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# Smoke-free environments: the missing link in EU anti-tobacco policy

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## Executive Summary

- The European Union pursues an ambitious anti-tobacco policy, but its action regarding smoke-free environments limits itself to recommendations addressed to member states.
- The recent decision by Austria to scrap a total ban on smoking in bars and restaurants illustrates the diversity of rules related to smoke-free environments in the EU.
- The absence of any binding measures can be explained by the limited EU competence in public health and the necessity for the Union to tie measures enacted in this area to the completion of the internal market.
- This demonstrates the limits of the current EU competence framework and the restrictions faced by the EU when pursuing its public health agenda.
- The adoption of binding measures on smoke-free environments on the EU level would hence require a change in the Treaty, or in the interpretation of the Court thereof.

The new ruling coalition in Austria recently took the controversial step to overturn a total ban on smoking in bars and restaurant, decided by the previous government and supposed to enter into force on 1 May 2018. Smoking rooms will therefore remain allowed in venues larger than 50 m², while owners of smaller venues will retain the possibility to authorise smoking in their premises (Smoke Free Partnership). This decision was taken amidst a wave of discontent. A petition against this "unprecedented rollback of protection against passive smoking in the European Union" (New Europe 2018) gathered more than 500,000 signatures in Austria.

In 2002, according to conservative estimates, 19,000 non-smokers died due to exposure to cigarette smoke (European Commission 2013: 1). While it can be hoped that this death toll has decreased, protection against second-hand smoking, and smoking in general, remains a public health priority. Recent figures show that many Europeans are actually still exposed to passive smoking. According to a recent Eurobarometer survey, a fifth of the respondents encountered smoking the last time they visited a bar. This already high percentage comes with huge disparities: 87 per cent in Greece, around three quarters in Croatia and the Czech Republic and only 2 per cent in Sweden (European Commission 2017: 11-12). These differences can be explained by the absence of any binding rules on the European Union (EU) level on smoke-free environments, such as in bars and restaurants, workplaces or public transports.

This policy brief critically discusses the current state of EU legislation on the matter and discusses potential future developments.

### The limits of EU policy on smoke-free environments

The European Union increasingly regulates lifestyle risks, such as tobacco, alcohol or unhealthy diets. The EU health programme 2014-2020 has as an objective "to promote health, prevent diseases, and foster supportive environments for healthy lifestyles (…) by addressing in particular the key lifestyle related risk

factors with a focus on the Union added value" (art. 3(1), Regulation 282/2014).

This policy is particularly ambitious in the case of tobacco control. The EU, like all its member states, is a party to the World Health Organisation (WHO) Framework Convention on Tobacco Control (FCTC), which aims at raising the level of protection from tobacco consumption and exposure to tobacco smoke worldwide (art. 3 FCTC).

The Union has adopted numerous binding measures designed to fight tobacco consumption, such as rules on the packaging of tobacco products, the prohibition of certain products (tobacco for oral use, products with a characterising flavour) and a ban on cross-border tobacco advertising and sponsorship (see Directive 2003/33/EC and Directive 2014/40/EU).

This contrasts with the relatively hands-off approach it has followed in relation to smoke-free environments. The only instrument currently in force is the Council Recommendation of 30 November 2009 on smoke-free environments (2009/C 296/02), a type of Union legal act without any binding force (art. 288 TFEU). This text recommends that member states "provide effective protection from exposure to tobacco smoke in indoor workplaces, indoor public places, public transport and, as appropriate, other public places as stipulated by Article 8 of the WHO Framework Convention on Tobacco Control (FCTC)".

The implementation report of this recommendation draws a nuanced picture (European Commission 2013). Protection from second-hand smoke considerably improved in the European Union and good progress has been made in transposing the recommendation. However, the report still finds great differences in the extent and scope of national measures (ibid.: 18), and, as outlined above, exposure to cigarette smoke still varies greatly from one member state to the other.

Nearly all countries have adopted rules on smoking in public places, but these measures range from total bans, bans with the possibility of separate enclosed smoking rooms, to partial bans without the designation of smoking zones (ibid.: 4, Smoke Free Partnership). Furthermore, exposure to second-hand smoking does not only result from divergence in laws but also from their enforcement, which has been challenging in some countries (ibid.: 5-6).

**The EU's constrained competence in public health**

In contrast to the vast body of binding rules existing on other aspects of tobacco consumption, none have been adopted in relation to smoke-free environments. This may be explained by the Union's general lack of competence to act in a more compelling fashion paired to member states' reticence to act at the EU level.

Indeed, under its limited competence to protect and improve human health, the EU can only "carry out actions to support, coordinate or supplement the actions of the member states" (art. 6 TFEU), "excluding any harmonisation of the laws and regulations of the Member States" (art. 168(5) TFEU).

Yet, the Union enjoys broader powers in relation to the internal market, particularly through article 114 TFEU, which allows it to harmonise national provisions "which have as their object the establishment and functioning of the internal market" (art. 114(1) TFEU). Given that the consumption of tobacco is an economic activity, it can be covered by the internal market competence of the Union. As the European Court of Justice expressed in the landmark *Tobacco Advertising* judgement, provided that a measure serves the objective contained in article 114 TFEU, the fact that public health is a decisive factor in the choice of this measure cannot prevent its adoption (Case C-376/98, para. 88).

