matter at all that measures are not intended to cure barriers to trade. As long as actually contributing to the furtherance of the internal market is one result of the directive it can pursue whatever objective it wants.

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[340] Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, para 80

[341] Case C-491/01 Opinion of Advocate General Geelhoed delivered on 10th September 2002 *R v Secretary of State ex parte BAT and Imperial Tobacco* [2002] ECR I-11543, para 106

[342] Case C-491/01 Opinion of Advocate General Geelhoed delivered on 10th September 2002 *R v Secretary of State ex parte BAT and Imperial Tobacco* [2002] ECR I-11543, para 97

The challenge to the Roaming Regulation in the *Vodafone* case, which resulted in the ECJ upholding the use of Article 114 to harmonise laws regulating data roaming charges by mobile operators, also confirmed that the result of *Tobacco Advertising 1* was to set a 'threshold that is both low and imprecise.'[343] In *Vodafone* the ECJ 'clarified further its case law on preventative approximation, in particular the notion of likelihood',[344] building on earlier case law such as *Spain v Council* that established that a measure which 'aims to prevent the heterogeneous development of national laws leading to further disparities which would be likely to create obstacles to the free movement of…products within the Community and thus directly affect the establishment and the functioning of the internal market' could be validly adopted on the basis of Article 114 TFEU. The Advocate General wrote that 'I cannot find that the risk of possible future differences in national price controls creating obstacles to trade has been established to the point of justifying the adoption of Community price control measures under Article 95 [114 TFEU]'.[345] The Court however brushed this argument aside, concluding that 'the Community legislature was actually confronted with a situation in which it appeared likely that national measures would be adopted…such measures would have been likely to lead to a divergent development of national laws'.[346] In similar fashion to *Tobacco Advertising 1*, this conclusion is made by referring to the legislature's assessment in the recitals to the Regulation itself,[347] with no attempt to explore the 'adverse yet plausible view that a Member State would have no interest in enacting such ineffective laws'.[348] Thus, it seems to continue to be the case that 'any assertion by the EU legislature which is not on the face of it unlikely appears to meet the likelihood threshold'.[349] Since *Tobacco Advertising 1* the Court has displayed distinct 'judicial reticence to analyse this [likelihood] condition',[350] and appears happy to use the

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[343] S Weatherill, 'Current Developments: European Union Law – Free Movement of Goods', (2012) ICLQ, 61, 541, 548

[344] M Brenncke, 'Case C-58/08, Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010' [2010] CMLR, 47, 1793, 1800

[345] Case C-58/08 Opinion of Mr Advocate Genral Poiares Maduro delivered on October 1 2009 *Vodafone and Others* [2010] ECR I-04999, para 18

[346] Case C-58/08 *Vodafone, O2 et al v Secretary of State* [2010] ECR I-04999, paras 45

[347] See Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para 90

[348] M Brenncke, 'Case C-58/08, Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010' [2010] CMLR, 47, 1793, 1801

[349] M Brenncke, 'Case C-58/08, Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010' [2010] CMLR, 47, 1793, 1801

[350] M Brenncke, 'Case C-58/08, Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010' [2010] CMLR, 47, 1793, 1800

analysis of the legislature in place of its own, giving a broad discretion to the legislature even where reliance on Article 114 is tenuous. The outcome of course is that 'diligent drafters of preambles and of accompanying documents to pieces of EU legislation will easily find a way to create the impression that a danger to free trade by impending national measuresis imminent'.[351]

To what extent is further harmonisation of alcohol advertising laws therefore permitted by the *Tobacco Advertising 1* test?

To recap, if the EU wishes to use the powers in Article 114 to adopt further harmonising legislation on alcohol advertising, it is necessary to satisfy the test for determining whether the required threshold of contributing to the establishment and functioning of the internal market has been met. The test was established in *Tobacco Advertising 1*, and has been applied in instructive fashion by the Court to a number of further measures using Article 114 as their legal basis. The test can now be applied to alcohol advertising to determine how far the EU's competence to further harmonise Member State alcohol advertising laws will extend.

It will be little contested that there are disparities between the laws of the Member States and that these cause obstacles to the free movement of goods or services. Documentation arising from the First Application Report of the AVMSD shows that there is plenty of variance among the 22 Member States that establish stricter levels of protection against alcohol advertising.[352] An examination of data compiled in more detailed reports shows that the conditions on which alcohol may be advertised in audiovisual media are unique in every Member State.[353] This diversity can certainly be construed as likely to create obstacles to free movement – the report 'Alcohol in Europe' written for the Commission acknowledges that 'the basic opinion of the courts is clear: advertising restrictions may infringe trade commitments, but (if proportionate) they are justified by the aim of protecting health',[354]

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[351] T Ackermann, 'Vodafone: Price Regulation as a Substitute for Intervention under Article 102 TFEU', (2010) Journal of European Competition Law & Practice', 1(5), 426, 428

[352] See Table on some national rules on commercial communications and promotion of European works, available at http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact_comm/35_table_1.pdf (accessed 24/07/12)

[353] See EGTA, 'Compendium of regulations, self-regulatory standards and industry codes of conduct on audiovisual advertising of alcoholic beverages across the EU', March 2011, available at http://www.egta.com/alcohol/documents/alcohol_compendium_v032011_merged.pdf (accessed 24/07/12)

[354] P Anderson and B Baumberg, 'Alcohol in Europe', Institute of Alcohol Studies, London 2006, 352

and that as a result 'only once has an advertising ban been struck down by the courts'.[355] This therefore means that each Member State law approved by the Court will be a barrier to trade if it has been declared justified by virtue of fulfilling the public interest objective of public health. There is even proof of such disruption in cases such as *Bacardi France*, where French company Bacardi were actively prevented from acquiring advertising space at foreign football clubs by companies negotiating for television rebroadcasting rights, by virtue of the fact that the French ban on television alcohol advertising meant that otherwise the television companies would not be able to broadcast matches into France where Bacardi had its advertising.[356] In all, it is therefore overwhelmingly likely that a measure further harmonising alcohol advertising laws would be construed as acting against disparities in national laws that are harmful to the achievement of the internal market.

