Lobbying, transparency and trust: power imbalances and the failure to implement Europe's Beating Cancer Plan

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Summary

In the Prevention Pillar of Europe's Beating Cancer Plan (EBCP), the European Commission made a series of commitments to promote better health for all, including proposals for new legislation on food and alcohol labelling. However, the implementation of these commitments has been paralysed. In this Viewpoint, we argue that this paralysis stems, in part at least, from insufficient incorporation of the principles of transparency and openness, which promote the accountability of policy actors through citizens' participation in the legislative process. This has led to a twofold problem: 1) the misplaced belief in the contribution that self-regulation can make to the promotion of healthier environments; and 2) the failure to adopt effective legally binding measures to regulate the commercial determinants of health, as the failure to publish the suite of legislative proposals promised in the EBCP epitomises.

Keywords: Transparency; Lobbying; Trust; Non-communicable diseases (NCDs); European Union (EU); Power imbalances; Commercial determinants of health

Introduction

In recent years, the prevention of non-communicable diseases (NCDs) has been a recurring feature of EU policy. Nevertheless, the prevalence of NCDs continues to rise. It is estimated that over 91% of deaths and more than 87% of DALYs in the EU in 2019 resulted from NCDs, including cardiovascular diseases, diabetes, chronic respiratory diseases and cancers.[1] The economic and health costs of NCDs are high and expected to increase considering the ageing population, thus questioning the sustainability of health systems.

In the Prevention Pillar ('Saving lives through sustainable cancer prevention') of Europe's Beating Cancer Plan (EBCP), the European Commission made a series of commitments to prevent NCDs, including proposals for new legislation on food and alcohol labelling. However, no such proposal has been published to date, and the legislative process is at a standstill. We argue that the principles of transparency and openness, which contribute to better accountability of policy actors whilst promoting citizens' participation in the legislative process, have not been effectively implemented in EU health policy.[2] This has led to a twofold problem: (1) the misplaced belief in the contribution that self-regulation can make to the promotion of healthier environments; and (2) the failure to adopt effective legally binding measures to regulate the commercial determinants of health, as the failure to publish the suite of legislative proposals promised in the EBCP epitomises.

After briefly reviewing the development of EU NCD prevention policy, by focusing on recent lessons on front-of-pack nutrition labelling, we reflect on how the EU could increase transparency and address the power imbalances that have paralysed the implementation of the legislative proposals it has committed to in the Prevention Pillar of the EBCP and thereby promote better health for all.

A brief overview of EU NCD prevention policy

The EU's recognition of the threat posed by NCDs is relatively recent. Some measures were adopted in the early days of the European Community, including food labelling laws adopted between the late 1970s and early 1990s, which required ingredients to be listed on most pre-packaged food and regulated how nutrition information should appear on food labels. However, these laws were by-products of the internal market rather than a systematic attempt to address NCD risk factors. The introduction of a chapter on public health in the EU Treaties in the 1990s, together with the growing rates of NCDs and the increasing attention to the main risk factors (not least the consumption of tobacco, alcohol and unhealthy diets) marked a turning point in the EU's approach to NCD prevention.[3]

In 2003, the Commission proposed an EU regulation on nutrition and health claims made on foods, which gave rise to vivid opposition from major multinational

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food companies. Three years later, the Food Claims Regulation (Regulation 1924/2006) was nonetheless adopted and remains a cornerstone of EU nutrition policy. There were good reasons to be hopeful at that time: the General Food Safety Regulation establishing the European Food Safety Authority (Regulation 178/2002) had just been adopted too. The EU was also preparing its Nutrition and Health White Paper, initiating the regulation of the provision of food information to consumers (Regulation 1169/2011) and the marketing of food and alcohol to children (Directive 2007/65, as amended by Directive 2018/1808). Furthermore, the EU had already adopted extensive tobacco-control legislation, most notably the Tobacco Advertising Directive (Directive 2003/33) and the first Tobacco Products Directive (Directive 2011/37), followed by a second, more ambitious directive (Directive 2014/40).