This provides the EU with a powerful indirect competence to legislate on public health, including tobacco, explaining the existing legislation in this field. However, as is also clear from the Court's case law, to be lawfully adopted under article 114 TFEU, EU harmonisation measures must remove obstacles to freedom of movement or appreciable distortions of competition (Tobacco Advertising, para. 84, 95, 108). This means that any such measure designed to address the public health dimension of tobacco consumption must necessarily be tied to the achievement of the internal market. This, in turn, can explain the gaps that can be found in the current EU anti-tobacco policy.

If one considers packaging: having a common set of rules on, for instance, the size and composition of the health warnings to be affixed to tobacco products

undeniably contributes to a smoother circulation of the same products. After harmonisation, tobacco manufacturers are left to comply with one single body of regulation, instead of potentially 28, which helps them to sell their products on the different national markets. Here, it is thus possible to fix a common standard that pursues a health purpose while fulfilling the necessary economic criteria.

However, the regulation of advertising offers a good illustration of the limits posed by this approach. In the aforementioned *Tobacco Advertising* judgement, where the Directive at hand included different prohibitions of the advertising of tobacco products, the Court made a clear distinction between different types of measures and their validity under article 114 TFEU (para. 97-100). On the one hand, prohibiting advertising in press items would fall squarely under this article. Indeed, and following the logic developed in the case of packaging, if all magazines or newspapers have to comply with the same rule, they can circulate more easily between different member states. On the other hand, prohibiting other types of advertising, such as posters or advertising spots in cinemas, would "in no way" help to facilitate trade in these products and could not be adopted under article 114. Billboards or cinemas, once built, do not move, hence prohibiting certain types of advertising on these supports cannot be considering as removing obstacles to their trade. Furthermore, and as pointed by the Court (para. 108-114), the differences in advertising regulation between member states could not be considered as appreciable distortions of competition.

This logic explains why an EU-wide ban on smoking in bars and restaurants would currently not be feasible. It would not help tobacco products entering the different EU markets and it is hard to see the current differences in national regulations as appreciable distortions of competition. In the absence of a convincing internal market rationale for smoking bans, the EU is thus left to rely on its direct legal basis which excludes harmonising legislation. Arguably, as advanced by the European Commission in its 2007 Green Paper, an action on the specific issue of workplaces could be envisaged (European Commission 2007: 18). The EU is indeed granted with harmonisation powers in the field of workers' health and safety (art. 153 (2)(b) TFEU). But this leaves out all the other public places that could be concerned.

**The shortcomings of the current competence framework**

The current competence framework is unsatisfactory from a constitutional and a public health point of view for at least three reasons.

First, it is deceptive (Garben 2014: especially 24-26). The classification of public health as a complementary competence, at odds with legislative practice, appears as no more than window-dressing. As we have seen, this classification has not prevented the EU from adopting far-reaching measures and progressively replacing member states' policy in certain areas, such as tobacco.

Second, conducting a policy that has as its ultimate purpose the eradication of tobacco consumption with a competence aiming at facilitating cross-border economic activity makes no conceptual sense. This sometimes leads the EU legislator to act beyond its powers, a situation that the Court of Justice often fails to acknowledge (see Wyatt 2009, Weatherill 2011).

Third, and perhaps most importantly, the EU legislator finds itself unduly restricted (see more generally Garben 2014: 24). Its actions do not depend on the importance of the health concern at stake but on the link that can be found with free movement. Is it that, from a public health standpoint, the prohibition of tobacco advertising on TV (contained in Directive 2010/13/EU) is more important than in cinemas? Probably not. But the former removes obstacles to trade (see *Tobacco Advertising*, para. 98) while the latter does not.

In the case of smoke-free environments, a number of arguments could yet be found to support stricter rules at the EU level. One would be that passive smoking kills people who made the choice not to smoke, which is particularly unjust. Another would be that, in a Union which promotes the free movement of persons, it is quite regrettable that a basic protection against second-hand smoking is not provided evenly. More generally, whole parts of lifestyle risks policies cannot easily be pursued at the Union level because of their limited contribution to cross-border trade or undistorted competition: age limits on the sales of tobacco or alcohol, restrictions on vending machines, prohibition of static advertising, etc.

One may of course wonder if the EU should meddle at all with national choices in this area, which are the expression of local preferences. Austrians, and others, may want to retain their autonomy in deciding over these socio-cultural issues. However, considering that the EU and its member states have already made the choice to act at the Union level in a range of public health matters, including tobacco, it can be regretted that some meaningful actions are taken out from the political debate due to the constraints set by the Treaties. Addressing those would also be a matter of coherence and effectiveness of EU action.

**Conclusion**

European citizens do not enjoy an even protection against exposure to tobacco smoke throughout the Union, which leads to harmful consequences. These could probably be reduced if the EU adopted stricter rules on smoke-free environments, a policy that is not available to the EU legislator under the current competence framework.

The Union could of course continue to take incentive measures designed at diminishing the exposure to second-hand smoking, but the adoption of binding measures in this matter would require a change in the Treaty, or in the interpretation of the Court thereof. The current context does certainly not favour any Treaty reform, especially aimed at granting further powers to the Union. The answer could come from an evolution in the Court's case-law: if the principles set out in the *Tobacco Advertising* judgement and outlined above still hold, it is true that they have been somewhat loosely applied by the Court in more recent cases (see Weatherill 2011, Delhomme 2017).

## Further Reading


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## About the Author


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