‘Fat taxes’ in Europe

A Legal and Policy Analysis under EU and WTO Law

Alberto Alemanno[*] – Ignacio Carreño[•]

Abstract

At a time in which food taxes are gaining momentum throughout Europe, this paper provides an initial analysis of the genesis, rationale, scientific evidence and legal implications stemming from the introduction of such fiscal schemes. By taking as a case study the recently implemented Danish fiscal scheme, it discusses the compatibility of these product-specific taxes under both EU law and WTO Law. Given the increasing number of Member States considering adopting such measures, it also examines the legality of a hypothetical EU-wide fat tax scheme within the framework of the revision of EU’s Obesity Prevention Strategy. Although fat taxes are not a panacea to solve the ‘obesity epidemic’, the tobacco experience suggests that the use of fiscal policies to affect the price of products may be effective but only when it is part of an overall strategy based on a mix of policy tools. Unfortunately neither the EU nor the Member States have yet shown enough political will and creativity as to develop a credible EU’s obesity prevention strategy.

I. Introduction

The growing rate of overweight and obesity and the resulting medical costs are leading public authorities to explore fiscal and regulatory interventions to provide consumers with economic incentives to modify their food consumption, thus controlling their body weight. In particular, to discourage unhealthy eating and limit the population’s intake of fatty foods an increasing number of

---

* Jean Monnet Professor of EU Law & Risk Regulation, HEC Paris.

• Senior Associate at FratiniVergano, Brussels. Special thanks go to his colleague Vladimir Talanov for his input and critical review on the WTO analysis.

countries across the industrialised world are considering levying taxes on unhealthy food.[1] A 'fat tax' may be defined as a tax or surcharge placed upon fattening foods, beverages or individuals with the aim to decrease consumption of foods that are linked to obesity and other health-related risks[2]. This is not an entirely new idea – some theorists, starting with Arthur Pigou, a 20th-century English economist –, have long presented the arguments for imposing special taxes on goods and services whose prices do not reflect the true social cost of their consumption.[3] Examples of Pigouvian taxes are duties on cigarettes, alcohol, gambling and environmental emissions. The imposition of taxes on specific consumption goods and services is generally defined as 'excise taxation'. The theoretical prediction underpinning excise duties according to which the induced relative price effect actually works is supported by empirical evidence[4]. Examples of Pigouvian taxes are duties on cigarettes, alcohol, gambling and environmental emissions. Support for another such tax, a fat tax, is now spreading across Europe thus raising the question whether the European Union should take the lead by proposing a EU-wide fat tax scheme or rather go after the Member States adopting on a unilateral basis such measures[5].

On 1 October 2011, Denmark introduced a tax on foods by targeting those products that are high in saturated fat. The Danish Fat Tax Act[6] confirms the trend in various EU Member States to tax certain

---

1 See e.g. OECD, Obesity and the Economics of Prevention: Fit not Fat (2010); Food Taxes: A Palatable Solution to the Obesity Epidemic?, 23 Pac. McGeorge global Bus. & Dev. L.J 255, 2010-2011;

2 See e.g. Hanna Rosin, 'The Fat Tax: Is It Really Such a Crazy Idea?', The New Republic, May 18, 1998.

3 A. C. Pigou, "Chapter IX: Divergences between Marginal Social Net Product and Marginal Private Net Product", in The Economics of Welfare (1932).

4 B.S. Frey, Excise Taxes : Economics, Politcs and Psychology, in S. Cnossen, Theory and Practice of Excise Taxation : Smoking, Drinking, Gambling, Polluting, and Driving, Oxford University Press, 2005.

5 Alemanno, Alberto and Carreno, Ignacio, Fat Taxes in the European Union between Fiscal Austerity and the Fight Against Obesity (October 18, 2011). European Journal of Risk Regulation, Issue 4, 2011.

6 Fedtafgiftsloven, full title: Lov om afgift af mættet fedt i visse fødevarer (Act on a tax on saturated fat in specific food), LOV nr 247 af 30/03/2011 Gældende (Fedtafgiftsloven), published on 31 March 2011. Available at: https://www.retsinformation.dk/Forms/R0710.aspx?id=136314#Not1.

foods or consider taxing them in the future.[7] On 1 September 2011, Hungary introduced a tax on products considered excessively salty, sweet or with high caffeine levels, Act CIII of 2011 on the Public Health Product Tax,[8] also known as the 'chips tax' (*chipsadó*), which is levied on the producer or first distributor[9]. The French Government will increase excise taxes on soft drinks in 2012.[10] Inspired by the French example, the Irish government is also considering introducing a tax on carbonated soft drinks to help combat obesity.[11] Finally, the Prime Minister of the UK has announced on 4 October 2011 that he is considering the possibility of introducing a Danish-style fat tax to address obesity.[12]

This article provides a detailed analysis of the genesis, rationale, scientific evidence and legal implications of these national fat tax schemes within the EU framework. By focusing in particular on the recently implemented Danish fiscal scheme, it discusses the compatibility of these product-specific taxes under both EU and WTO law. Given the increasing number of Member States considering adopting such measures, it also examines the possibility that the EU enacts as EU-wide scheme mandating fat taxes within the framework of the revision of EU's Obesity Prevention Strategy. It also illustrates a paradox: at the time we see obesity prevention elevated to a public health priority, especially

7 For an analysis of the Danish fat tax, see TradePerspectives, Issue No. 18 of 7 October 2011, http://www.fratinivergano.eu/TradePerspectives.html.

8 2011. évi CIII. Törvény a népegészségügyi termékadóról, Date of publication: 19 July 2011. Magyarközlöny (Hungarian Gazette) 2011. évi 85. Szám, p. 25125.

9 For an assessment of the Hungarian Fat Tax, see Ed Holt, Hungary to introduce broad range of fat taxes, The Lancet, Vol 378 August 27, 2011.

10 Articles 26 and 27 of Loi n° 808 de finances pour 2012, adopted by the Assemblée Nationale on 21 December 2011 and available at http://www.assemblee-nationale.fr/13/ta/ta0808.asp In its decision No. 2011-644 DC of 28 December 2011, the French Conseil Constitutionnel approved the Finance Act 2012, which includes a so-called 'soda tax' on sugar sweetened beverages. http://www.conseil-constitutionnel.fr/decision/2011/2011-644-dc/decision-n-2011-644-dc-du-28-decembre-2011.104235.html

11 The Irish Times, 22 September 2011; Food Navigator, 29 September 2011. http://www.foodnavigator.com/content/view/print/564786

12 'UK could introduce "fat tax", says David Cameron', The Guardian, 4 October 2011. http://www.guardian.co.uk/politics/2011/oct/04/uk-obesity-tax-david-cameron

in the aftermath of the Political Declaration on Non-Communicable Diseases (NCDs) by the UN General Assembly[13] in September 2011, "we only have a limited number of studies from which to examine findings" about the effectiveness of obesity prevention[14]. Regardless of the scientific and legal rationales underpinning fat taxes, these instruments seem no longer orphans of tax policy[15] but they appear predestined to spread across countries in order to allegedly curb the detrimental effects stemming from the consumption of unhealthy foods as well as the costs associated with the so called 'obesity epidemic'[16].

