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6. Is there a European human rights approach to tobacco control?

Amandine Garde and Brigit Toebes

1. INTRODUCTION

The Regional Office for Europe of the World Health Organization (WHO Europe) estimates that of all WHO regions, Europe has the highest prevalence of tobacco smoking among adults (28 per cent) and some of the highest prevalence of tobacco use by adolescents. As such, tobacco use is responsible for 16 per cent of all deaths in the region (compared to the 12 per cent global average), many of which are premature.¹ WHO Europe also indicates that, overall, smoking is increasing in the region – though in some countries, particularly those that have extensively regulated the tobacco industry and its products, smoking rates are in steady decline² – and that in some countries tobacco use among youth is very similar to that of adults.³ It also projects that overall smoking prevalence by 2025 will rise, with a rate of 31 per cent among

¹ WHO Europe, 'Data and Statistics' (*WHO*) <http://www.euro.who.int/en/health-topics/disease-prevention/tobacco/data-and-statistics>, accessed 4 October 2019.

² See, for example, NHS, 'Statistics on Smoking, England – 2019 [NS] [PAS]' (*NHS Digital*, 2 July 2019) <https://digital.nhs.uk/data-and-information/publications/statistical/statistics-on-smoking/statistics-on-smoking-england-2019/part-3-smoking-patterns-in-adults-copy#smoking-prevalence-among-adults>, accessed 4 October 2019, which shows the smoking prevalence among adults in England has fallen to 14.4 per cent of adults, in comparison to 14.9 per cent in 2017 and 19.8 per cent in 2011. See also 'Tabagisme en France: 1 million de fumeurs quotidiens en moins' (*Santé Publique France*, 28 May 2018) <https://www.santepubliquefrance.fr/les-actualites/2018/tabagisme-en-france-1-million-de-fumeurs-quotidiens-en-moins>, accessed 17 July 2019, where it is revealed that there were one million fewer daily smokers in 2017 in France.

³ See, for example, WHO, 'WHO report on the global tobacco epidemic, 2017: Country profile Lithuania' (*WHO*, 2017) https://www.who.int/tobacco/surveillance/policy/country_profile/ltu.pdf?ua=1, accessed 17 July 2019; WHO, 'Latvia' (*WHO*, 2003) <https://www.who.int/tobacco/media/en/Latvia.pdf>, accessed 17 July 2019.

males and 16 per cent among females.⁴ Smoking therefore remains a major public health concern in the European region, which poses significant questions from the perspective of law, policy and human rights.

The Council of Europe (CoE) does not have an overarching tobacco control strategy. An analysis of the case law of the treaty bodies of the CoE reveals that tobacco use and exposure to second-hand smoke (SHS) are only addressed to a limited extent, except in the decisions of the European Committee of Social Rights (ECSR). Nonetheless, the CoE human rights framework holds much potential for the further identification of a human rights approach to tobacco control in Europe.

By contrast, conscious of the negative impact that risk factors like smoking have on the European population, the European Union (EU) has developed public health strategies in which tobacco control has featured prominently and led to the adoption of EU-wide tobacco control legislation, recommendations and information campaigns. Tobacco control has also been the focus of key judgments of the Court of Justice of the European Union (CJEU).

This chapter critically assesses the ways in which both the CoE and the EU have engaged with the interface between human rights and tobacco control, looking at laws and policies relevant to tobacco use and exposure to SHS. Its overarching objective is to explore whether a human rights approach to tobacco control exists in Europe.

2. TOBACCO CONTROL AND THE COUNCIL OF EUROPE

2.1 The Council of Europe, Human Rights and Tobacco Control

The CoE is an intergovernmental organization whose primary aim is to uphold human rights, democracy and the rule of law in Europe. With 47 Member States, it has a much broader membership than the EU. The two key human rights instruments are the European Convention on Human Rights on civil and political rights (ECHR) and the (Revised) European Social Charter on economic and social rights (ESC). They reflect a dichotomy similar to what we find at the UN level,⁵ and like the UN instruments they are complementary

⁴ See WHO Europe (n 1).

⁵ After the adoption of the comprehensive Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), two separate treaties were adopted, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 and the International Covenant on Economic, Social and Cultural Rights (adopted 19 December 1966, entered into force 3 January 1976) 993 UNTS 3.

and interdependent.⁶ Based on this assumption, this chapter discusses both mechanisms in an integrated fashion.

The CoE has not adopted any tobacco control strategy, law or policy.⁷ Nor have its human rights monitoring bodies paid much attention to tobacco control. Nonetheless, the CoE's human rights framework holds much potential for tobacco control in Europe. Many human rights in the ECHR and the ESC are potentially relevant to protect everyone in society from tobacco use and exposure to SHS in Europe. In the ECHR, of specific importance are: the right to life (Article 2), the right to privacy and family life (Article 8) and the prohibition of torture and inhuman and degrading treatment (Article 3). Importantly, the ESC contains the right to the enjoyment of 'the highest possible standard of health attainable' (Article 11), which identifies three State obligations in relation to the realization of the right, which are all relevant in the context of tobacco control.⁸ Article 3 ESC on the right to safe and healthy working conditions is also important in the context of tobacco farming, while Articles 7 and 17 stipulate the right of children and young persons to protection,⁹ and the right of children and young persons to social, medical and legal assistance.¹⁰

While the individual complaint mechanism of the European Court of Human Rights (ECtHR) is well known and its case law is very influential at the domestic level, the case law of the ECSR, the treaty body of the ESC, should not be overlooked. Even though tobacco control has not been raised within the framework of its collective complaint mechanism, the Committee has paid ample attention to tobacco control in its State reporting procedure.