It would also be a certainty that a measure on alcohol advertising would be judged as pursing internal market measures, notwithstanding the fact that the main objective of the measure is undoubtedly to impose stricter conditions on advertising for the benefit of public health. A direct comparison can be drawn between the Tobacco Advertising Directive and a Directive proposing to impose similar conditions on alcohol advertising, making the analysis made in the above sections on tobacco relevant to alcohol. It should be noted that at the time of the Tobacco Advertising Directive's adoption the TVWFD already provided for a ban on television advertising of tobacco products in order to prevent obstacles to free movement in the television sector, and thus the objective of Directive 2003/33 was to extend that ban to further types of media. The Court confirmed in *Tobacco Advertising 2* that 'following the example of Article 13 of Directive 89/552, Articles 3(2) and 4(1) of the Directive, which prohibit the advertising of tobacco products in information society services and in radio broadcasting, seek to promote freedom to broadcast'.[357] Similarly, the primary objective of a Directive on alcohol advertising would be to extend the alcohol advertising provisions of that very same Directive (albeit now the updated AVMSD), in much the same way as the Tobacco Directive to as many forms of media as possible. Therefore the origins of the desire for a Directive on alcohol advertising and the specific aims and objectives it would pursue, would be the same. Consequently, the outcome of the application of the test to tobacco, that the underlying public health objectives of the Directive did not preclude reliance on Article 114 as a legal basis since internal market aims were also pursued, should be considered equally applicable and valid for alcohol, meaning that a Directive on alcohol advertising should also fulfil the requirements of this stage of the Article 114 test as well.

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[355] P Anderson and B Baumberg, 'Alcohol in Europe', Institute of Alcohol Studies, London 2006, 352

[356] Case C-429/02 *Bacardi France* [2004] I-06613

[357] Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11634, para 70

Having established that the disparities and resultant internal market harm would be sufficient to satisfy the test, and that the objectives of the Directive would not fall foul of the test, we reach the crucial stage of the enquiry, namely what measures for alcohol advertising would satisfy the requirement to make a genuine contribution to improving conditions within the internal market. Again, the comparison with tobacco should provide the answers.

The test is clear that only measures that serve to make a genuine contribution towards improving the internal market can be adopted under Article 114. Thus, only advertising that plays a role in the internal market, i.e. advertising that crosses borders, can be the subject of a harmonisation measure. The Court in *Tobacco Advertising 1* was clear on this at least when it said that measures adopted under Article 114 must be 'justified by the need to eliminate obstacles to the free movement of advertising media or the freedom to provide services in the field of advertising'.[358] It is clear that more stringent restrictions on television advertising will serve this need, since as was pointed out above the EU has already established competence to regulate television advertising.

Extending regulation to alcohol advertising in the press will also fulfil the cross-border requirement, since the Court has confirmed that 'the market in press products…is a market in which trade between Member States is relatively sizeable and is set to grow further',[359] and therefore that 'the Court has already held that a prohibition on the advertising of tobacco products in periodicals, magazines and newspapers with a view to ensuring the free movement of those goods may be adopted on the basis of Article 95 EC'.[360] Adopting measures on press advertising of alcohol should therefore be similarly allowed.

Alcohol advertising on the radio, in information society services and through the medium of sponsorship could all furthermore be included in a harmonising Directive. These were all included in the successfully adopted second Tobacco Directive, and the Court has confirmed that in general bans on these advertising types do have as their object the improvement of conditions in the internal market, stating that 'this conclusion is not called into question by the applicant's line of argument that…the Directive concerns only advertising media which are of a local or national nature and lack cross-border effects'.[361]

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[358] Case C-376/98 *Germany v Parliament v Council* [2000] ECR I-08419, para 99

[359] Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11634, para 53

[360] Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11634, para 70

[361] Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11634, para 79

Another alcohol promotion medium that could potentially be included in a Directive harmonising alcohol advertising laws is advertising on the internet. Internet advertising was not covered by the Tobacco Directive, although interestingly the Court in *Tobacco Advertising 2* did visit the subject in passing to remark that the inter-State market in press products will grow 'as a result, in particular, of the link between the media in question and the internet, which is the cross-border medium *par excellence*'.[362] Whether internet advertising of alcohol, like that on websites such as YouTube and Facebook as discussed in Chapter 1, could be included in a harmonising Directive is a little more up for debate. It is submitted that of itself there is noting to stop internet advertising from being included. One problem might be showing the necessary risk posed by such advertising to the internal market, however although internet alcohol promotion may not be widely regulated by the Member States, the way the test has been applied with regard to likely obstacles arising to trade in the future suggests that this would not be an issue. In cases such as *Vodafone* the Court leaps very quickly from the suggestion that 'there was pressure for Member States to take measures to address the problem of the high level of retail charges for Community-wide roaming services'[363] to the conclusion that 'the Community legislature was actually confronted with a situation in which it appeared likely that national measures would be adopted aiming to address the problem',[364] and that consequently these divergent national laws would cause internal market obstacles. This has prompted one commentator to remark that 'a competence to harmonize which did not exist in the past may come into being where public pressure for national regulation increases'[365] For many brands it is known that 'the internet is identified as one of the top media routes to the target audience'.[366] If pressure on national governments does grow to tackle this increasingly prevalent form of alcohol advertising, then internet advertising could also be included in an EU Directive on alcohol advertising.