II. The Genesis

Kelly Brownell, an internationally renowned expert in obesity based at Yale University, pioneered the concept of modern food taxes[17]. Professor Brownell observed in the early 1990s that foods high in fat and low in nutritional value were among the cheapest on the market and subsequently proposed the creation of a food tax. The stated aim of this fiscal measure was not only to offset this price imbalance but also – as it is often the case with excise taxation – to raise revenue, in particular to collect resources to be invested in nutrition programs.[18] The proposal elicited a lively debate: opponents claimed that it interfered with individual rights, and as such qualified as a paternalistic measure. Yet, since the establishment of its Global Strategy on Diet, Physical Activity and Health in 2004, the World Health Organization has considered fat taxes as a relevant policy option for encouraging people to make healthier eating choices.[19] While this is consistent with growing worldwide interest in the effect of fiscal policy on diet, there is little data supporting the effectiveness of taxes in this context[20] – as illustrated

---

13 *See* Framework Convention on Tobacco Control, May 2003, 42 I.L.M. 518 [hereinafter FCTC]. The FCTC was adopted by World Health Assembly Resolution 56.1 (May 21, 2003), available at http://www.who.int/fctc. For an analysis, see Benn McGrady, Trade and Public Health: The WTO, Tobacco, Alcohol and Diet (2011).

14 B. Buchner, Nutrition, Obesity and EU Health Policy, European Journal of Health Law 18 (2011) 1-8.

15 For an insightful analysis of the emerging role of excise taxation today, see Sijbren Cnossen, The Economics of Excise Taxation, in S. Cnossen (ed.), Theory and Practice of Excise Taxation : Smoking, Drinking, Gambling, Polluting, and Driving, Oxford University Press, 2005.

16 Report submitted by the Special Rapporteur on the Right to Food, Olivier de Schutter. Human Rights Council, XIX session, United Nations General Assembly, A/HRC/19/59, p. 21.

17 Kelly Brownell, Food Fight: The Inside Story of the Food Industry, America's Obesity Crisis, and What We Can Do About It (McGraw-Hill, 2004).

18 See e.g. Kelly Brownell et al., The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages, The New England Journal of Medecine 361 (2009), 1599; A. Leceister et al., The 'Fat Taxes': Economic Incentives to Reduce Obesity', Institute for Fiscal Studies, Briefing note, n. 49, 2005.

19 World Health Organization, Global Strategy on Diet, Physical Activity and Health (Geneva: WHO, 2004), at para 41(2); World Health Organization, 2008–2013 Action Plan for the Global Strategy for the Prevention and Control of Non-Communicable Diseases (Geneva: WHO, 2008).

20 See e.g. World Bank, Repositioning Nutrition as Central to Development: a Strategy for Large-Scale Action. (Washington: The World Bank, 2006)

below, the available evidence on the use of food taxes as a public health strategy is in fact rather modest. [21] For the time being, the EU Strategy on Nutrition, Overweight and obesity related health issue (2007-2013) does not contemplate the adoption of any taxation policy at national or EU level. However, given the significant number of Member States that have adopted or are considering implementing 'fat taxes', the question arises today whether the EU Member States and the EU may validly adopt such schemes under EU law.

III. The Rationale and the Scientific Evidence

The rationale of a fat tax seems clear. Make 'bad' food more expensive, 'good' food relatively less so, and people will probably shift at least some of their purchases to those healthier options. This seems crucial as evidence shows that fattening foods tend to be cheap and fresh produce and meat are often among the priciest food products.[22] A tax can theoretically help offset that imbalance, nudging people to eat more of what is good for them and less of what is not. Yet, given the relative novelty of the use of tax schemes to pursue nutritional policies, empirical evidence is limited. Cross-sectional, prospective, and experimental studies have found an association between obesity and the consumption of sugar-sweetened drinks.[23] Thus, for instance, scientific research shows that taxing soft drinks and pizza can decrease the amount of calories that people consume from these foods. However, experimental studies have not always found an association, and the size of the effect can be very modest[24]. Sometimes it can also be ambiguous – ambiguous because increasing the price of a food to reduce calories purchased tends to reduce also purchases of other nutrients deemed good for health. This outcome seems to be strengthened by the fact that nutrient price elasticity tends to be generally small[25]. This is because the

---

21 See e.g. A. M. Thow, S. Jan, S. Leeder and B. Swinburn. 'The impact of fiscal policy interventions for diets, obesity and chronic disease: a systematic review' Bulletin of the World Health Organization, 88 (2010), 609-14

22 For an explanation of why junk food is cheaper than healthier alternatives, see Michael Pollan, The Omnivore's Dilemma (2009).

23 L. R. Vartanian, M. B. Schwartz, K. D. Brownell, 'Effects of soft drink consumption on nutrition and health: a systematic review and meta-analysis', American Journal of Public Health; 97 (2007), 667–75; S. French et al., Pricing and Promotion on Low-Fat Vending Snack Purchases: The CHIPs Study", American Journal of Public Health 91 (2001).

24 See, e.g., O. Allais et al., Fat Tax : A Nutritional Approach, Amer. J. Agr. Econ. 92(1) :228-245.

25 Yaniv, Gideon & Rosin, Odelia & Tobol, Yossef, "Junk-food, home cooking, physical activity and obesity: The effect of the fat tax and the thin subsidy," Journal of Public Economics, Elsevier, vol. 93(5-6), pages 823-830, June 2009; A. Leceister et al., The 'Fat Taxes': Economic Incentives to Reduce Obesity', Institute for Fiscal Studies, Briefing note, n. 49, 2005.

smaller the elasticity, the greater the increase in price is needed to reduce consumption by a target amount. Moreover, fat taxes are also suspected to produce undesired side effects. Indeed, imposing a higher tax on particular good means that the relative price of a substitute good falls at the same time. Empirical research, although limited to the alcohol and drugs sectors, suggests for instance that the raising of prices of liquors raises the level of consumption of marijuana[26]. Although econometric estimates are not robust enough to be able to predict whether such an undesired effect may occur also in relation to food, these unexpected and undesired effects of excise policies should be considered while pondering on their extension to fatty foods. The question remains how elastic is the demand for consumption of such nutrients, or in other words, how easy is for people to escape taxation by switching to substitute products[27]. There is even evidence that such taxes can have the perverse effect of increasing consumption of fatty or salty foods. While studies show that eating behaviour may be more responsive to price increases than to nutritional education,[28] there is also evidence that obese individuals are less responsive to changes in the price of food than normal-weight individuals. Indeed, a fat tax may have less impact than its advocates expect. Some studies on the effect of cigarette and alcohol 'sin taxes' suggest heavy users are less influenced by price changes than others, so that a fat tax may do little to improve health, at least for today's junk-food addicts. This may suggest that fat taxes are more likely to prevent obesity than to tackle it. Advocates of the taxes usually point to the positive effect taxes have had on alcohol and tobacco use. However, taxation structures that worked for tobacco (i.e. an excise tax on a single substance that is proven to be harmful) may not be automatically transferable to food, which is essential for life and as such tends to involve more complex choices. It is in the light of the above that the World Health Organisation has expressed some caution when addressing the issue of fat taxes. Timothy Armstrong, coordinator at WHO's department for Health Promotion, declared that: "The WHO recommends to member states that they should consider fiscal

---

26 Farrelly, M.C., Bray, J.W., Zarkin, G.A., & Wendling, B.W. (Jan 2001). The joint demand for cigarettes and marijuana: Evidence from the National Household Surveys on Drug Abuse. Journal of Health Economics, 20 (1):51-68.

27 For one of the few attempts to establish nutrient elasticities, see O. Allais et al., Fat Tax : A Nutritional Approach, Amer. J. Agr. Econ. 92(1) :228-245.

28 Dana Goldman, Darius Lakdawalla and Yuhui Zheng, 'Food process and the dynamics of body weight', NBER Working Paper No 15096 (June 2009); Gideon Yaniv, Odelia Rosin and Yossef Tobol, 'Junk-food, home cooking, physical activity and obesity: The effect of the fat tax and the thin subsidy', Journal of Public Economics (June 2009).

policies to promote health but that such policies should be evaluated to assess the risk of any unintentional effects of such policies on vulnerable populations”[29].