After 2014, progress stalled. Even though the EU has experimented with stakeholder 'platforms' and 'forums',[4] published various 'action plans' and 'strategies', and established 'initiatives' and 'joint actions', EU NCD prevention policy has relied nearly exclusively in the past decade on self-regulation, public-private partnerships, and the exchange of 'best practice' rather than the adoption of legally binding EU-wide rules.[5]

The EBPC, alongside the Farm-to-Fork Strategy, promised a change of direction with the announcement of a suite of forthcoming legislative proposals intended to promote healthier environments throughout the EU. Beyond leading the revision of existing EU laws (e.g. on tobacco and alcohol taxation), the Commission indicated that it would propose new legislation mandating front-of-pack nutrition labelling and alcohol health warnings across the EU.

Well-designed legal instruments can facilitate healthier choices for all—for example, through the imposition of health warnings on alcohol or front-of-pack nutrition labels on food; by mandating tobacco plain packaging; by restricting the marketing of alcohol and unhealthy food; or measures reducing the availability or increasing the price of unhealthy commodities. These measures are underpinned by an extensive body of scientific evidence[6] and are recommended by the WHO.[7] In particular, the plans to adopt front-of-pack nutrition labelling and alcohol health warnings,[8] both central to the Prevention Pillar of the EBCP, are intended to inform consumer choices, in line with the 'information paradigm' at the heart of EU policies since the 1970s that informed consumers are 'empowered' consumers.[9]

Such legal measures are binding, in sharp contrast to self-regulatory commitments which are, by definition, voluntary. Binding measures are important from an internal market perspective, as they are more likely to create a level-playing field within which businesses operate. They are also more effective from a consumer and health perspective, as the scope of industry commitments is insufficient to achieve their proclaimed objective of promoting healthier environments. These commitments are not adequately monitored or enforced either. In short, evidence shows that self-regulation does not work for improving health.[10,11]

Corporate tactics and regulation

Challenging business models that have proven immensely profitable for commercial actors to the detriment of public health requires a legal response. This logic applies even more in the EU internal market where the EU already regulates many products, which unavoidably reduces Member States' regulatory autonomy to introduce their own national laws. Moreover, goods such as tobacco, alcohol and food move extensively between Member States and, therefore, even when Member States can introduce national rules, it is often difficult for them to regulate unilaterally the commercial practices of powerful commercial actors that operate across borders. For example, a Member State's incentive to increase taxation (e.g. through excise duties) or regulate the advertising of tobacco, alcohol or unhealthy food on its territory may be lower if neighbouring States do not follow suit, as they may fear the increase of cross-border purchases or cross-border marketing.

However, when the EU does attempt to introduce legislative measures, evidence shows that corporate actors seek to influence policy decisions towards their own interests. Lobbying aims to align legislative outcomes with corporate interests. While this may be seen as a legitimate element of the democratic process, it can—and often does—lead to policy decisions that favour private, short-term interests of a few corporate actors over the public interest in better health for all.[12] Such lobbying includes delaying the adoption of legislation, falsely questioning scientific evidence that suggests a need for intervention or that supports the adoption of the law, creating industry groups to promote corporate interests, casting doubt on the role of harmful products in the rise of NCDs, suggesting less effective alternative measures, and trying to reframe the debate to be one about willpower, individual responsibility and an overbearing 'nanny state'.[13] Such practices have long been documented in tobacco control, and a growing body of evidence shows that the food and alcohol industries are engaging in similar tactics.[14] The EU Transparency Register is the database listing 'interest representatives' (organisations, associations, groups and self-employed individuals) who carry out activities to influence the EU policy and decision-making process. It shows that a variety of tobacco, alcohol and food businesses and their associations have lobbied the EU extensively on the implementation of the EBCP.

Three years after the EBCP was published, notwithstanding the global COVID-19 pandemic, the prospects

for implementation are bleak. We are at a standstill.[15] Creating a *properly* functioning internal market is a competence, and therefore a responsibility, that the EU and Member States share.[5] This raises the question of what could be done to move past the status quo. If the EU is to restore public trust in its ability to prevent NCDs effectively, it needs to address the power imbalances that have paralysed effective EU action in this field.