There are plenty of other forms making up the marketing spectrum for alcohol that could also be considered as candidates for inclusion in a future harmonisation measure. These include more subtle forms such as packaging, visual displays, direct mailings, promotional gifts, billboards and hoardings and advertising in electronic games. How many of these forms would pass the required threshold for the use of Article 114?

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[362] Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11634, para 53

[363] Case C-58/08 *Vodafone, O2 et al v Secretary of State* [2010] ECR I-04999, paras 44

[364] Case C-58/08 *Vodafone, O2 et al v Secretary of State* [2010] ECR I-04999, paras 45

[365] A Alemanno, 'Out of Sight Out of Mind - Towards a New EU Tobacco Products Directive', (2012) Columbia Journal of European Law, 18(2), 20

[366] G Hastings, '"They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents', (2009) The Alcohol Education and Research Council, 42

A comparison with tobacco is again instructive. There is currently a proposal to update the Tobacco Products Directive to include a requirement for plain packaging of cigarette boxes and a ban on visual displays. It has been concluded by commentators that 'it seems that both an EU-wide plain packaging and display ban, as general rules mandating a common standard for the marketing and sales of cigarettes in Europe, would actually remove any possible obstacles emerging from disparities among national rules'.[367] Similar regulation of the packaging and labelling of alcoholic drinks could likewise be considered a measure to address the obstacles to trade arising within the internal market when different Member States impose different rules on how alcoholic drinks can be packaged. There have been cases that show the impact a different set of packaging rules can have on the importation and marketing of alcoholic beverages, for instance in *Prantl* where Italian importers of wine into Germany were prevented from using a particular distinctively shaped bottle on grounds that its availability would cause confusion with a similar traditional German bottle reserved to German producers of quality wine, thus depriving them of the commercial advantages of using such a bottle.[368] Thus harmonising packaging rules for alcoholic beverages would arguably make a genuine contribution to removing trade barriers arising from divergent packaging rules.

It is not so clear, however, that national laws on static forms of alcohol advertising, such as point of sale advertising, promotional items (such as bar mats), posters or billboards will do enough to trigger reliance on Article 114. Although national laws on these types of promotion may differ between Member States, it should be recalled that mere disparities are not enough to justify recourse to Article 114. In order to do so, 'one has to look at the effect of such disparities'.[369] The *Tobacco Advertising 1* judgement was fairly conclusive when it stated that 'in particular…the prohibition on advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, and the prohibition of advertising spots in cinemas…in no way help to facilitate trade in the products concerned'.[370] A similar assessment would in all likelihood be made of posters, promotional products and the like that advertised alcohol brands, as these forms of advertising when *in situ* are not designed to be seen by consumers in multiple countries, and therefore an alcohol advertisement displayed on such a product cannot be said to hinder the movement of the relevant goods or service across borders. Consequently, the necessary intent to remove barriers to trade would not be present if a Directive on alcohol advertising were to target

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[367] A Alemanno, 'Out of Sight Out of Mind - Towards a New EU Tobacco Products Directive', (2012) Columbia Journal of European Law, 18(2), 217

[368] Case 16/83 *Prantl* [1984] 1299, para 23

[369] A Alemanno, 'Out of Sight Out of Mind - Towards a New EU Tobacco Products Directive', (2012) Columbia Journal of European Law, 18(2), 211

[370] Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para 99

these forms of promotional activity, and thus they could not be included in such a Directive that takes Article 114 as its legal basis.

CONCLUSION

The principle of conferral requires that the EU demonstrate that a specific Treaty article legitimately confers power upon the EU legislature to act before any measure can be adopted. In this section it has been shown that if the EU wishes to further harmonise the laws of the Member States relating to alcohol advertising, then Article 114 must be used as the specific public health powers in Article 168 do not allow harmonisation of public health laws.

In order to have recourse to Article 114, the EU must show that the proposed Directive on alcohol advertising would have as its object the improvement of the internal market. Due to the broad and rather lenient test that was constructed in *Tobacco Advertising 1* and developed in subsequent case law, the EU will be able to show that harmonisation of all but distinctly static alcohol advertising methods would meet the criteria of making a genuine contribution to improving conditions in the internal market.

In this section we have discussed which methods of advertising the EU has a legal basis to harmonise. Having identified what it is possible to adopt laws on, in the next section we turn to the question of whether the EU should adopt these laws under the principle of subsidiarity.

SUBSIDIARITY

It has been established that the EU has a legal basis to enact harmonising measures for any type of alcohol promotion with a cross border dimension. Now it must also be established that to use those powers would be in line with the principle of subsidiarity.

The principle of subsidiarity is contained in Article 5(3) TEU, which provides that:

> *'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the*

proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional or local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.

Therefore the EU must show that due to the efforts needed to successfully accomplish the aims of these actions, the EU would be better equipped to achieve them than the Member States.

ARE THE MEMBER STATES CAPABLE OF ACHIEVING THE OBJECTIVES OF THE PROPOSED ACTION?

In order to pass the first stage of the subsidiarity test, the EU will need to show that the Member States are incapable of achieving the objectives of the proposed harmonisation measure alone. In the case of harmonising measures under Article 114 TFEU, the objectives of any proposed EU action would ultimately be the removal of any barriers to free movement arising from national legislators trying to ensure public health protection at the local level (with the underlying aim of achieving a superior level of health protection).