IV. Distributive Justice

Fat taxes are questioned not only on their effectiveness but also on the grounds of distributive justice. It is argued that since the poor spend a greater proportion of their income on food (as well as on alcohol and gambling), and in particular on unhealthy cheaper food, there is a risk that a junk food tax may be regressive.[30] This – as it has been observed – seems all the more problematic, as obesity is already associated with social exclusion and inequalities[31]. In particular, given that the taxed products are inelastic, fat-tax policies raise substantial revenues, but this political instrument can be extremely regressive[32]. Certain studies have found that food taxes are only slightly regressive, however, and that lower-income households reduce their consumption proportionately more than wealthier households, as has been observed with tobacco taxes.[33] In that sense, a fat tax might have a progressive incidence. To make a fat tax less burdensome for the poor, proponents recommend earmarking the revenues to subsidise healthy foods and health education. Combining food taxes with subsidies might help alleviate potential regressivity by enabling consumers to switch to more healthy products without incurring additional costs. Moreover, proponents generally argue that a fat tax may be less regressive than it appears to the extent that it lowers medical expenditures among the poor. This seems to be true insofar as there is a higher incidence of diet-related illnesses among the poor than in the general population.[34] Others support the progressive character of excise duties by highlighting that those who are hurt most

29 As quoted by Ed Holt, Hungary to introduce broad range of fat taxes, The Lancet, Vol 378 27 August 2011. See also the WHO Global Strategy on Diet, Physical Activity and Health, at para 41(2).

30 See e.g. M. Caraher, G. Cowburn, ‘Taxing food: implications for public health nutrition.’ Public Health Nutrition 8 (2005), 1242-9;9 O. Allais et al., Fat Tax : A Nutritional Approach, Amer. J. Agr. Econ. 92(1) :228-245..

31 A. Garde, EU Law and Obesity Prevention, Wolters Kluwer, 2010, at 288.

32 O. Allais et al., Fat Tax : A Nutritional Approach, Amer. J. Agr. Econ. 92(1) :230.

33 S. Smed, J. D. Jensen, S. Denver, ‘Socio-economic characteristics and the effect of taxation as a health policy instrument’, Food Policy 32 (2007), 624-39; D. K. Remler, ‘Poor smokers, poor quitters, and cigarette tax regressivity’, American Journal of Public Health 94 (2004), 225-9.

34 D. K. Remler, ‘Poor smokers, poor quitters, and cigarette tax regressivity’, American Journal of Public Health 94 (2004), 225-9.

by the tax are also those who are most price sensitive to the underlying products, meaning that their self-control value of taxation is larger[35]. Unlike placing restrictions on foods or ingredients, a fat tax would not limit consumer choice, only change relative prices. Yet, unlike smoking or excessive gambling and drinking, eating unhealthy food does not directly impair the well-being of anyone else. This seems to reduce the case for the introduction of fat taxes and makes them more controversial. A more direct, yet contentious, approach would simply be to tax people on the basis of their weight[36]. This would amount to tax overeating. Japan implemented a measurement of waist sizes during 2008 to help avoid the obesity epidemic confronting the United States[37]. The *New York Times* wrote: 'To reach its goals of shrinking the overweight population by 10 per cent over the next four years and 25 per cent over the next seven years, the government will impose financial penalties on companies and local governments that fail to meet specific targets. The country's Ministry of Health argues that the campaign will keep the spread of diseases like diabetes and strokes in check'. Interestingly enough, the average male waist size in Japan is smaller than the average in the EU and the US.

V. A case study: The Danish Fat Tax

On 1 October 2011, the Danish Fat Tax Act came into effect.[38] Its declared purpose is to promote better diets and therefore improve the health of the population. The tax of DKK 16 (around EUR 2.15) per kilogram of saturated fat is imposed on all food products produced in and imported into Denmark. The scope of the new legislation is established in Article 1 of the Act, which specifies that the following products are taxable: meat, certain dairy products, animal fats, edible oils and other fats, margarine, spreadable composite products, and other products which can be considered as substitutes or imitations of the above. The tax does not apply to products containing less than 2.3% per weight of

35 Gruber J. and Köszegi, B. (2001) Is Addiction Rational ? Theory and Evidence, Quarterly Journal of Economics 116.

36 However, should data show that obesity prevalence is higher in low income segments of the population a regressive effect of these taxes would immediately appear. This outcome does not seem farfectched since we know, for instance, that the lower your income, the more likely you are to inhabit an "obesogenic" environment. See, e.g. Swinburn B, Egger G, Raza F., Dissecting obesogenic environments: the development and application of a framework for identifying and prioritizing environmental interventions for obesity, Prev Med., 1999 Dec; 29(6 Pt 1):563-70.

37 'Japan, Seeking Trim Waists, Measures Millions', New York Times, June 13 2008. http://www.nytimes.com/2008/06/13/world/asia/13fat.html

38 For an analysis of the genesis and rationale of the Danish fat tax, see e.g. Wencke Gwozdz, Showcase: On the Way to a Fat Tax in Denmark (Corpus, 2010).

saturated fat, which means that most types of milk are exempt. Goods for export, animal feed, additives, certain food supplements and medicines are also exempt.

The obligation to pay the tax is incumbent upon those who produce the food in Denmark commercially, receive the food from another EU country, import food into Denmark from a country outside the EU or from areas located in the EU but outside of the EU's fiscal territory, or sell food from another EU country in such a way that the goods are directly or indirectly sent or transported by the seller or on behalf of the seller to non-commercial purchasers in Denmark (i.e., distance selling) (hereinafter, the taxable parties). Both producers and importers of these goods must register for the tax on saturated fat with the Danish Customs and Tax Administration. The base amount on which the tax is to be paid is the weight of saturated fat in the food. For meat products, standard rates per kilogram have been set in an Annex to the Act (for example, for beef with a saturated fat content of 5.2 g per 100 g, the tax per kg of beef will be DKK 0.83, or EUR 0.11). Under certain conditions, the tax can also be paid according to the saturated fat content in a cut. There are several options to determine the base amount on which the tax is to be paid. The taxable party can use publicly available food information, which sets average standards for the levels of saturated fat in specific foodstuffs. The base amount can also be determined based on a technical analysis of the specific food. And finally, nutrition labelling can be used. Nutrition labelling is currently not mandatory in the EU, but it is set to become so soon: a mandatory nutrition declaration (including the indication of saturated fat per 100 g or 100 ml in a product) will have to be implemented by operators according to the recently adopted Regulation (EU) No. 1169/2011 on the provision of food information to consumers as of 13 December 2016[39].

The Danish fat tax also applies to imported products. Article 8 of the Act establishes that, where such food is received, imported or sold by distance selling in Denmark, a tax is to be paid to the treasury on the contents used in the production of food. Danish importers of products covered by the Act must therefore obtain a declaration of fat content from the foreign supplier. Where taxable parties are unable to document the weight of saturated fat, the tax is to be paid based on the total amount of both saturated and unsaturated fat in the food or, if this also cannot be provided, on the basis of the net weight of the food product. According to Article 22 of the act, fines are imposed on anyone who knowingly or recklessly submits incorrect or misleading information, violates certain provisions of the

---

39 Regulation (EU) No, 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, OJ L 304, 22.11.2011, p. 18–63.

Act (Article 4(1), Article 4(3)(1) or (2), Article 4(4), Article 10(1) or (3), Article 14(2)(1) Article 15, Article 16, Article 19(1)–(3) and (5)–(7) or Article 20(1) (7)) or transfers, obtains or acquires goods (or attempts to do so) on which tax has not been paid and which should have been paid in accordance with the Act.