2.2 Case Law of the Treaty Bodies of the Council of Europe

This section discusses how tobacco has thus far been addressed by the ECtHR and the ECSR. Two key areas of potential tobacco regulation (and litigation) are identified: exposure to SHS and consumption of tobacco products.¹¹

⁶ 'The European Social Charter' (*Council of Europe*) <https://www.coe.int/en/web/turin-european-social-charter/-european-social-charter-and-european-convention-on-human-rights>, accessed 4 October 2019.

⁷ The Council of Europe has developed policies, strategies and programmes in many areas, including in the field of human rights education, racism and intolerance, youth mobility and cybercrime.

⁸ (1) removing the causes of ill health, (2) providing advisory and educational facilities for the promotion of health and (3) and preventing disease.

⁹ In particular in the context of labour.

¹⁰ Which embraces the right to grow up in an environment, which encourages the full development of their personality and of their physical and mental capacities.

¹¹ For reasons of space tobacco farming is not discussed here.

2.2.1 Exposure to tobacco smoke

The case law of the ECtHR has paid some attention to SHS over the past 20 years. A first recognition of the importance of regulating tobacco came in 1998 with the case of *Wöckel v Germany* before the former European Commission on Human Rights. It dealt with the question of whether Germany was obliged, as the applicant claimed, to enact legislation prohibiting smoking in public with a view to protecting non-smokers.¹² Noting that the German government had already introduced a public information campaign on the health risks of smoking, imposed restrictions on tobacco advertising and prohibited smoking in certain public areas, the Commission held that the applicant's rights to life and respect for private and family life (Articles 2 and 8 ECHR) had not been violated. Balancing the competing interests between non-smokers and smokers, it argued that the absence of a general prohibition on tobacco advertising and on smoking did not amount to a violation of these rights.¹³ Although much was left to the discretion of the State, this decision nonetheless affirms that Articles 2 and 8 imply a positive obligation of the State to protect non-smokers.¹⁴

There are also several ECtHR judgments dealing with the rights of non-smokers and their exposure to SHS during detention.¹⁵ In nearly all of these cases, the Court held that there was a violation of Article 3 ECHR (in particular, prohibition of inhuman and degrading treatment). For example, in *Kalashnikov v Russia* the Court ruled that the combined unhealthy conditions in detention, including exposure to SHS, amounted to a violation of Article 3 ECHR.¹⁶ In its judgment in *Elefteriadis v Romania*, the Court observed that a State was required to take measures to protect a prisoner from the harmful effects of passive smoking where medical examinations and the advice of doctors indicated that this was necessary for health reasons.¹⁷

Given the parallels between exposure to SHS and air pollution, it is also worth referring to the ECtHR's body of case law on the latter. In *Brincat and others v Malta*, the ECtHR addressed the rights of workers who were exposed to asbestos during their careers as employees in a ship repair yard. The Court

¹² *Wöckel v Germany* (1998) 93-A DR 82 [8]. See also Melissa E Crow, 'Smokescreens and State Responsibility: Using Human Rights Strategies to Promote Global Tobacco Control' (2004) 29 *Yale Journal of International Law* 236.

¹³ *Wöckel v Germany* (n 12) [85].

¹⁴ See also Crow (n 12) 236.

¹⁵ Inter alia, *Florea v Romania* App No 37186/03 (ECtHR, 14 September 2010); *Elefteriadis v Romania* App No 38427/05 (ECtHR, 25 January 2011); *Kalashnikov v Russia* App No 47095/99 (ECtHR, 15 October 2002); *Keenan v the United Kingdom* App No 27229/95 (ECtHR, 3 April 2001).

¹⁶ See, for example, *Kalashnikov v Russia* (n 15) [102].

¹⁷ *Elefteriadis v Romania* (n 15).

argued that the government should have been aware that shipyard workers could suffer from exposure to asbestos and that it was inconceivable that there was no access to sources of information on the harmfulness of asbestos.¹⁸ Malta had thus failed to satisfy its positive obligations under Articles 2 and 8 ECHR to legislate or take other practical measures to ensure that the applicants were adequately protected and informed of the risk to their health and lives.¹⁹ As such, and contrary to the cases about exposure to SHS in prisons, the focus was on Articles 2 and 8 ECHR, not on Article 3 ECHR. Given that exposure to asbestos and SHS can both lead to respiratory problems and contribute significantly to lung cancer,²⁰ future cases may address exposure to SHS in the context of Articles 2 and 8 ECHR.

A specific question concerns exposure to tobacco smoke by the unborn through smoking by the pregnant mother or her exposure to SHS. Based on the case law of the ECtHR, the issue of when the right to life begins falls within the margin of appreciation of State Parties.²¹ Yet the Court established in its case law that the unborn child is not regarded as a person directly protected by Article 2 ECHR. The ECtHR has stated that if the unborn child does have a right to life, the mother's rights and interests implicitly limit this right.²² Nonetheless, the Court has not ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child.²³ The scope of application of such relative protection remains unclear. We would argue that safeguards for the unborn child could include consultations with pregnant women on the risks of smoking during pregnancy, as well as public information campaigns informing future parents about such risks.