In principle therefore, the first part of the test involves a 'negative, rebuttable, presumption',[371] that the Member States are competent in shared areas unless they are shown to be otherwise by the EU. Accomplishing this however has not been difficult in the past, and the ECJ has seemed to apply a very soft standard of review, demonstrating 'considerable deference to the subsidiarity assessments conducted by the Union legislature'.[372] The standard of review is so soft that it can be said that in applying the subsidiarity test the Court 'simply checks whether or not the reasons set out by the Union legislature add up'.[373] This can be seen in several cases. For instance in *Alliance for Natural Health* the Court simply regurgitates the objectives set out in the recitals of the challenged Directive of removing barriers to trade resulting from differences between national rules[374] and proceeds to state that 'to leave the Member States the task of regulating trade in food supplements which do not comply with Directive 2002/46 would perpetuate the uncoordinated development of national rules and, consequently, obstacles to trade…it follows that the objectives pursued…cannot be satisfactorily achieved by action taken by the

[371] T Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw', (2012) JCMS, 50(2), 267, 268

[372] T Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw', (2012) JCMS, 50(2), 267, 269

[373] T Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw', (2012) JCMS, 50(2), 267, 269

[374] Recital 2, Directive 2002/46 EC

Member States alone'.[375] In *Vodafone* the subsidiarity review was even more perfunctory, the Court stating that 'the Community legislature could legitimately take the view that it had to intervene at the level of retail charges as well. Thus, by reason of the effects of the common approach laid down in Regulation No 717/2007, the objective pursued by that regulation could best be achieved at Community level', reducing the test to merely assessing whether the legislature's reasons for rebutting the above mentioned negative presumption were legitimate.

Therefore, when it comes to applying the subsidiarity review to a potential Directive regulating alcohol advertising, the EU legislature will not have difficulty in convincing the Court that the Member States are incapable of achieving the objective on their own. The only defence that could be put forward is that some Member States have already enacted strict laws against alcohol advertising, the obvious example being France, whose Loi Evin has been judicially acknowledged as conforming with the requirements of the Treaty. As one commentator highlights, the first requirement laid down by Article 5(3) 'appeared to be an absolute standard',[376] which could lead to the potential conclusion that 'the [EU] would not be entitled to act…where the Member States could - in absolute terms - achieve the desired result'.[377] Does the fact that the French Loi Evin has been enacted and successfully defended mean that the Member States are, in principle, capable of achieving the aims of public health protection alone?

Unfortunately the Member States cannot be regarded as truly capable of achieving the objectives that an EU Directive on alcohol would pursue. Article 5 of the Protocol on Subsidiarity and Proportionality[378] suggests that in applying the subsidiarity test it should first be determined whether 'the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States'. The objective of the proposed Directive is to remove barriers to trade by extending the coverage and strength of regulation for all forms of cross border alcohol advertising, following the example of the Tobacco Advertising Directive. This could certainly be considered to have transnational aspects. The fact that the French Loi Evin has been the subject of several pieces of litigation regarding cross border sporting events is evidence that this national law at least cannot be considered to have successfully regulated transnational aspects. Furthermore, every other

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[375] Joined cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-06451, paras 106-7

[376] R Schütze, 'From Dual to Cooperative Federalism: The Changing Structure of European Law', OUP, Oxford 2009, 250

[377] R Schütze, 'From Dual to Cooperative Federalism: The Changing Structure of European Law', OUP, Oxford 2009, 250

[378] Protocol 30 on the Application of the Principles of Subsidiarity and Proportionality, C 321 E , 29/12/2006 P. 0308 - 0311

Member State has adopted different rules, the disparities between which mean that an advertising service is forced to comply with different rules depending on which Member State it is trying to access. This leads to the unsatisfactory situation where 'the disparity of national laws is an obstacle to the operation of the internal market'.[379] Thus, the Member States neither singly nor collectively appear to be able to successfully regulate the transnational aspects of alcohol advertising, a conclusion that would easily sweep aside the weak subsidiarity review applied by the Court to determine whether the Member States are incapable of acting.

Furthermore the ECJ held in the *Working Time* case that 'once the Council has found that it is necessary to improve the existing level of protection', [380] this need 'necessarily presupposes Community-wide action'. [381] On a theoretical level this reasoning is unsatisfactory as it contains an unacceptable 'ontological tautology'[382] and a certain level of circularity - the Member States are incapable of acting sufficiently because in order to remove obstacles to trade harmonisation is necessary and only the EU can enact harmonising laws, however this action is made conditional upon the Council finding that it is necessary to improve the existing level of protection. It completely cuts out a reasoned evidential analysis of the Member States' capacity to improve protection themselves. However, deficient or not, when this reasoning is in practice applied to the case of extending the level of protection already established by the AVMSD, the Member States are indeed incapable of acting, because to extend the level of protection further, along the lines of the Tobacco Advertising Directive, would require harmonisation. Therefore according to the *Working Time* test, the first half of the subsidiarity enquiry is passed.

IS THE EU IN A BETTER POSITION TO ACHIEVE THE DESIRED OBJECTIVE

In order to complete the subsidiarity enquiry, it must now be shown that the EU can in fact better achieve the objective of eliminating obstacles to the free movement of advertising services.

It is fairly clear that the EU is in a better position. Looking back to the Protocol on Subsidiarity and Proportionality, the third guideline in paragraph five is whether 'action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States'. Firstly, cross-border trade represents a

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[379] C Twigg-Flesner, 'Time to Do the Job Properly - The Case for a New Approach to EU Consumer Legislation', (2010) J Consum Policy, 33, 355, 357

[380] Case C-84/94 *UK v Council* (*Working Time*) [1996] ECR I-05755, para 47

[381] Case C-84/94 *UK v Council* (*Working Time*) [1996] ECR I-05755, para 47

[382] R Schütze, 'From Dual to Cooperative Federalism: The Changing Structure of European Law', OUP, Oxford 2009, 254

significant part of the alcohol products industry and the alcohol advertising industry alike,[383] which means that regulators with the ability to tackle cross-border problems are necessarily in a better position to legislate – 'it is the cross-border nature of the economic activity itself that renders the EU legislator more apt than national authorities to regulate certain phenomenon'.[384]

If the objective is to broaden and deepen the existing rules then it is clear that compared to what can be achieved by national law, alcohol advertising that moves across borders (for example that carried by television, in the press and on the internet) can be controlled far easier by EU legislation compared to Member State legislation.