Regaining trust by acting transparently

While the tactics described above are not new, their impact on the decision process may be significant, particularly considering the Commission's failure to propose the legislation it had committed to. Indeed, power imbalances have been identified as a major factor for the notable lack of progress in the implementation of effective NCD prevention strategies around the world.[16] They have also contributed to the lack of progress of EU NCD prevention policy. It is only if the Commission and Member States are prepared to address these imbalances that they will be able to implement the measures contained in the Prevention Pillar of the EBCP, as well as all the others that it does not contain but are nonetheless required to effectively prevent NCDs (e.g. marketing restrictions). They will, in turn, be able to increase trust in the EU's ability to improve public health through a genuine health in all policies approach.

According to the EU Treaties, the European Commission is entrusted to promote the general interest of the Union and take appropriate initiatives to that end. It is solely responsible for proposing new EU legislation and, therefore, a legislative proposal on NCD prevention can only be discussed and adopted by the European Parliament and the Council of the EU if the Commission first initiates the process. It is therefore paramount to scrutinise what happens in Brussels in the different Directorates-General of the Commission to understand the standstill regarding the implementation of the Prevention Pillar of the EBCP.

The EU Treaty enshrines the concept of openness, aspiring to create "an ever closer union" in which decisions are taken as openly as possible. In particular, the Commission is expected to be transparent about the legislative choices it makes. This is particularly important in relation to complex areas, such as NCD prevention, which have tended to be polarising.

Transparency has different components, which all promote trust by increasing the accountability of EU institutions, whilst facilitating public participation in EU decision making.[17,18]

Disclosing interactions with interest groups

Transparency requires that the Commission documents and discloses its interactions with various interest groups. In a suite of decisions involving the tobacco and the food industries, the European Ombudsman[19] has found maladministration in the Commission's failure to ensure transparency across all its departments when meeting with lobbyists. She has also highlighted the Commission's failure to ensure that all departments systematically assess whether specific meetings with the tobacco, alcohol or food industry representatives were needed in the first place. Together, these decisions call for 'pro-active transparency' to facilitate public scrutiny and provide the basis of the trust required for a genuine democratic debate.[20,21]

In this respect, DG SANTE and DG TAXUD have developed a far more transparent approach concerning their dealings with health-harming industries, than their DG AGRI counterpart, as the outcome of recent freedom of information requests, also relating to the front-of-pack nutrition labelling debate, discussed below, demonstrates.[22]

Access to documents

The Commission is also expected to grant access to documents widely, subject only to specific and narrowly interpreted exceptions.[23] Importantly, the EU Court of Justice has ruled that this obligation extends to impact assessments (IAs) which are produced for legislative initiatives expected to have 'significant economic, social or environmental impacts'.[24] In particular, in the *ClientEarth* case,[25] challenging the Commission's refusal to disclose two IAs relating to environmental protection, the Court held that the possibility for citizens to scrutinise and be aware of the information forming the basis of EU legislative action was a precondition for the effective exercise of their democratic rights. Moreover, these documents should be made accessible 'in good time' to enable citizens to attempt to influence the decision-making process.[25]

In *ClientEarth*, the Commission argued that disclosure of IAs 'might create external pressures which could hinder those delicate decision-making processes, during which an atmosphere of trust ought to prevail'. The premise should, instead, be that trust requires more transparency, not less. Therefore, although the Commission must enjoy a space for deliberation, this does not mean that documents drawn up in the context of an IA may, generally, remain confidential until that institution had made such a decision. Rather, the Commission shall examine each document individually to determine whether its release could seriously undermine the decision-making process.[25]

The European Ombudsman very recently applied these principles to nutrition labelling and upheld a complaint challenging the Commission's refusal to disclose the IA it had produced as part of the revision process of the Food Information Regulation. She noted: 'under well-established case law, the Commission could not refuse public access to legislative documents by

Recommendations

The European Commission and other EU institutions must ensure a high level of health protection in the development and implementation of all EU policies, as mandated by the EU Treaties.