In the light of the above, it can be expected that the taxable parties will ultimately pass on the tax to the final consumer. The implementation of the tax scheme imposes quite a burden on producers, importers and outlets, as there is a heavy degree of bureaucracy involved in establishing the amount of tax on domestically produced or imported goods. For instance, declarations from producers are required for the saturated fat content in the actual product as well as for the amount used in its preparation. In addition, it has been reported that the Danish authorities reserve the right to impose a flat fee on the importer when the fat content of an imported product is not sufficiently indicated.[40]

VI. Legal Implications

Excise taxation vs General Taxation (VAT)

According to the OECD, excise systems comprise all selective taxes on the production, sale, transfer, leasing and delivery of goods and the rendering of services, as well as selective taxes on the use of goods, or on the permission to use goods or perform activities, other than general taxes on goods and services[41]. There does not seem any doubt that fat taxes fall within this category of taxation schemes whose distinguishing features are: selectivity in coverage, discrimination in intent, and often some form of quantitative measurement in determining the tax liability along with the application of specific rates and physical controls over production for enforcement purposes. These features enable us to distinguish fat taxes from general consumption taxes, such as value-added taxes (VATs) whose bases are typically designed so as to include all goods and services other than those expressly exempted. Moreover, VAT is generally levied to raise revenue not to pursue other public policy objectives and, similar to an income tax, is determined through documentary evidence.

40 Le Danemark lance la première taxe sur le gras', Le Figaro, 1 October 2011. http://www.lefigaro.fr/conjoncture/2011/10/01/04016-20111001ARTFIG00422-le-danemark-lance-la-premiere-taxe-sur-le-gras.php

41 OECD (2009), Revenue Statistics 1965-2008, Organisation for Economic Cooperation and Development, Paris.

National Fat taxes under EU law

The Danish fat tax, the Hungarian 'chips tax', and similar measures which might be introduced in individual EU Member States in the future appear to be indirect internal taxes that are currently not harmonised at the EU level. All EU Member States apply excise duties to: alcoholic beverages; manufactured tobacco products and energy products[42]. As a result, EU legislation in the area of excise duties had been adopted only in relation to those products in the context of the establishment of the Internal Market on 1 January 1993, which involved the abolition of controls of a fiscal nature at internal borders between Member States. This legislation, which has been further developed since, consists of a set of sectoral directives defining: (i) the structure of the tax to be applied to a particular group of products[43]; (ii) the minimum rates of duty that Member States have to respect for each type of product. Above those minimum rates, Member States can freely fix their own rate levels and the collected revenue accrues to them. A further directive lays down common provisions on control, holding and movement of duty-suspended products[44].

In principle, outside of the alcohol, tobacco and energy sectors, EU law allows Member States to introduce and maintain non-harmonised internal taxes and freely establish their modalities. However, such taxes must comply with the Treaty on the Functioning of the European Union (hereinafter, TFEU), in particular with Article 110 thereof, which prohibits internal discriminatory taxation, direct or indirect, on products from other Member States, in excess of that imposed on 'similar domestic products'. The same provision also prevents Member States from imposing on products from other Member States any internal taxation 'of such a nature so as to afford indirect protection to other products'. In other words, if goods are similar (Article 110(1)) or if dissimilar but in competition to each other (Article 110(2)), this provision prohibits Member States from discriminating against imported products by imposing a higher tax on them than on goods of national origin. Therefore in order to determine whether national fat taxes may create a higher tax burden on imported products, one has to determine what constitute what represents "similar products" for the purpose of Article 110(1), and what "other products" for the purposed of Article 110(2). According to settled case law, the interpretation of "similar product" is quite broad as it encompasses products at the same stage of production or marketing that have similar characteristics and meet the same need from the point of

[42] In particular, motor fuels and heating fuels, such as petrol and gasoline, electricity, natural gas, coal and coke.

[43] The structure of the tax means the definition of the product categories, the way in which the excise duty is calculated (e.g. per hl; per degree alcohol; per 1000 pieces, etc.), the scope of possible exemptions, etc.

[44] Directive 2008/118 repealing directive 92/12, OJ 2009 L9/12.

view of consumers[45]. As for the interpretation of "other products", the Court looks at whether the products are in competition with each other. It is only if it so that it will consider whether the domestic products benefit from some form of indirect fiscal protectionism. The notion of competition is quite broad as it includes actual as well as potential competition by requiring that also potential substitutes be considered under the examination[46].

Therefore, Member States are not precluded from introducing fat taxes, but in so doing they must ensure to tax foodstuffs that are similar and foodstuffs that are in competition so as to avoid any claim of discrimination or protectionism.

The Danish and Hungarian governments have notified the European Commission of these taxes under the Directive 98/34/EC procedure.[47] In both cases it was noted that the measure 'had no significant impact on international trade'.[48]

A EU-wide Fat Tax under EU law

If several Member States adopt such taxes, the EU may consider stepping in so as to adopt an EU-wide fat tax. The first obstacle faced by the EU in the establishment of such a fiscal measure would be the issue of competence: to what extent could an EU-wide fat tax be imposed on public health grounds? Both health policies and taxation are the eminent domain of the Member States. Even after the entry into force of the Treaty of Lisbon, the main responsibilities for both policies still lie with the Member States. Indeed, it is generally believed that the EU's scope of competence in the field of public health remains largely unchanged under the TFEU as this document did not introduce any extension of the Union's powers in health and tax matters.[49] Under Article 6 a) TFEU, Article 168 sect. 2, the EU's competence is restricted to a coordinating function, supporting and supplementing the measures adopted by the Member States. However, Article 9 TFEU states that the protection of public health is

[45] See, e.g., Case 45/97 REWE v. HZA Landau 1976 ECR 181, at para 12 ; C-106/84 Commission v Denmark 1986 833 ; C-112/84 Humblot 1985 ECR 1367.

[46] See, e.g., C-86/78 SA des Grandes Distilleries Peureux 1979 ECR 897 ; C-167/05 Commission v Sweden 2008 ECR 2127.

47 Directive 98/34/EC establishes a procedure that imposes an obligation upon EU Member States to notify the Commission and each other of all draft technical regulations concerning products before they are adopted in national law.

48 Communication from the Commission - SG(2011) D/5138 (Notification: 2011/0019/DK of 20 January 2011) and Communication from the Commission - SG(2011) D/51616 (Notification: 2011/0340/HU of 8 July 2011).