Most Member States rely on self-regulatory codes to do the majority of the work in regulating alcohol advertising instead of statutory laws, and it has been shown that various aspects of these codes are weak. Because of the voluntary and industry driven nature of self-regulation, 'both the spirit and the letter of the codes are challenged and the boundaries are pushed'.[385] In the UK for instance, Lambrini's strapline of 'Girls Just Wanna Have Fun' was supposed to have been banned by the regulator in 2007, however is has been reported that the strapline still appeared in various advertising mediums after that including television,[386] and on the company's website until 2009.[387] The Commons Select Committee in which this evidence was revealed asked 'does it not make a mockery of the system?'[388] When this one example is added to the fact that the First Application Report of the AVMSD reveals that of the advertising monitored 'a significant proportion, more than 50%, of the advertising spots contained elements which might be linked to some of the characteristics banned by the AVMSD', it is evident that advertisers are successfully pushing up to and beyond the limits of the codes without being checked by the system. Therefore, the consequence is that some Member States are ineffective in controlling what can or cannot

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[383] See P Anderson and B Baumberg, 'Alcohol in Europe', Institute of Alcohol Studies, London 2006, for instance Table 3.1 page 51, Netherlands makes up 22% of world beer exports and France 37% of world wine exports.

[384] A Alemano 'Out of Sight Of Mind - Towards a New EU Tobacco Products Directive', (2012) Columbia Journal o European Law, 18(2), 26

[385] G Hastings, '"They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents', (2009) The Alcohol Education and Research Council, 48

[386] http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhealth/151/09070205.htm (accessed 28/07/2012)

[387] G Hastings, '"They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents', (2009) The Alcohol Education and Research Council, 50

[388] http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhealth/151/09070205.htm (accessed 28/07/2012)

be used in a cross border campaign, yet some States such as France or Sweden have statutory bans on alcohol advertising, making it impossible for alcohol adverts to be shown there. This difference is made worse by the fact that for many alcohol producers the 'intent is to debate "vigorously" with the regulators',[389] which could lead to different interpretations being made of broadly similar codes by regulators in each Member State. Thus the disparate regulatory attempts of the Member States have actually added to the obstacles facing advertisers who wish to provide their service as easily as possible in as many States as possible.

Due to the weak standard of review and negative presumption employed by the first half of the test, it is almost logical that if that is fulfilled, then the second half will be fulfilled also. If the Court does not conduct an analysis of what the Member States are actually capable of to prove their ineffectiveness, as conducted above, and declares that they cannot achieve the stated objective, then they have already in essence decided that the EU is in a position to achieve a better result, and this conclusion follows naturally. Therefore for a Directive on alcohol advertising, the EU must be in a better position compared to the Member States because harmonisation measures such as EU directives would be able to achieve what national laws cannot, since 'by prohibiting those features of advertisements with respect to which national rules differ',[390] in this case unacceptable features of alcohol advertisements, 'the effect is to permit advertisements compliant with Community rules to "move freely" within the Community'.[391] An EU harmonising measure enacted on the legal basis provided by Article 114 TFEU would establish common rules for cross border advertising, creating the same or very similar standards in each Member State, thus allowing the movement of advertising services to benefit from uniform regulatory conditions. This is a power that the Member States do not possess, and one whose use would be effective in achieving the stated aims, thus putting the EU in a better position to regulate cross border alcohol advertising. The second half of the subsidiarity test can consequently be considered fulfilled.

CONCLUSION

In this section I have argued that the adoption of certain hard and soft law EU measures would meet the requirements of subsidiarity. Member States are currently unable to meet the challenges of regulating advertising services that move from one State to another, and this inability combined with the position the EU finds itself in leads to the conclusion that

[389] G Hastings, '"They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents', (2009) The Alcohol Education and Research Council, 48

[390] D Wyatt, 'Community Competence to Regulate the Internal Market', in M Dougan and S Currie (eds), '50 Years of European Treaties', Hart Publishing, Oxford 2009, 93, 8

[391] D Wyatt, 'Community Competence to Regulate the Internal Market', in M Dougan and S Currie (eds), '50 Years of European Treaties', Hart Publishing, Oxford 2009, 93, 8

action against cross border alcohol advertising would be better taken at EU level than national level.

PROPORTIONALITY

This section will address the final stage of the competence enquiry and ask whether action at EU level would be proportionate.

The proportionality principle is expressed in Article 5(4) TEU, which states 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'.*

Thus, the two tests to be satisfied in order to meet the standard required for proportionate action, as stated in the *Vodafone* judgement are that EU measures must 'be appropriate for attaining the legitimate objectives pursued by the legislation at issue' and that they 'must not go beyond what is necessary to achieve them'.[392]

APPROPRIATE FOR ATTAINING THE OBJECTIVE PURSUED

Where the arguments against the legal basis and the subsidiarity of an EU measure regulating cross-border alcohol advertising have been fairly weak, the arguments against the proportionality of such measures are stronger. These principally revolve around legal diversity in the Member States and freedom of commercial expression arguments, which can be roughly attributed to protecting the concepts of federal proportionality and liberal proportionality respectively.

Federal Proportionality

Proportionality can firstly be understood in a federal sense – the Member States are afforded a certain level of autonomy by the Treaties, and EU action in spheres of shared competence must respect this fact. No EU action must unjustifiably restrict the freedom of the Member States to legislate. Thus it is the collective autonomy of a people that is

[392] Case C-58/08 *Vodafone* [2010] I-04999, para 51

protected'.[393] For a long time the Member States have enjoyed much autonomy in the sphere of alcohol advertising regulation, so the proportionality principle when applied here must ensure that to encroach upon that autonomy would be appropriate.