To this effect, the Commission should build a stronger consensus between its different Directorates General and ensure that the policies it proposes are evidence-based and guided by the public interest rather than driven by the lobbying strategies of a few powerful economic actors. In particular, it should propose the legally binding measures that it has promised in the Europe's Beating Cancer Plan instead of relying on ineffective self-regulatory mechanisms.

EU institutions, and more specifically the Commission as a key legislative actor, will only address power imbalances if they act openly and work towards the avoidance of conflicts of interests. To this effect, they need to ensure that they act transparently. This, in turn, entails: 1) that they do not grant privileged access to private economic actors; 2) that the interactions that they have with these actors are duly recorded; and 3) that they respond favourably to reasonable access to document requests: in particular, they should not refuse access to a document if they do not have tangible evidence that such requests pose a specific, actual and reasonably foreseeable risk that such access would seriously undermine the decision-making process. Only such 'pro-active transparency' will facilitate public engagement, renew public trust and promote a much-needed democratic debate on the EU's role in preventing non-communicable diseases for all.

invoking merely general considerations, such as the fact that the preparatory work was still ongoing. EU institutions can refuse public access to legislative documents only if they have tangible evidence demonstrating a specific, actual and reasonably foreseeable risk that access to the document would seriously undermine the decision-making process.' She concluded that in that case the Commission—a key player in the legislative process—had failed to provide such tangible evidence.[22]

Improving transparency is only a first, though a necessary, step towards addressing the power imbalances that have hampered the development of NCD prevention policies in Europe.

Moving forward

Back in 2003, the proposal for a Food Claims Regulation provided a starting point for discussion.[26] The text was watered down before its adoption in 2006, and remains incomplete today, but it nonetheless greatly improved both the level of consumer protection and the functioning of the internal market across the EU.

Much work remains to be done to align the perspectives of all parts of the Commission to improving public health. This is greatly complicated by the fact that the Commission and national governments are not monolithic. Diversity of opinions and priorities within decision-making institutions has been a major piece of the NCD prevention puzzle.

Public authorities, including the European Commission, should also ensure that industry does not have a privileged, disproportionate access to decision-makers to avoid—or, at the very least effectively manage –real, potential or perceived conflicts of interests. Article 5.3 of the WHO Framework Convention on Tobacco Control provides useful food for thought to reflect on the extent to which the alcohol and food industries should be kept at arm's length. Moreover, whatever representations the tobacco, alcohol and food industries make, the decision-making process should always be guided by objective and independent scientific evidence, and not by the distortion of such evidence.

'Health in all policies', 'One Health', the 'well-being economy' and 'sustainability' must be more than political slogans; they must guide all that we do. To promote trust in the EU, market integration can and must have health at its core. Both the letter and the spirit of the EU Treaties are clear: the internal market is a means to an end, not an end in itself. This, in turn, requires that the long-term health and well-being of all EU citizens, and that of future generations, should not be sacrificed in the name of the internal market on the altar of short-term interests for a few.

Together with the EU Belgian Presidency of the Council which, rightly, placed the implementation of the EBCP on its agenda, we urge the Commission to publish the legislative proposals it promised to prevent NCDs. Such proposals can then be discussed and possibly amended if a sufficient majority cannot be found in their support. The EU will only generate the trust of EU citizens, on which the project of European integration must rest, if it acts transparently, addresses power imbalances and is accountable for the decisions it takes, as well as those it has promised and has failed to take.

And if the EU cannot galvanise sufficient political will for EU-wide harmonising legislation, it should at the very least ensure, in a spirit of sincere cooperation, that it does not stifle national initiatives by preventing Member States from regulating commercial practices that are not conducive to healthier environments.

Contributors

AG and NG designed, drafted and revised the manuscript. JCPLL and JS provided research assistance and editing to the manuscript. All authors reviewed and agreed the final text.

Declaration of interests

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