49 See e.g. Craig, The Treaty of Lisbon – Law, Politics and Treaty Reform, (OUP, 2010), p. 325; Piris, The Treaty of Lisbon – A Legal and Political Analysis (Cambridge University Press, 2010), pp. 320-321.

one of the basic requirements that the EU has to take into account in the enactment of any of its policy or activities.[50] Thus, for instance, it is by relying on a combining reading of these provisions as well as the legal basis of its internal market that the EU has developed, over time, an effective prevention policy against tobacco consumption. In so doing, the EU provided significant impetus for the Member States that had until then been reluctant to adopt preventive measures at a national level. The long overdue tobacco product advertising and mandatory warning claims were thus initiated by EU legislation.[51] In any event, although the EU has no competence in terms of direct taxation, it is entitled, under Article 113 TFEU, to 'adopt provisions for the harmonisation of legislation concerning … excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment of the internal market and to avoid distortion of competition'.[52] The rationale of EU action is that indirect taxation may create obstacles to the free flow of factors of production within the internal market as well as distortions of competition. Indeed, should only a few countries tax heavily certain goods, consumers would take advantage of price differentials and purchases the goods in question in the Member States not imposing such as higher taxation. However, given the modest impact on the intra-Community trade of unhealthy food products, it seems unlikely today that the EU might validly and credibly step in by relying on Article 113 as such. Even though the trigger for the adoption of harmonised excise duties at EU law is to ensure the free movement of goods and services within the internal market, the pursuit of objectives such as environmental and health protection have already inspired the adoption of harmonised excised duties by the EU. Thus, the EU clearly declared that behind the latest increase of EU excise duty legislation on tobacco there was for the first time the idea to contribute to reducing tobacco consumption by 10% during the next five years[53]. Similarly, on the occasion of the last reform of the system of excise duty for mineral oils the Commission extended the scope of the directive to all energy products including coal, natural gases and electricity and increased the EU minimum rates of taxation[54]. While the main goals pursued by the directive is to

50 Article 9 TFEU.

51 Directive 2001/37 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, O.J. 2001, L 194/26.

52 Article 113 TFEU.

53 Council Directive 2002/10/EC of 12 February 2002 amending Directives 92/79/EEC, 92/80/EEC and 95/59/EC as regards the structure and rates of excise duty applied on manufactured tobacco, Official Journal L 046 , 16/02/2002 P. 0026 - 0028

54 Council directive 2003/96, OJ 2003 L283/51.

ensure a proper functioning of the internal market, these amendments clearly reflect environmental concerns.

In the light of the above, it remains to be seen whether the EU will, once again, assume a central role in the development of an effective prevention policy for nutrition and obesity via a EU tax policy. There are signs that the EU is eager to play such a role[55]. Indeed, the Union has already shown political will to embark on this path by adopting a regulation on nutrition and health claims[56] which forces food companies to substantiate their labelling claims, as well as a regulation on the provision of food information[57], one of whose main goals is to provide help to consumers in making 'healthy' choices. Yet, given the significant differences in obesity prevalence among the EU Member States, to establish a EU-wise fat tax would also face the challenge to determine a viable and effective tax rate valid for the whole European territory[58]. Moreover, the requirement of unanimity required by Article 113 TFEU for the adoption of fiscal measures dealing indirect taxation might represent, once more, a significant obstacle to the adoption of a EU-wide fat tax.

55 For a detailed analysis of EU policies aimed at curbing obesity, see A. Garde, EU Law and Obesity Prevention. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2010.

56 Regulation (EC) No. 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, OJ L 404, 30.12.2006, p. 9.

57 Regulation (EU) No. 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, OJ L 304, 22.11.2011, p. 18.

58 In Europe, the prevalence of obesity (body mass index ≥ 30 kg/m²) in men ranges from 4.0% to 28.3% and in women from 6.2% to 36.5%. It has been observed considerable geographic variation, with prevalence rates in Central, Eastern, and Southern Europe being higher than those in Western and Northern Europe. See Berghöfer A, Pischon T, Reinhold T, Apovian CM, Sharma AM, Willich SN. Obesity prevalence from a European perspective: a systematic review. BMC Public Health 2008;8:200.

Fat taxes under WTO law

The imposition and implementation of taxes that target products that are high in fat may amount to a discrimination against third country products. The WTO's General Agreement on Tariffs and Trade (hereinafter, the GATT) prevents WTO members from applying to imported products internal taxes in excess of those applied to domestic products. In addition, it prohibits internal taxation applied in a way that protects domestic production.

The obligations of the WTO Members in respect of their internal taxes and other internal charges have been established in Article III:2 of the GATT. The provision reads:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

The cited provision imposes two separate legal tests. The first sentence of the article requires the products at hand to be like and that the imported products are taxed in excess of the domestic ones. As stated by the Appellate Body in *Canada –Periodicals*, in case one of those conditions is not met, the Panel should proceed with the examination of Article III:2, second sentence.59 As an example, the compliance of the Danish tax targeting those products that are high in saturated fat60., (hereinafter, the Danish Fat Tax Act) with Article III:2 of the GATT is analysed consecutively for the first and the second sentences of the provision.

Article III:2, first sentence, of the GATT

The test in Article III:2, first sentence, is two-fold: (1) taxed imported and domestic products should be *like products*, and (2) the taxes applied to imported goods shall be *in excess of those* applied to the like domestic products. Notably, the test of the provision does not include the proof of the 'protective

---

59 Canada – Periodicals Appellate Body Report, WT/DS/31/AB/R, 31 July 1997, p. 23.

60 Fedtafgiftsloven, full title: Lov om afgift af mættet fedt i visse fødevarer (Act on a tax on saturated fat in specific food), LOV nr 247 af 30/03/2011 Gældende (Fedtafgiftsloven), published on 31 March 2011. Available at: https://www.retsinformation.dk/Forms/R0710.aspx?id=136314#Not1 .

application' of the tax, and fulfilment of the two of the mentioned conditions would suffice for a violation.61

As specified by the WTO Appellate Body (hereinafter, AB) in *Japan—Alcohol II*, the breadth of the term '*like products*' in GATT Article III:2, first sentence, has to be determined on a case-by-case basis with reference to the context of the provision and the circumstances of the given case. Nevertheless, with respect to the criteria for the determination of product likeness in the relevant provision, it has been proposed to take into account all the relevant evidence, including the criteria elaborated by the Working Party on *Border Tax Adjustments*: i.e., the properties, nature and quality of the products; the end-uses of the products; and consumers' tastes and habits.62 Other criteria taken into account by the WTO adjudicators include the detailed uniform tariff classification of the products63 and the elasticity of substitution.64 The criteria should be applied narrowly to reflect the narrow definition of '*like products*' in the first sentence of Article III:2 of the GATT as compared to other provisions.65

The question arises whether the products affected by the Danish Fat Tax Act could be found '*like*'. According to Article 1 of the Act, the tax is to be paid if the saturated fat content in the food exceeds 2.3% by weight. The products at issue to be compared, therefore, shall be similar products with saturated fat content above and below the 2.3% threshold. Would the sole difference in the fat content make the products '*unlike*'? The physical characteristics of low-fat and high-fat products are similar: it appears too far-reaching to conclude that a difference of 0.1 – 0.2% fat content may be sufficient itself to make products *'unlike'*. It is reasonably noted by some of the commentators, that differences in health consequences may be highly relevant to the determination of consumer preferences.66 However, different health consequences would not automatically make the products unlike. As noticed by the Appellate Body in *EC – Asbestos*, "consumers' reactions to products posing a risk to human health vary considerably depending on the product, and on the consumer. Some dangerous products, such as tobacco, are widely consumed, despite the known health risks. The influence known dangers have on

61 Argentina – Hides and Leather, Panel Report, WT/DS155/R, 16 February 2001, para. 11.137.

62 Border Tax Adjustments, Report of the Working Party adopted on 2 December 1970 (L/3464), para. 18.

63 US – Gasoline, Panel Report, WT/DS2/R, 29 January 1996, para. 6.9.

64 Japan – Alcohol II, Panel Report, WT/DS8/R, WT/DS10/R, WT/DS11/R, 1 November 1996, para. 6.22.

65 Japan – Alcohol II, Appellate Body Report, WT/DS75/AB/R, 17 February 1999, p. 20.

66 Benn McGrady, Trade and Public Health: The WTO, Tobacco, Alcohol and Diet, New York: Cambridge University Press, 2011, p. 93.

consumers' tastes and habits is, therefore, unlikely to be uniform or entirely predictable".67 It seems unlikely that Danish consumers consider products with minor changes in the fat content as significantly different. The question is whether the WTO adjudicators would find similar taxable products differing in fat content 'like'.