Turning to the ECSR, no collective complaint has thus far addressed the matter, but the Committee frequently touches on this matter in its reporting procedure.²⁴ For example, in its Conclusions regarding Greece, it established that the country had by far the highest level of annual per capita cigarette consumption in the EU and the European Economic Area and that the figure

¹⁸ *Brincat and others v Malta* App Nos 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11 (ECHR, 24 July 2014) [104], [106].

¹⁹ *ibid.*

²⁰ Among many studies see, for example, Kentaro Inamura and others, 'Combined Effects of Asbestos and Cigarette Smoke on the Development of Lung Adenocarcinoma: Different Carcinogens May Cause Different Genomic Changes' (2014) 32 *Oncology Reports* 47.

²¹ *Vo v France* App No 53924/00 (ECtHR, 8 July 2004) [82].

²² *ibid* [80].

²³ *ibid* with reference to *Bruggeman and Scheuten v Federal Republic of Germany* (1977) 3 EHRR 244 [61].

²⁴ As based on an analysis of the conclusions of the Committee in its reporting procedure, see 'European Social Charter' (n 6).

had been rising steadily since 1988. Considering that this situation was not in conformity with Article 11(3) ESC, it suggested that the Greek government should toughen its existing legislation, for example ‘to prohibit the sale of tobacco to young people and ban smoking in public places, including on public transport, ban on billboard advertising and advertising in newspapers and magazines’.²⁵ Here, the ECSR clearly suggested that Article 11(3) ESC contains an obligation to regulate exposure to SHS.

2.2.2 Tobacco use

An important governmental tool to curb tobacco use concerns the restriction of tobacco advertising. The policy space that governments have to restrict such advertisements was challenged several times by tobacco firms before the ECtHR and its former Commission. When balancing freedom of (commercial) expression against the need to protect the general interests of the public, the Court tends to grant governments a significant margin of appreciation in deciding whether a certain type of advertising can be restricted.²⁶ In the cases of *Hachette Filipacchi Presse Automobile et Dupuy v France* and *Société de Conception de Presse et d’Edition et Ponson v France*, which concerned the publication of pictures of Michael Schumacher wearing the colours of a tobacco brand, the Court ruled that restrictions on such advertisements were ‘necessary in a democratic society’.²⁷

Curbing tobacco use has not yet been addressed in the ECSR’s collective complaint mechanism, though the procedure offers potential. In *Interights v Croatia*, which challenged the sexual education in curricula in Croatia, the Committee held that Article 11 ESC mandates governments to provide scientifically accurate and non-discriminatory sex education to youth that does not involve censoring, withholding or intentionally misrepresenting information on issues such as contraception.²⁸ One could argue that Article 11 ESC more generally embraces the provision of evidence-based and neutral health-related information, including on the harm caused by tobacco use and exposure to SHS.

²⁵ European Committee of Social Rights, *Conclusions XV-2* (Council of Europe 2001) Greece.

²⁶ *Anheuser-Busch Inc v Portugal* App no 73049/01 (ECtHR, 11 January 2007); *Hachette Filipacchi Presse Automobile and Dupuy v France* App No 13353/05 and *Société de Conception de Presse et d’Edition & Ponson v France* App No 26935/05 (ECtHR, 5 March 2009) [54]. See also the decision of the (former) European Commission on Human Rights in *Osterreichische Schutzgemeinschaft für Nichtraucher and Robert Rockenbauer v Austria* App No 17200/91 (ECHR, 2 December 1991).

²⁷ *Hachette Filipacchi* (n 26) [54].

²⁸ *INTERIGHTS v Croatia* No 45/2007 (ECSR, 30 March 2009) [43]–[66].

Tobacco use is frequently addressed within the framework of the ESC's State reporting procedure. For example, in its Conclusions with regard to Bosnia and Herzegovina's compliance with Article 11(3) ESC, the ECSR held that 'to be effective, any prevention policy must restrict the supply of tobacco through controls on production, distribution, advertising and pricing ... In particular, the sale of tobacco to young persons must be banned ...'.²⁹ This statement reveals that the Committee is very explicit in its State reporting procedure about the need to monitor and regulate tobacco use.

3. TOBACCO CONTROL AND THE EU

This section focuses more specifically on EU tobacco control policy, bearing in mind that EU Member States are all members of the CoE and that the EU Treaties³⁰ refer to the case law of the ECtHR as one of the main sources of EU human rights law.³¹ The EU has a range of conferred powers to adopt EU-wide harmonizing legislation, which has proven to be a powerful vector of EU integration, particularly in the field of EU tobacco control. After briefly describing EU tobacco control policy (Section 3.1) and the challenges mounted against it (Section 3.2), this section assesses whether, and if so how, EU tobacco control policy protects health-related human rights (3.3).