Opponents to a Directive on alcohol advertising might argue that it would not be appropriate due to the fact that 'in Europe we see a high level of diversity'.[394] In view of this many would argue that to harmonise Member State laws on alcohol and thus to restrict their legislative autonomy would be unjustified since, as the industry will point out, 'the diversity of economies, societies, cultures, traditions and beverages across the enlarged Europe make European-level legislation inappropriate'.[395] It is true that 'alcohol is a commodity where the ideological and cultural diversity between Member States is especially apparent',[396] and that this has led Member States to adopt different legislative approaches when it comes to regulating alcohol advertising. For instance Sweden has traditionally held particularly strong views on alcohol policy and shortly after joining the EU in 1995 'considerations of how to influence the EU on alcohol policies became one of the first issues where national traditions were in conflict with the free trade principles of the Union'.[397] Each Member State could legitimately take a different approach to alcohol advertising regulation, given that there are marked cultural differences between the Member States in how alcohol is perceived and used,[398] and thus marketing messages considered inappropriate in one Member State may not be considered so in another. In consequence it is 'not axiomatic that the EU should engage itself in policy development of the area'.[399]

In response to this, it can nevertheless be considered that harmonisation of cross-border alcohol advertising would be proportionate. The ECJ has given a broad discretion to the legislature in areas 'which entail[s] political, economic and social choices on its part, and in

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[393] R Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?', (2009) CLJ, 68(3), 525, 533

[394] J Snell, 'Who's got the Power? Free Movement and Allocation of Competences in EC Law' (2003) Yearbook of European Law, 323, 331

[395] P Anderson and B Baumberg, 'Stakeholders' views of alcohol policy', (2005) Institute of Alcohol Studies, London, 31

[396] J Cisneros Örnberg, 'Escaping deadlock – alcohol policy-making in the EU', (2009) Journal of European Public Policy, 16(5), 755, 756

[397] J Cisneros Örnberg, 'Escaping deadlock – alcohol policy-making in the EU', (2009) Journal of European Public Policy, 16(5), 755, 755

[398] See P Anderson and B Baumberg, 'Stakeholders' views on alcohol policy' (2005) Institute of Alcohol Studies, London, 86-87 on the cultural variance in alcohol use.

[399] J Cisneros Örnberg, 'Escaping deadlock – alcohol policy-making in the EU', (2009) Journal of European Public Policy, 16(5), 755, 756

which it is called upon to undertake complex assessments'.[400] As a result, the Court has held, notably for current purposes when upholding the legitimacy of the second Tobacco Advertising Directive, that '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'.[401] Thus, a measure regulating cross border alcohol advertising would have to be manifestly inappropriate before it was at risk of being struck down by the Court for lack of proportionality.

In the end it is submitted to be a question of evidence as to whether the adoption of cross-border alcohol advertising legislation would be manifestly inappropriate, considering that its legitimate objective is the reduction of harmful consumption of alcohol by controlling the marketing of alcoholic beverages. It has been pointed out that 'if the EU legislature does not attempt to establish the likely impact of marketing practices on public health before adopting legislation restricting such practices, then the risk is that a failure to engage with existing evidence may fuel the arguments put forward by industry operators that the restrictions thus imposed are disproportionate'.[402] There is arguably more than sufficient evidence to support the harmonisation of cross-border alcohol advertising. The industry may claim that diversity in national legislative approaches and alcohol culture makes EU level action inappropriate, however the fact remains that many Member States' regulatory systems are simply too weak to prevent any level of inappropriate advertising. Strong control of advertising is needed in order to reduce the link between alcohol advertising and consumption, for which there is much evidence as seen in Chapter 1. There it was shown that at least three reviews of longitudinal studies - Smith & Foxcroft (2009),[403] Meier (2008),[404] and Anderson et al (2009)[405] – demonstrated that there was a positive relationship between advertising seen and level of alcohol consumed, particularly in the case of minors.

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[400] Case 380/03 *Germany v Parliament v Council* [2006] ECR I-11573, para 145

[401] Case 380/03 *Germany v Parliament v Council* [2006] ECR I-11573, para 145

[402] A Garde, 'Freedom of Commercial Expression and Public Health Protection: The Principle of Proportionality as a Tool to Strike the Balance', in N Shuibhne and L Gormley, 'From Single Market to Economic Union: Essays in Memory of John A Usher', OUP, Oxford 2012, 122

[403] L Smith and D Foxcroft, 'The effect of alcohol advertising, marketing and protrayal on drinking behaviour in young people: systematic review of prospective cohort studies', (2009) BMC Pubic Health 9:51

[404] P Meier, 'Independent review of the ffects of Alcohol pricing and promotion Part A: Systematic Reviews', http://www.dh.gov.uk/en/Publichealth/Healthimprovement/Alcoholmisuse/DH_4001740, section 2.7

[405] P Anderson, A de Bruijn, K Angus, R Gordon and G Hastings, 'Impact of alcohol advertising and media exposure on adolescent alcohol use: a systematic review of longitudinal studies'. Alcohol Alcohol, Advance Access published January 14, 2009 doi: 10.1093/alcalc/agn115

However many Member States have fairly weak controls that do not serve to combat any level of inappropriateness. For instance as one of the five Member States revealed by the First Application report of the AVMSD not to have improved on the protection offered by the AVMSD, Denmark's regulatory scheme for television advertising contains no restrictions above that on the broadcasting of alcohol advertising around children's programmes and during sports programmes, with applicable content limitations for commercial communications no stricter than those found in Article 22 AVMSD, a standard already shown to offer weak protection.[406] This is compounded by the Country of Origin principle on which the AVMSD is based, which requires that Member States must ensure freedom of reception for broadcasts originating from other Member States, for which those other States have regulatory responsibility. Thus, not only are some Member States currently not capable of guaranteeing an adequate level of protection against determined alcohol advertisers, but communications originating in such States may be broadcast unimpeded in States that do stipulate good levels of protection. Consequently, enacting EU regulation that is more stringent than that currently in force, in order to weaken the link between advertising and consumption, and thus replacing the autonomy of the Member States with EU action, could not be described as a manifestly inappropriate step for the EU to take. EU action would therefore be appropriate for attaining the objective pursued and proportionate in a federal sense.