There is no unequivocal WTO jurisprudence available for the interpretation of this matter. One could try to find certain fruitful insights from the *US – Malt Beverages* case, where the GATT Panel analysed the likeness of low alcohol beer and high alcohol beer and found that those need not be considered as '*like products*'. However, those arguments could not be relevant for the case of fat taxes. To begin with, in *US – Malt Beverages,* the Panel examined the term likeness under Article III:4, and not under Article III:2, first sentence. It has been established by further WTO case law, that the concept of likeness in Article III:4 should be interpreted differently than in Article III:2, first sentence as embracing all the dimensions of likeness from Article III:2.68 Secondly, as discussed above, the Article III:2, first sentence test does not include any application of the tax 'so as to afford protection' to domestic products. In addition, the 'aim and effects' test, employed in *US – Malt Beverages*, was completely reversed by the Appellate Body in *Japan – Alcohol II* and *EC – Bananas III*, and thus seems legally obsolete.69

Based on the above, it seems highly possible that similar products with minor differences in fat content may be considered as '*like products*' by a WTO panel. However, even if so, this would not mean that the Danish fat tax is in breach of the WTO rules. For the tax to go contrary to the national treatment principles, the second condition of GATT Article III:2, first sentence should be met: the taxes applied to imported goods shall be *in excess of those* applied to the like domestic products.

The provision requires that imported products are not taxed in excess of the like domestic products, i.e. it demands at least identical or better tax treatment to be accorded to the imported goods. As crystallized in *Argentina – Hides and Leather*, panels compare the actual, not nominal tax burdens on the

67 EC – Asbestos, Appellate Body Report, WT/DS135/AB/R, 5 April 2001, fn. 103.

68 Id., para. 94 et seq.

69 The 'aim and effects' test proposed that the legitimacy of internal taxes must be determined primarily in light of their purpose and market effects. The Panel would determine if the tax has a bona fide regulatory purpose and whether effect of the tax on terms of competition does not afford a protective benefits in favour of domestic products. Some of the authors propose that the similar approach has been nonetheless further adopted by the Appellate Body in EC – Asbestos (see, e.g. Matthias Oesch, 'Commentary on EC – Asbestos', International Trade Law Reports VI, 2003, 441, 455). It should be noted that the Report of the Appellate Body in EC – Asbestos dealt with GATT Article III:4; thus, the findings could not be transposed on taxes.

products.70 The provision therefore embraces both *de jure* and *de facto* discrimination. Thus, even taxes applied across the board may in fact be inconsistent with WTO rules. In *Korea – Alcohol*, the Appellate Body established a violation of GATT Art. III:2, first sentence, based on the fact that "the tax operates in such a way that the lower tax brackets cover almost exclusively domestic production, whereas the higher tax brackets embrace almost exclusively imported products."71 In other words, the assessment of the effects of taxation should be based on the comparison in aggregate of all domestic like products with the imported ones. This approach has been widely supported by scholars and was entitled as "asymmetric impact test".72 Moreover, it has been widely used in GATT/WTO jurisprudence, starting with the GATT *Spanish Unroasted Coffee* case.73

For the Danish fat tax all that demonstrates, that it may be found WTO incompatible if the effective burden of the tax would lie predominantly on imported goods, while the majority of domestically produced like products contain saturated fat at a level lower than 2.3% and are thus exempted from the tax. A potential failure of the Danish government to meet this requirement appears difficult to be proven. The tax is applied to the widest list of food products of 6 large subgroups, including the widely worded "animal fat" and "edible oils". Moreover, Article 1 of the Danish Fat Tax Act captures any "other food which, based on the overall evaluation of the nature of the food, its use and the way it is marketed, can be considered to be a substitute for or imitation of" the goods, covered by the tax. Thus, the design of the measure is demonstratively origin neutral and does not seem to effectively tax imported products in excess as compared to the like domestic product. The most viable inconsistency of the provision could be established in case it was proven that domestic products generally tend to contain less than 2.3% of saturated fat. In such an occasion, the operation of a tax predominantly in respect of foreign like products could amount to an GATT Article III:2, first sentence, violation.

Article III:2, second sentence, of the GATT

As discussed above, in case an inconsistency with the first sentence of the provision is not established, the analysis shall proceed with the examination of the second sentence. The second sentence of GATT

70 Argentina – Hides and Leather, Panel Report, WT/DS155/R, 16 February 2001 , para. 11.183.

71 Korea – Alcohol, Appellate Body, WT/DS75/AB/R, WT/DS84/AB/R, 17 February 1999, para. 150.

72 Lothar Ehring 'De Facto Discrimination in World Trade Law: National and Most-Favoured Nation Treatment – or Equal Treatment?', Journal of World trade (JWT), Vol. 36(5), 2002, p. 924.

73 Spain—Unroasted Coffee, GATT Panel Report, BISD 28S/10211, June 1981, paras. 4.5, 4.9 & 4.10.

Article III:2 considered in light of the Interpretative note to Article III:274 requires (1) directly competitive and substitutable products (2) to be similarly taxed. Moreover, due to explicit reference to Article III:1, the provision (3) prohibits measures applied so as to afford protection.

As noted by the AB in *Korea – Alcohol*, the category of directly competitive or substitutable products could not be interpreted narrowly and is broader than 'like products'.75 In addition to the criteria used for the determination of likeness, the AB in *Japan – Alcohol II* proposed that elasticity of substitution, performed through cross-price elasticity studies, should also be taken into account.76 According to the Panel in *Korea – Alcohol*, channels of distribution are considered relevant for the competitive products determination.77 There is no need for the panel to compare the products item by item, an analysis of the relevant groups of products would suffice.78

The concept of directly competitive or substitutable goods could provide an additional angle of the examination of the Danish Fat Tax Act to substitutable products with a different fat content. One merely needs to mention, as an example, the difference in taxation of whole chicken and chicken tenderloin prescribed by the Act. In particular, whole chicken is taxed (as it amounts to 3.4% of the saturated fat content overall), while the inner fillet of chicken is exempted from taxation, as it contains only 1% of saturated fat.79 It is assumed that whole chicken and chicken fillet could be regarded as directly competitive or substitutable products. This argument could be supported by cross-elasticity studies of the Danish consumption patterns. Though cross-elasticity studies could not be decisive for the determination of products as directly competitive or substitutable, those studies are highly relevant for those goals.80 In addition, it is without doubt that both products (whole chicken and chicken fillet) share the same distribution channels and are offered for sale to consumers on the same product shelves. It appears, therefore, not unlikely that chicken fillets and a whole chicken be found to be

---

74 The interpretative note to Article III:2 reads as follows: "A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed".

75 Korea – Alcohol, Appellate Body Report,WT/DS75/AB/R, WT/DS84/AB/R, 17 February 1999, para. 114.

76 Japan – Alcohol II, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1 November 1996, p. 22.

77 Korea – Alcohol, Panel Report, K WT/DS75/R, WT/DS84/R, 17 September 1998, para. 10.43.

78 Korea – Alcohol Appellate Body Report,WT/DS75/AB/R, WT/DS84/AB/R, 17 February 1999, para. 142.

79 See examples in table 1 of the notes to the proposed Act, available at: https://www.retsinformation.dk/Forms/R0710.aspx?id=135445.