3.1 The Development of a Comprehensive EU Tobacco Control Policy?

Over the years, the EU has adopted a number of tobacco control rules, incrementally tightening its regional grip on the tobacco industry. In 2005 the EU ratified the WHO Framework Convention on Tobacco Control (FCTC),³² thus confirming its status as a major actor on the public health scene at the global level.

The two main building blocks of the EU's regulatory tobacco control arsenal are the Tobacco Advertising Directive and the Tobacco Products Directive.

²⁹ 'Conclusions with regard to Bosnia and Herzegovina (2017) in relation to Article 11-3 ESC' (European Committee of Social Rights, 24 January 2018) Doc ID 2017/def/ROU/11/3/EN. With reference to Conclusions XVII-2 (2005), Malta; Conclusions 2012, Andorra; and *Conclusions XV-2* (n 25).

³⁰ The EU Treaties refer to the Consolidated version of the Treaty on European Union [2012] OJ C326 (TEU) and Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/13 (TFEU).

³¹ Article 6(3) TEU.

³² Council Decision of 2 June 2004 concerning the conclusion of the WHO Framework Convention on Tobacco Control [2004] OJ L213/8.

They both have a long and controversial history.³³ Suffice it to say that the Tobacco Advertising Directive³⁴ imposes an EU-wide ban on cross-border tobacco advertising and sponsorship in all media.³⁵ The Tobacco Products Directive,³⁶ which was revised to adapt its provisions to new scientific developments and ensure compliance with the FCTC, lays down wide-ranging rules governing the manufacture, presentation and sale of tobacco and related products. The EU has also adopted rules establishing minimum excise duties on tobacco products.³⁷ The paradigm characterizing EU tobacco control increasingly consists in ‘nudging’ people, particularly young people, away from temptation.³⁸ As a result of the EU’s strong regulatory involvement, this policy area has been at the forefront of a ‘federal’ experimentation, helping

³³ On the various methods that the tobacco industry has used against its regulation, particularly in the EU, see ‘Tobacco Tactics’ (*Tobacco Tactics*) <http://www.tobaccotactics.org>, accessed 23 September 2019, a database run by the University of Bath. On its opposition to the Tobacco Products Directive more specifically, see S Peeters, Hélia Costa, David Stuckler, Martin McKee and Anna B Gilmore, ‘The Revision of the 2014 European Tobacco Products Directive: An Analysis of the Tobacco Industry’s Attempts to “Break the Health Silo”’ (2016) 25 *Tobacco Control* 108.

³⁴ Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L152/16, in particular Articles 3 and 4. Only publications intended for professionals in the tobacco trade and publications from non-EU countries which are not principally intended for the EU market are exempt.

³⁵ Except those such as television and other audiovisual media services, which are covered by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L303/69.

³⁶ Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (Tobacco Products Directive) [2014] OJ L127/1.

³⁷ Article 113 TFEU allows the EU to adopt common rules harmonizing the laws of the Member States on direct taxation. On the harmonization of excise duties of tobacco products, see Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco [2011] OJ L176/24.

³⁸ Alberto Alemanno, ‘EU Public Health Law and Policy – Tobacco’ in Tamara Hervey, Calum Alasdair Young and Louise E Bishop (eds), *Research Handbook on EU Health Law and Policy* (Edward Elgar Publishing 2017). On the EU tobacco control policy, see also Donley Studlar, ‘Tobacco Control: The End of Europe’s Love Affair with Smoking’ in Scott L Greer and Paulette Kurzer (eds), *European Union Public Health Policy: Regional and Global Trends* (Routledge 2013).

delineate the limits of EU competences and the relevance of the principles of subsidiarity and proportionality for EU law and policy-making.³⁹

The constitutional set-up of the EU legal order, and the limits placed on the EU's public health competence,⁴⁰ prevent the EU from adopting a comprehensive tobacco control policy implementing all the provisions of the FCTC. Even if the scope of EU powers has been interpreted extensively, and the EU has been able to implement several FCTC provisions at regional level, the fact remains that the EU cannot regulate tobacco products and commercial practices comprehensively alone. It is only if Member States regulate tobacco products at national level that the FCTC can be fully implemented in the EU. For example, the EU-wide ban on all forms of cross-border advertising and sponsorship has been complemented by national restrictions on forms of advertising and sponsorship arrangements that the EU cannot regulate itself as a result of limited public health powers.⁴¹

However, where the EU does not have the conferred powers to adopt harmonizing legislation, it can adopt 'soft law' provisions. The Tobacco Products and the Tobacco Advertising Directives have therefore been complemented by recommendations to Member States⁴² and EU-wide anti-smoking campaigns.

³⁹ Alberto Alemanno and Amandine Garde, *Regulating Lifestyles in Europe: How to Prevent and Control Non-Communicable Diseases Associated with Tobacco, Alcohol and Unhealthy Diets?* (Swedish Institute of European Policy Studies Report 2013) 19 http://www.sieps.se/en/publications/2013/regulating-lifestyles-in-europe-how-to-prevent-and-control-non-communicable-diseases-associated-with-tobacco-alcohol-and-unhealthy-diets-2013/sieps_2013.pdf, accessed 23 September 2019.

⁴⁰ Article 168(5) TFEU.