MUST NOT GO BEYOND WHAT IS NECESSARY

Any harmonising measure for cross border alcohol advertising must also not go beyond what is necessary to achieve the objective pursued – in other words there must not be a less restrictive alternative. An alcohol advertising Directive would meet the requirements of necessity in view of its objective of reducing alcohol related harm by controlling irresponsible advertising. It will be extremely difficult to show that the significant level of discretion on the question of necessity that the EU legislature is afforded when adopting legislation has been overstepped, even taking into account industry arguments that legislation limiting their freedom of commercial expression would go beyond what is necessary, in view of the mainstreaming of public health within the EU Treaties that provide ample support for the necessity of legislative measures trying to achieve the objectives stated above.

The ECJ in reviewing the proportionality of measures has traditionally left the EU legislature an extremely wide margin of discretion when it comes to deciding whether an act is necessary. It can be seen from the case law that 'the Court does not apply the less restrictive

[406] egta/ACT, 'Compendium of Regulations, Self-Regulatory Standards and Industry Codes of Conducts on Audiovisual Advertising of Alcoholic Beverages Across EU Member States', April 2009, available at http://www.acte.be/EPUB/easnet.dll/GetDoc?APPL=1&DAT_IM=028204

alternative test scrupulously relying instead on some notion of reasonableness or arbitrary conduct'.[407] Thus in *Vodafone* the Court gave the following analysis: 'particularly in the light of the broad discretion which the Community legislator has…it could legitimately take the view that regulation of the wholesale market alone would not achieve the same result as regulation such as that at issue, which covers at the same time the wholesale market and the retail market, and that the latter was therefore necessary'.[408] In fact the Court appears to apply the same standard of review as it does in the suitability assessment, i.e. manifest inappropriateness, in order to decide whether the decision to adopt the specific measures rather than any other ones was manifestly inappropriate. Comparisons with what might otherwise have been a less restrictive measure seem not to enter the Court's assessment, as evidenced by the *BAT* judgment, where arguments put forward that Spanish law served as an example of a less restrictive method of achieving the same result[409] were simply ignored by the Court when they came to declare that the legislation in question did not go beyond what was necessary.[410]

Liberal Proportionality

It is recognised that in addition to protecting the legislative autonomy of the Member States, 'the proportionality principle was historically designed to safeguard liberal values. Proportionality would protect private rights against excessive public interference'.[411] Thus, the proportionality of a Directive on alcohol advertising must also be assessed in light of what a justified restriction on personal rights might be.

Specifically in this context, the personal right at stake is the freedom of commercial expression of companies that produce and market alcohol. It is submitted that the level of discretion afforded to the legislator as seen above will assist in overcoming industry arguments that a stricter set of regulation would be an unnecessary imposition on their freedom of commercial expression.

The right to freedom of expression is guaranteed by the European Convention of Human Rights. Article 10(1) states that:

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[407] T Tridimas, 'The General Principles of EU Law', (2nd Ed) OUP, Oxford 2006

[408] Case C-58/08 *Vodafone* [2010] I-04999, para 68

[409] Case C-491/01 *BAT* [2002] ECR I-11453, para 114

[410] Case C-491/01 *BAT* [2002] ECR I-11453, para 126

[411] R Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?', (2009) CLJ, 68(3), 525, 533

> *'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'.*

There is an exception though in Article 10(2), which states that the freedom 'may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society…for the protection of health'. Thus, it is clear that alcohol producers 'have a right to promote their goods and services, and that right…may only be restricted if national authorities establish that they have an overriding requirement of public interest for doing so',[412] subject also to the proportionality assessment. Alcohol producers will argue that their advertising activities should not be restricted because they ensure the right of the consumer and society in general to make their choices in a fully informed environment supplied by the free flow of truthful commercial information. They will point to rulings from the United States such as that in the *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* case, in which the US Supreme Court gave the opinion that:

> *'advertising, however tasteless and excessive it 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 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'.*[413]

They can also draw inspiration from the Opinion of Advocate General Jacobs in *Leclerc-Siplec*, where he said that 'advertising injects greater fluidity and mobility into the economy and enhances competitiveness. A ban on advertising tends to crystallise existing patterns of consumption, to ossify markets and to preserve the *status quo*'.[414] Thus, restrictive measures on alcohol advertising would be disproportionate as they quash the free commercial speech of alcohol producers, which leads to a diminishing of the ability of society to make informed commercial choices about alcohol.

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[412] A Garde, 'Freedom of Commercial Expression and Public Health Protection: The Principle of Proportionality as a Tool to Strike the Balance', in N Shuibhne and L Gormley, 'From Single Market to Economic Union: Essays in Memory of John A Usher', OUP, Oxford 2012, 119

[413] *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748(1976), 765

[414] Case 412/93 Opinion of Advocte General Jacobs delivered on 24th November 1994 *Leclerc-Siplec* [1995] ECR I-00179, para 20

In the face of this argument, a Directive on alcohol advertising would still be considered necessary and proportionate by the ECJ, as they have in the past recognised that despite the place of freedom of commercial speech there is a competing need to balance several different matters of public interest. Crucially, they have held that there is 'discretion enjoyed by the competent authorities in determining the balance to be struck between freedom of expression and the objectives in the public interest which are referred to in Article 10(2) of the ECHR', [415] and that 'when a certain amount of discretion is available, review is limited to an examination of the reasonableness and proportionality of the interference'.[416] This revives the situation noted above that the Court's review of necessity when it comes to 'a field as complex and fluctuating as advertising'[417] is merely limited to assessing manifest inappropriateness of the legislature's decision, rather than trying to establish whether the measure itself really is necessary, revealing the evident reluctance of the Court to interfere with political assessments.