80 Id., para. 114.

directly competitive and substitutable goods. Products are deemed to be not similarly taxed if the tax burden on the imported products is heavier than on competitive domestic products with the differentiation in taxation overcoming *de minimis* amount.81 The *de minimis* margin could be determined on a case-by-case basis only.82

However, in case of the Danish fat taxation, it is still unlikely that a WTO panel would find an inconsistency with GATT Article III:2, second sentence. For a violation to be present, the measure should be applied "so as to afford protection" to domestic products. The inquiry shall be based on the design, architecture and structure of the measure, its application and underlying criteria.83 Moreover, statutory objectives would be highly relevant for the compliance assessment under this element of the test.84 The healthcare objectives of the fat tax would be surely taken into account by the adjudicators. Furthermore, the Danish Fat Tax Act seems to set objective criteria for the inclusion or exclusion of products in the taxable list. Similarly to *de facto* discrimination discussed above, the violation may be established if the lower tax brackets (or tax exemption) covered almost exclusively domestic products, and the higher brackets almost exclusively imported products. Otherwise, it appears unlikely for the fat tax to be found applied protectively. Thus, for the example of the Danish tax scheme, it seems that an inconsistency with GATT Article III:2, second sentence, could not be established.

Article X(3) of the GATT

An additional WTO compliance issue could derive from the administration and application of the fat tax scheme. Article X(3) of the GATT demands that trade laws and regulations are administered in a uniform, impartial and reasonable manner. The provision refers to the 'administration of trade laws', i.e. "putting into practical effect" or "applying" of those measures. Thus the provision differentiates between the text of the trade regulation and its application.85 The term has been interpreted by the WTO Dispute Settlement Body very broadly: administration of trade regulations would include very different matters, from treatment of parties as 'related' for the customs purposes to the treatment of the binding tariff information by the customs authorities.86 Nevertheless, the Panel in *US – Hot-Rolled*

81 Japan—Alcohol II, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1 November 1996, p. 26.

82 Id., p. 27.

83 Chile – Alcohol, Appellate Body Report, WT/DS/87/AB/R, WT/DS110/AB/R, para. 62.

84 Id., paras. 62, 71.

85 EC – Selected Customs Matters, Appellate Body Report WT/DS315/AB/R, 11 December 2006, para. 224.

86 EC – Selected Customs Matters, Panel Report, WT/DS315/R, 16 June 2006, paras. 7.317, 7. 410.

Steel determined that the term '*administration*' could not be confused with the application of the measure. Administration would reflect the "pattern of decision making", a systemic approach taken by the authorities, and not the application of the measure in the specific case.87

In respect of the administration of the Danish fat tax scheme, problems could arise in respect of the rules on registration, prescribed by the Act. Persons, liable to pay financial levies, are requested to register with the Danish Tax and Customs Administration. The administrative procedure of the registration is not set in the Act and is likely to be regulated separately. Article 10 of the Act requests the registration to be completed prior to the start of the taxable activities. However, needless to say, restrictions on registration or systemic undue delays in the registration of the entities may in effect hinder the importation of the taxable products. Thus, particular attention should be paid to the manner in which the Act is administered, so as to avoid a violation of Article X(3) of the GATT.

WTO rules on subsidies

Another potential dimension of concern that could also emerge in case of fat taxes could be related to the WTO rules on subsidies. Clearly, the Danish measure at hand does not apply to all products containing fat: the Act determines that the tax is levied on the product only if the saturated fat content in the food exceeds 2.3% by weight. In a nutshell, domestic producers of covered commodities with less than 2.3% saturated fat are not taxed. The question arises if under certain circumstances such exemption could violate WTO rules. The new tax regime could be interpreted as constituting a subsidy to producers of low fat commodities

In appears that a subsidies disciplines breach could hardly be established in the case at hand. On the one hand, the WTO Agreement of Safeguards and Countervailing Measures (SCM Agreement) does not define a subsidy as only a direct transfer of funds. Article 1.1 of the SCM Agreement enlists various kinds of subsidies, including in para. (a)(1)(ii) government revenue that is otherwise foregone or not collected (e.g., fiscal incentives such as tax credits). This provision clearly includes the flexibilities of the government in the collection of public revenue through the course of the governmental fiscal policy. For the mentioned provision to be invoked, two elements must be met: (a) public revenue should be forgone or not collected and (b) the same public revenue was otherwise due. The starting point of the analysis tries to understand if the exclusion of the low fat commodities producers meets both of these elements.

87 US – Hot-Rolled Steel, Panel Report, WT/DS184/R, 28 February 2001, para. 7.268.

According to the Appellate Body in *US – FSC*, for the financial contribution under Article 1.1(a)(1)(ii) of the SCM Agreement to be established, one should use a 'normative benchmark' that demonstrates the revenue normally due according to the general domestic tax law of the Member.88 Without doubt, such benchmark could be only determined on a case-by-case basis. The Appellate Body requested the examination under Article 1.1(a)(1)(ii) to be sufficiently flexible to suit the complexities of the taxation rules of the Members.89 This requirement could be illustrated on one of the examples from the WTO jurisprudence. In *Korea – Vessels*, the EC stated that one of the Korean companies, absent of the disputed legal provisions, would have been requested to pay more taxes according to the general Korean company tax law. The Panel rejected the argument on the factual ground and found no financial contribution in the case at hand. The Panel stated that in the case circumstances there was no 'taxable event' in the behaviour of the Korean company under the general normative benchmark, thus, not financial contribution was granted.90

The same logic could be applied to the case of the fat tax. The Danish legislator should be given the regulatory freedom to determine taxable events, what would embrace the freedom to determine the 'normative benchmark' for the taxation of fat food. Thus, it seems that the fat tax could not be considered as a form of financial contribution to the domestic producers of low fat products as the contained fat threshold itself creates the 'normative benchmark' in the given circumstances. A different decision appears to overly restrict the regulatory freedom of countries in their fiscal policies. However, even if, arguing that the fat tax was found to constitute a financial contribution and a benefit to low fat commodities producers under Article 1 of the SCM Agreement, the existence of such a benefit would not in itself amount to a violation of WTO rules. The SCM Agreement does not prohibit subsidies as such. For the subsidy to be found inconsistent, the producers affected by the tax would either have to demonstrate the contingency of the tax upon export performance of the low fat goods producers (*de facto* contingency covered). If no export contingency is established, the producers would have to demonstrate adverse effects to the interests of other WTO Members triggered by the fat tax in accordance with Article 5 of the SCM Agreement, which contains a very high evidential standard. Finally, all of the taxed products are agricultural goods, thus specific rules on the domestic support of low fat commodities producers may apply. The WTO Agreement on Agriculture provides the Members with a wider range of flexibilities in respect of subsidies to domestic farmers mainly

---

88 US – FSC, Appellate Body Report, WT/DS108/AB/R, 24 February 2000, para. 90.

89 Id., fn. 66.

90 Korea – Vessels, Panel Report, WT/DS273/R, 7 March 2005, para. 7. 507 et seq.

restricting only the aggregate support granted to the farmers by the government. Based on all that one could conclude that the WTO rules on subsidies are unlikely to be violated by a fat tax scheme like the Danish measure. However, any eventual company-specific exemptions from the fat tax regime, if introduced later, might have significant implications for the compliance with the WTO regime on subsidies.

Article XX(b) of the GATT

In case a violation of any GATT provisions is determined, the measure might be justified under the general exceptions to the GATT. The relevant provision would be Article XX(b) of the GATT, allowing measures necessary to protect human, animal or plant life or health. The test of Article XX(b) is not easy to meet: it should be demonstrated that the measure is necessary (i.e., there are no less trade restrictive alternatives available), that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or disguised restriction on international trade. However, most notable, for a fat tax to be justified under this exception, it should be demonstrated that the measure significantly contributes to the objectives of human health protection.