⁴¹ In particular, the CJEU ruled that the EU has no powers to regulate static advertising (for example advertisements in hotels, on billboards, umbrellas, ashtrays and similar items), advertisements screened in cinemas and the sponsorship of events that do not have any cross-border appeal when it annulled Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L213/9, often referred to as the First Tobacco Advertising Directive, on the ground that it exceeded the powers granted to the EU under Article 114 TFEU to harmonize the laws of Member States to facilitate the establishment and functioning of the internal market in Case C-376/98 *Germany v Council and the European Parliament (Tobacco Advertising I)* [2000] ECR I-8419. The EU subsequently adopted Directive 2003/33/EC (n 34), the Second Tobacco Advertising Directive, whose validity was upheld by the Court in Case C-380/03 *Germany v Council and the European Parliament (Tobacco Advertising II)* [2006] ECR I-11573.

⁴² See, in particular, Council Recommendation of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control [2003] OJ L22/31, and Council Recommendation of 30 November 2009 on smoke-free environments [2009] OJ C296/4.

As Member States have regulated tobacco products beyond the implementation of EU rules to different degrees, the picture remains one of diversity.⁴³ This diversity is exacerbated by the fact that political will has not always been sufficient to ensure the adoption of all the tobacco control measures that the EU would have the necessary powers to adopt under Article 114 TFEU. For example, even though it did not prevent States from imposing the plain packaging of tobacco products, it decided against the adoption of an EU-wide plain packaging scheme.⁴⁴

3.2 The CJEU's Consistent Rejection of Industry-led Challenges to EU Tobacco Control Legislation as Infringing the Fundamental Rights of Tobacco Manufacturers

When fundamental rights were first invoked in the context of EU tobacco control policy, it was primarily as a result of the vigorous and creative litigation strategies tobacco manufacturers developed to protect their economic interests.⁴⁵ In particular, tobacco manufacturers have argued, when challenging tobacco control legislation, that EU harmonizing rules regulating the content, presentation or promotion of their products infringes the fundamental rights they derive from EU law. This includes their freedom of (commercial) expression and information, their right to (intellectual) property and their freedom to trade and conduct a business. These claims have never succeeded before the CJEU on the ground that the rights of tobacco manufacturers and related business actors to sell and promote tobacco products are not absolute and can be limited on grounds of public health protection.

3.2.1 Freedom of commercial expression

The tobacco industry has repeatedly claimed before the CJEU that the imposition of tobacco marketing restrictions infringes their right to free expression. In particular, the Court dismissed the challenge that British American Tobacco mounted against the first Tobacco Products Directive, which imposed an EU-wide ban on the use of texts, names, trademarks and figurative or other signs on tobacco products which suggest that a particular tobacco product

⁴³ For example, in 2013, the Commission reported that 17 EU States had comprehensive smoke-free legislation in place: Commission Staff Working Document, Report on the implementation of the Council Recommendation of 30 November 2009 on Smoke-free Environments [2013] SWD 56 final/2.

⁴⁴ See Article 24 of the Tobacco Products Directive, as interpreted by the CJEU in Case C-547/14 *Philip Morris* ECLI:EU:C:2016:325.

⁴⁵ Alemanno and Garde (n 39) 87.

is less harmful than others (for example ‘light’ or ‘mild’).⁴⁶ The Court noted that these descriptors could mislead consumers, not least because ‘the use of descriptions which suggest that consumption of a certain tobacco product is beneficial to health, compared with other tobacco products, is liable to encourage smoking’ and individuals need to be given objective information concerning the toxicity of tobacco products.⁴⁷

Similarly, when challenged by Germany, the CJEU dismissed the argument that the 2003 Tobacco Advertising Directive, which bans all forms of cross-border advertising and sponsorship, constituted an unlawful interference with freedom of expression.⁴⁸ After recalling its settled case law that the EU legislature should be granted a broad margin of discretion in areas entailing political, economic and social choices on its part, and in which it was called upon to undertake complex assessments, the Court concluded that the measures under review were not disproportionate.⁴⁹ In its judgment, the Court relied explicitly on the case law of the ECtHR on Article 10 ECHR.⁵⁰ After upholding the principle of freedom of expression as a general principle of EU law,⁵¹ the Court noted that the freedom of individuals to promote commercial activities derived not only from their right to engage in economic activities and the general commitment, in the EU context, to a market economy based upon free competition, but also from their inherent entitlement as human beings freely to express and receive views on any topic, including the merits of the goods or services which they market or purchase.⁵² This is all the more

⁴⁶ Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [2001] OJ L194/26.

⁴⁷ Case C-491/01 *British American Tobacco and Imperial Tobacco* [2002] ECR I-11453.

⁴⁸ Directive 2003/33/EC (n 34).

⁴⁹ *Tobacco Advertising II* (n 41).

⁵⁰ The CJEU referred to *Markt Intern v Germany* Series (1990) 12 EHRR 161; *Groppera v Switzerland* (1990) 12 EHRR 321; and *Casado Coca v Spain* (1994) 18 EHRR 1.

⁵¹ The CJEU draws upon the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights, on which the Member States have collaborated or to which they are signatories. The ECHR has always had special significance in that respect as is now specifically recognized in Article 6(3) TEU. On the importance of the right to free expression in the EU legal order, see Derrick Wyatt, ‘Freedom of Expression in the EU Legal Order and in EU Relations with Third Countries’ in Jack Beatson and Yvonne Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (OUP 2000).