A further way in which this extensive discretion enjoyed by the EU legislator will ensure that a Directive on alcohol advertising would be considered necessary can be found when one considers the 'mainstreaming' provisions on public health within the EU Treaties. There are several points in the Treaties at which the EU is required to pay particular attention to public health in its legislative activities. For instance, Article 9 TFEU states that 'in defining and implementing its policies and activities, the Union shall take into account requirements linked to the…protection of human health'. Similarly, Article 168(1) TFEU requires that 'a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities', and furthermore Article 114(3) TFEU provides that 'the Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as its base a high level of protection, taking account in particular of any new development based on scientific facts'. These numerous obligations will 'provide[s] a strong mandate for the European institutions'[418] to actively pursue health initiatives, and thus increase the likelihood that any measure that has the improvement of public health as one of its objectives will be considered necessary. This was shown to be true in the *Tobacco Advertising 2* judgement, where the Court held in relation to the measures in the second Tobacco Advertising Directive, 'nor, given the obligation on the Community legislature to ensure a high level of human health protection, do they go beyond what is necessary in order to achieve that

[415] Case 380/03 *Germany v Parliament and Council* [2006] ECR I-11573, pare 155

[416] Case 380/03 *Germany v Parliament and Council* [2006] ECR I-11573, pare 155

[417] Case 71/02 *Karner* [2004] ECR I-3025, para 51

[418] T Ståhl et al (eds), 'Health in All Policies: Prospects and potentials', Ministry of Social Affairs and Health, Finland 2006, xxvii

objective'.[419] The same reasoning should apply to alcohol advertising. Given the far from rigorous standard of review that the Court seems to apply when assessing the necessity of a measure, it would be almost inconceivable that they would think the EU legislature unreasonable in considering a Directive imposing stricter regulations on the advertising of alcohol to be necessary, since the Treaties demand that a high level of public health be ensured by the Directive, and the measures enacted in the Directive respond to this constitutional requirement.

CONCLUSION

The EU legislator is given a high level of discretion when it comes to harmonising laws, and given the pressure that is placed on governments to do something about the weak alcohol advertising laws that currently exist, it would be far from unreasonable for the EU legislator to act. Anything short of a manifestly inappropriate use of power will be declared to satisfy the proportionality principle, and given the precedents that the legislator can draw on it is highly unlikely that a cross-border measure on alcohol advertising will be judged as manifestly inappropriate.

CONCLUSION

In summary, it is likely that the EU would be able to adopt a Directive containing far more stringent and broader regulation of cross-border alcohol advertising than currently exists. There is an appropriate legal basis, and satisfying the requirements of subsidiarity would not be problematic. This is especially true in light of the fact that our comparative case study of the Tobacco Advertising saga referred to a complete ban on all cross-border tobacco advertising. Thus, the above analysis has been conducted on the assumption that anything up to a comparable ban could be adopted for alcohol advertising. If the political willpower does not exist for a total ban, but merely for heavy restrictions, then the argument for such a measure's subsidiarity and proportionality would be even stronger.

Should the Commission not wish to propose a Directive on alcohol advertising, or should there be insufficient consensus in Council to adopt one, then the soft law route is surely an attractive one. Soft law could be adopted whether or not a Directive is enacted, and would certainly accommodate the sensitivities surrounding alcohol advertising regulation far

[419] Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, para 146

better. Soft law would also allow the EU to contribute to improving the regulation of non-cross-border alcohol advertising where it cannot do so in a Directive.

CONCLUSION

In summing up this piece of research work, it possible to draw three main conclusions on the effectiveness of the various regulatory schemes for the control of alcohol advertising within the EU.

The first conclusion is that the current disjointed state of the legal landscape stems primarily from the failure of the EU to lay down strong, coherent laws that would provide a framework for more detailed rules at Member State level where necessary. The AVMSD cannot hope to provide this framework in its current manifestation, and the UCPD provides no great support. The EU Alcohol and Health Forum, while capable of providing the impetus needed to achieve a strong framework, is unfortunately hindered by its membership composition and how it focuses its activities. This places a heavy burden on national law, which often relies upon self-regulation to provide the necessary regulatory coverage. Either through the deregulating effect of having to submit their national alcohol advertising policies before the ECJ for justification, or through the enforcement problems that self-regulation entails, national law is struggling to provide a coherent set of strong laws across the European Union. This disparity can then be exploited by the alcohol producers, who will use subtle techniques of suggestion and target the under-developed parts of national law in order to convey their core messages to consumers, and in particular young consumers. Given the positive link between alcohol advertising and consumption, this will increase the risk that harmful drinking habits will be develop, causing increased harm to public health.

The second conclusion is that this situation need not continue, as the EU has a clear competence to enact harmonising legislation to control many types of advertising medium. Through a comparison with the Tobacco Advertising saga, it is evident that the harmonisation of cross-border alcohol advertising would find a Treat basis in Article 114 TFEU, and would meet the demands of both subsidiarity and proportionality. Furthermore, arguments relating to the diversity of national laws and the freedom of commercial speech would not be a legal bar to the adoption of a Directive on alcohol advertising, however on a political level these are certainly barriers that must be considered. If the political willpower could still not be established for harmonising measures, then soft-law could be a useful alternative, particularly in the field of non-cross-border alcohol advertising, where the EU lacks the necessary competence for harmonisation.

The final conclusion is that