There is no doubt, that the excessive consumption of fat food may have negative health implications; however, would the measure at hand be able to reverse the negative impact of fat food on human health? Products containing high levels of saturated fat are not unhealthy per se . Even harmful foods may not necessarily be damaging to health, depending on how much of them are consumed. The tax as a price-based mechanism intends to alter the consumption patterns of food containing high levels of fat. However, there is no definitive answer whether such a measure would have any significant contribution to the goal of human health protection. The availability of the GATT Article XX(b) exception could trigger an intense debate before the WTO Panel should a dispute on a fat tax scheme be initiated.

Conclusions on WTO compatibility

The section above analyses the WTO compatibility of the Danish tax on saturated fat in certain food. On its face, the measure appears non-discriminatory and applied across the board and seems, therefore, WTO compatible. However, in certain circumstances issues of WTO compliance could arise. As discussed in more detail above, the similar exported and domestic taxable products differing in fat content may be found 'like' by the WTO adjudicators. This would make the fat tax subject to the rules of Article III: 2, first sentence, of the GATT. Should the effective burden of the tax lie predominantly on imported goods, while the majority of domestically produced like products contain saturated fat at a level lower than 2.3%, a violation of GATT Article III: 2, first sentence, could be established. The registration system developed by the Act, if applied in a restrictive manner, could violate Article X(3) of the GATT. Though violations of GATT Article III: 2, second sentence, and the WTO rules on subsidies do not appear present in the case at hand, those aspects could rise in the further implementation of the fat tax scheme. Finally, it is uncertain whether the Article XX(b) GATT exception could be invoked if a violation was still determined. Products with high levels of saturated fat are not necessarily damaging to health if not consumed excessively, thus the availability of the exception in such circumstances remains an open question.

EU Member States willing to introduce a fat tax scheme must carry out a thorough and critical legal review of its measures to ensure that they are in compliance with its obligations under the GATT, in particular that they do not give cause to trade discrimination vis-à-vis products imported from third countries. This certainly also applies to the EU if it would consider introducing such a EU-wide fiscal scheme.

VII. Conclusion

It has long been evident to public health experts that dietary factors have a major impact on mortality and morbidity. Tackling obesity is now becoming an important challenge for regulators as well. This seems especially true after global leaders reached a consensus in the UN General Assembly on concrete actions to tackle non-communicable diseases (NCDs) via the adoption of the Political Declaration on the Prevention and Control of NCDs on 19 September 2011, eleven years after the adoption of the Global Strategy for the Prevention and Control of NCDs by the World Health Assembly. NCDs, including cancer, heart disease, diabetes and lung disease, are responsible for 63% of death every year, and as such are considered to be the leading cause of disease and death worldwide. They share four major causative risk factors (so called 'big four'): tobacco use, harmful use of alcohol, unhealthy diet and lack of physical activity. As the Political Declaration on the Prevention and Control of NCDs makes clear, the consequences of these risk factors go far beyond health consequences and include serious social and economic dimensions. Despite a general recognition of the global burden of NCDs and the urgent need for greater measures to prevent and control these diseases, the declaration lacks specific targets, including an overall goal of reducing preventable death. However, states committed to 'advance in the implementation of … interventions in order to reduce the impact of the NCD risk factors … through the implementation of relevant international agreements and strategies, and education, legislative, regulatory and *fiscal* measures, without prejudice to the right of the sovereign

Nations to determine and establish their taxation policies' (*emphasis added*).[91] In particular, they commit to 'promote the development and initiate the implementation, as appropriate, of cost-effective interventions to reduce salt, sugar and saturated fats, and eliminate industrially produced trans-fat in goods, including through discouraging the production and marketing of foods that contribute to unhealthy diets'.[92] Therefore, although fat taxes are not expressly mentioned in the text, the declaration clearly includes these measures among those that states may adopt in order to prevent and control unhealthy diets. Yet, as demonstrated by our analysis, the road towards the adoption of fat taxes is not without legal and policy difficulties. Legal questions aside, one question is whether these product-specific taxes are really addressing the obesity problem by penalising certain 'unhealthy' products or if they are just new instruments to generate fiscal revenues (or maybe, even, to protect certain domestic constituencies), in particular in view of the public deficit problems that many EU Member States are currently facing in the context of the economic crisis. Questions of moral and distributive justice are also raised by the introduction of fat taxes. Besides their regressive characters, these policy instruments may legitimise an emerging fat-thin dichotomy within which thin is good and fat is bad[93]. This issue, which remains largely unexplored, raises the question whether anti-obesity measures, such as fat taxes, may breach 'fat rights', i.e. "logics of personhood that link together identity, personal traits, moral responsibility, governmental response, and legal protections"[94]. Finally, there is no consensus in the scientific community on which foods to target. The WHO itself warns that there are question marks over the effectiveness of taxes limited to a narrow range of food products[95]. Therefore, before committing to the introduction of a fat tax, policy-makers need to consider their objective, the effect of the tax in combination with other measures, and the impact on businesses as well their legality. Indeed, as argued in relation to all form of excise duties, the relative advantages and disadvantages of these

---

91 Para 43.

92 Para 43, let. (g).

93 J. E. Oliver, Fat Politics : The Real Story Behind America's Obesity Epidemic , Oxford University Press, 2006, 76.

94 See, Anna Kirkland, Fat Rights : Dilemmas of Difference and Personhood, New York : New York University Press, 2008, p. 3. See also, e.g., Eric Olivier, Fat Politics : The Real Story Behind America's Obesity Epidemic, New York : Oxford University Press, 2006) and Paul Campos, The Obesity Myth : Why America's Obsession with Weight is Hazardous to your Health, New York : Gotham Books, 2004.

95 Ed Holt, Hungary to introduce broad range of fat taxes, The Lancet, Vol 378 August 27, 2011.

schemes should be evaluated carefully in the light of other methods of taxation and of economic and social policies in general[96]. In particular, the EU should consider which role, if any, fat taxes may play within the forthcoming reform of its Strategy on Nutrition, Overweight and obesity related health issue (2007-2013). The privileged venue to host these discussions seems to be offered by the High Level Group on Nutrition and Physical Activity that might be entrusted to monitor the recent experiences undertaken by member states such as Denmark and Hungary[97], and more recently by France[98].

Although fat taxes are not a panacea to solve the obesity epidemic, the tobacco experience suggests that the use of fiscal policies to affect the price of products may be effective but only when it becomes part of an overall strategy based on a mix of policy tools. Unfortunately neither the EU nor the Member States have shown enough political will and creativity so as to develop a credible EU's obesity prevention strategy. Therefore the debate about 'fat tax' might offer a tremendous opportunity for the EU to re-think its own approach, largely limited to self- and co-regulation initiatives, vis-à-vis the challenges raised by obesity, thus reconsidering the potential of the regulatory tools at its disposal.

96 B.S. Frey, Excise Taxes : Economics, Politics and Psychology, in S. Cnossen, Theory and Practice of Excise Taxation : Smoking, Drinking, Gambling, Polluting, and Driving, Oxford University Press, 2005.

97 This group seeks since 2005 European solutions to obesity-related health issues by : (i) offering an overview of all government policies on nutrition and physical activity ; (ii) helping governments share policy ideas and practice (e.g. redesigning the physical environment to encourage cycling, walking and other forms of daily activity, or reformulating food products to contain less salt, fats or sugars) ; improving liaison between governments and the EU Platform for diet, physical activity and health, so relevant public-private partnerships can be quickly identified and agreed on.

98 Projet de Loi des Finances 2012, Article 46, available at http://www.assemblee-nationale.fr/13/projets/pl3775.asp