⁵² Opinion of Advocate General Fennelly in *Tobacco Advertising II* (n 41) [154].

necessary, the Court noted, as advertising is paramount to the establishment and functioning of the EU internal market in that it allows commercial operators to break down barriers, thus granting more choice to individuals and ensuring that their consumption habits do not crystallize along national lines.⁵³ Nevertheless, the Court also explicitly stated that commercial expression was a lesser form of expression than political or artistic expression⁵⁴ that could therefore be restricted on public health grounds and that the EU legislature should retain a broad margin of discretion in determining what was legitimate and necessary to protect public health. Even though the outcome of these cases is aligned with what a human rights approach to tobacco control mandates, it is regrettable that the Court did not use the opportunity these cases offered to both challenge the information paradigm and to explain why such restrictions were indeed proportionate.⁵⁵

3.2.2 The right to property and the freedom to conduct a business

The right to property and the freedom to conduct a business have often been invoked in tandem. The CJEU has highlighted that neither of those rights constitutes an unfettered prerogative but should be viewed in light of their social function and could be restricted, provided that the restrictions imposed correspond to objectives of general interest pursued by the EU and do not constitute a disproportionate and intolerable interference with the very substance of the rights thus guaranteed.⁵⁶

In its *British American Tobacco* judgment, the CJEU dismissed the argument that the EU had unlawfully interfered with the right to property of tobacco manufacturers and their freedom to pursue a trade or profession by prohibiting the use of trademarks incorporating descriptors such as ‘light’ or ‘mild’. The Court noted that tobacco producers could continue to use other

⁵³ This was also and most vividly stated by Advocate General Jacobs in his Opinion in Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec* [1995] ECR I-179.

⁵⁴ Political, journalistic, literary or artistic expression contribute to a larger extent, in a liberal democratic society, to the achievement of social goods such as the enhancement of democratic debate and accountability, or the questioning of current orthodoxies with a view to furthering tolerance or change. By contrast, commercial expression promotes only economic activity.

⁵⁵ It hardly engaged in the balancing exercise required under Article 10 ECHR, as interpreted by the ECtHR, limiting itself to upholding the validity of the Directive: Amandine Garde, ‘Freedom of Commercial Expression and the Protection of Public Health in Europe’ (2010) Cambridge Yearbook of European Legal Studies 225.

⁵⁶ See in particular Case 44/79 *Liselotte Hauer* [1979] ECR 3727; Case 52/81 *Werner Faust* [1982] ECR 3745; Case 265/87 *Hermann Schröder* [1989] ECR 2237; Case 5/88 *Wachauf* [1989] ECR 2609; Case C-280/93 *Germany v Council* [1994] ECR I-4973; Case C-293/97 *Standley and Others* [1999] ECR I-2603.

distinctive signs on the packs.⁵⁷ ‘The fact remains that a manufacturer of tobacco products may continue, notwithstanding the removal of that description from the packaging, to distinguish its product by using other distinctive signs.’⁵⁸ As EU institutions enjoy a margin of discretion in the choice of the means required to achieve their policies, traders are unable to claim that they have a legitimate expectation that an existing situation which is capable of being altered by decisions taken by those institutions within the limits of their discretionary power will be maintained. In particular, no trader should expect that patterns of trade will remain unchanged.

3.2.3 Article 35 EU Charter and the mainstreaming of public health

Following the entry into force of the Lisbon Treaty in December 2009, the CJEU has continued to emphasize the limits to tobacco manufacturers’ commercial rights, although it now relies explicitly on the EU Charter, and in particular Article 11 (freedom of expression), Article 16 (freedom to conduct a business) and Article 17 (right to property), rather than on the general principles of EU law.⁵⁹

In its *Philip Morris* decision, the Court rejected the claimants’ argument that the revised Tobacco Products Directive infringed their rights under Article 11 of the EU Charter⁶⁰ on the ground that ‘human health protection ... outweighs

⁵⁷ Case C-491/01 *British American Tobacco* (n 47) [149]–[150].

⁵⁸ *ibid* [152]. Following this interpretation, it would seem that standardized packaging measures – implemented by ‘provisions of public law’ – would not breach trademark rights as they do not authorize third parties to exploit tobacco signs, but merely consist of a restriction on right owners’ ability to use their own signs. Despite the loss of distinctiveness of tobacco trademarks, rights holders could still exercise the right to prohibit the misappropriation of their signs by unauthorized third parties. On this question, see Court of Appeal decision in *R (British American Tobacco and others) v Secretary of State for Health* [2016] EWCA Civ 1182 (Admin). More generally on the relationship between health and intellectual property rights, see Alberto Alemanno and Enrico Bonadio (eds), *The New Intellectual Property of Health: Beyond Plain Packaging* (Edward Elgar Publishing 2016).

⁵⁹ On the balancing of Article 16 (freedom to conduct a business) and Article 17 (right to property) of the EU Charter, see in particular the judgment of the Grand Chamber in Case C-283/11 *Sky Österreich* [2013] ECR I-28, which confirmed that the EU legislature was entitled to give priority, in the necessary balancing of the rights and interests at issue, to overriding requirements of public interests over private economic interests, on the condition that the restriction was proportionate, that is, that a fair balance had been struck between several rights and fundamental freedoms protected by the EU legal order with a view to reconciling them (at [60]). In relation to health more specifically, see Case C-544/10 *Deutsches Weintor* [2012] ECLI:EU:C:2012:526. ECR I-526 and Case C-157/14 *Neptune Distribution* [2015] EU:C:2015:823.

⁶⁰ ‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.’

the interests put forward by the claimants in the main proceedings'.⁶¹ Indeed, 'as is apparent from the second sentence of Article 35 of the Charter and Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU, a high level of human health protection must be ensured in the definition and implementation of all the European Union's policies and activities'.⁶²

It is notable that the CJEU has relied extensively in its tobacco case law on the duty of the EU to ensure a high level of public health protection in the development and implementation of all its policies. Although the EU does not have unlimited powers to harmonize national tobacco control laws and implement the FCTC comprehensively at regional level, 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'. This 'mainstreaming' obligation can also be found in Article 114(3) TFEU and has been strengthened following the entry into force of the Lisbon Treaty, with Article 9 TFEU and Article 35 EU Charter.

The requirement to ensure that health concerns are accommodated in all policy areas is arguably reflected in the wording of Article 3 TEU, which sets out the broad objectives of the EU. Paragraph 1 states that the Union should promote 'the well-being of its peoples' – of which good health arguably is a precondition. Paragraph 3 calls on the EU to establish an internal market that 'shall work for the *sustainable* development of Europe' and shall 'promote *protection of the rights of the child*' (emphasis added) – bearing in mind that well-being, sustainable development and the rights of the child are all negatively affected by tobacco use.

Health will often be a decisive factor in policy choices. As the CJEU has noted, 'it is perfectly legitimate for the [EU] legislator to pursue simultaneously internal market and public health objectives'.⁶³ It is arguable that, in balancing the economic interests of tobacco manufacturers against the protection of public health,⁶⁴ the EU has indirectly recognized the need to protect the right to the enjoyment of the highest attainable standard of health, which the use of

⁶¹ *Philip Morris* (n 44) [156].

⁶² *ibid* [157].

⁶³ Opinion of AG Fennelly in *Tobacco advertising I* (n 41) [149]. On this balancing, see *ibid* [88]; *Tobacco Advertising II* (n 41) [39]; Joined Cases C-154 and 155/04 *Alliance for Natural Health* [2005] ECR I-6451 [30]; *Philip Morris* (n 44) [60].

⁶⁴ See, for example, Recital 3 of Directive 2003/33/EC (n 34); Recital 8 of the Tobacco Products Directive, 'Tobacco products are not ordinary commodities and in view of the particularly harmful effects of tobacco on human health, health protection should be given high importance, in particular, to reduce smoking prevalence among young people'.

tobacco products harms directly (for smokers) or indirectly (for second-hand smokers).

Even if the threshold of what constitutes ‘a high level of public health protection’ remains undefined, these provisions nonetheless require that the EU should place health concerns at the centre of the policy process and give them significant consideration when balancing them against other interests, not least the economic interests of the tobacco industry. As Advocate General Kokott stated:

It should be borne in mind, however, that the protection of human health has considerably greater importance in the value system under EU law than such essentially economic interests (see Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU and the second sentence of Article 35 of the Charter of Fundamental Rights), with the result that health protection may justify even substantial negative economic consequences for certain economic operators.⁶⁵

3.3 For a More Explicit and Systematic Rights-based Approach to EU Tobacco Control Policy

The EU is committed to the protection of human rights.⁶⁶ Nevertheless, the reference to the FCTC and the EU public health mainstreaming obligation can only constitute, at best, an implicit recognition that human rights underpin EU tobacco control policy. To date, there has been little reflection at EU level on the added value of an explicit reliance on human rights to regulate the tobacco industry and therefore promote better health.

If it is true that the wording of Article 35 of the EU Charter suggests that it may have a more limited scope than the provisions on the right to health in several international human rights instruments,⁶⁷ the EU could nonetheless rely more explicitly on human rights as a justification for its tobacco control policy. The very fact that the EU Charter contains a provision dedicated to

⁶⁵ Opinion of AG Kokott in *Philip Morris* (n 44) [179].

⁶⁶ Article 6 TEU.

⁶⁷ Article 35 EU Charter provides: ‘Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.’ This wording differs from the language used in several international human rights instruments, which refer to the ‘highest attainable standard of health’, not least ICESCR, Article 12 and Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Article 24. On EU Charter, Article 25, see EU Network of Independent Experts on Fundamental Rights, ‘Commentary on the Charter of Fundamental Rights of the European Union, Article 35 – Protection de la Santé’ (June 2006) 304.

health recognizes that health is indeed an important EU value.⁶⁸ The EU should acknowledge the onus that this provision, as complemented by the other health mainstreaming treaty obligations and other relevant provisions of the EU Charter,⁶⁹ places on its institutions to ensure that all EU policies do indeed protect the right to health and other rights harmed as a result of tobacco smoke exposure. The key contention is that if the EU has often relied on these provisions to either regulate the tobacco industry or defend itself from industry judicial review challenges, it has not done so systematically when assessing whether or not it should regulate the tobacco industry and, if so, whether the standards it has adopted are indeed sufficiently high to meet its obligations under both the FCTC and international human rights law.

Even if the EU is not itself a party to the International Covenant on Economic, Social and Cultural Rights (ICESR), the Convention on the Rights of the Child (CRC) or other major international human rights treaties, its Member States are. These instruments are therefore used to identify and flesh out the general principles of EU law with which all instruments of secondary law need to comply. For example, the case law of the CJEU,⁷⁰ and the European Commission's Communication of 4 July 2006 establishing a long-term EU strategy to effectively promote and safeguard the rights of the child in EU policies and to support Member State's efforts in this field,⁷¹ explicitly refer to the CRC as a reference point in determining how EU institutions and EU Member States should ensure that children's rights are duly protected, in particular that their best interests are upheld as a primary consideration in all EU policies, including EU tobacco control policy.⁷²

Mainstreaming is particularly important if the issue at hand is as complex as tobacco control and requires a multisectoral response to the problems tobacco smoke exposure raises. It should help ensure that a given issue is treated

⁶⁸ It is arguable that the EU Charter is much more modern and in keeping with twenty-first-century challenges than the ECHR may be in this respect.

⁶⁹ For example, EU Charter, Article 2, 'Everyone has the right to life'.

⁷⁰ The CJEU referred to the CRC for the first time in *Council v Parliament (Family Reunification Directive)* in June 2006, where it recognized that the CRC provided a source of the general principles of EU law. See Case C-540/03 *Parliament v Council* [2006] ECR I-5769.

⁷¹ Communication from the Commission: Towards an EU Strategy on the Rights of the Child [2006] 367 final [I.3]. The Commission Communication provides explicitly that the provisions of the Convention must be fully taken into account.

⁷² On the gap between EU rhetoric and practice on the regulation of commercial practices and the protection of children's rights, see Amandine Garde, 'Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interest of ... Commercial Operators?' (2011) 19 *International Journal of Children's Rights* 523.

consistently across multiple policy fields, when input from multiple policy fields – and therefore Directorates-General of the European Commission – is required.⁷³ If the EU has used its internal market powers extensively to regulate the tobacco industry, it has not relied on other available legal bases to ensure that health-related rights are effectively protected and the FCTC more comprehensively implemented. In particular, a more explicit and systematic emphasis on the EU's mandate to protect human rights (within the scope of EU attributed powers) should lead the European Commission to reframe the discussions on the taxation of tobacco products and propose to use EU legislative powers to increase the level of health protection across the EU.⁷⁴ Taxes are one of the most effective tools for policy-makers to influence the price of tobacco products.⁷⁵ Therefore, as an FCTC party, the EU must 'recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons'⁷⁶ and amend its regulatory framework accordingly. It is only if a truly coherent approach is adopted both across EU institutions and within EU institutions that the EU can claim that it has fulfilled its mandate to ensure a high level of public health protection in the development and implementation of *all* its policies.

4. CONCLUSIONS

This chapter has discussed whether there is a human rights approach to tobacco control in Europe. While the CoE has not adopted any tobacco control policy or strategy, the EU has adopted a number of tobacco control rules, in particular the Tobacco Advertising Directive and the Tobacco Products Directive. Both organizations have addressed tobacco consumption and exposure to SHS

⁷³ Public health mainstreaming was first seriously addressed at EU level during the Finnish Council Presidency in 2006, with the introduction of Health in All Policies, a strategic initiative that was intended to galvanize policy-makers to consider health determinants controlled in sectors other than health. On the notion of 'Health in All Policies', see Pekka Puska and Timo Stahl, 'Health in All Policies – the Finnish Initiative: Background, Principles, and Current Issues' (2010) 31 Annual Review of Public Health 315; Meri Koivusalo, 'The State of Health in All Policies in the European Union: Potential and Pitfalls' (2010) 64 Journal of Epidemiology and Community Health 500.

⁷⁴ Directive 2011/64/EU (n 37).

⁷⁵ Guidelines to Article 6, at paragraph 2.

⁷⁶ Article 6(1) FCTC. The Guidelines to Article 6 add: 'it is estimated that young people are two to three times more responsive to tax and price changes than older people. Therefore, tobacco tax increases are likely to have a significant effect on reducing tobacco consumption, prevalence and initiation among young people, as well as on reducing the chances of young people moving from experimentation to addiction' (at paragraph 2.1).

from a human rights angle. Even though it is difficult to argue, bearing in mind the differences between the CoE and the EU, that a unified European human rights approach to tobacco control has developed, one should note the commonalities between the approaches of these two organizations. Both the CoE and the EU have systematically rejected human rights claims from the tobacco industry. Specifically, the ECtHR and the CJEU are very reluctant to uphold claims based on freedom of expression when challenges are mounted against tobacco advertising legislation. Furthermore, the ECtHR has clearly recognized that exposure to SHS falls within the remit of Articles 2, 3 and 8 ECHR. The CJEU, along similar lines, sees the protection of public health as a decisive factor, thus implicitly protecting the right to health. Therefore, while there is no comprehensive and unified European human rights approach to tobacco control, there are nonetheless synergies between the two European organizations, which are sympathetic to protecting European citizens from the harms associated with smoking and exposure to SHS.