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Follow the Leader ! The EU as a Global Health Actor after the Negotiation of the Framework Convention on Tobacco Control

by

Elisabet Ruiz Cairó*

Abstract

This paper examines the role of the European Union as a global health actor. While it has traditionally been seen as an economic power, there is a tendency for the Union to play an increasing role at the global level in areas that do not correspond to this economic dimension as the example of public health illustrates. Taking the negotiation of the FCTC as a starting point, the paper puts forward the capacity of the Union to develop its leadership in an area where its competence was initially somehow disputed. The challenges and the results of the negotiations are examined and the strong commitment of the European Union towards the implementation of the FCTC is analysed. It is argued that this experience should be exported to the broader field of public health. While a first experience in a tobacco-control convention is an important step, it is considered that the European Union should seek further responsibilities. As the Union is willing to have a greater influence at the global level, one of its goals should be to become a public health leader. An enhanced role at the World Health Organization could be considered. The Union could also pursue the negotiation of other international conventions in the field of public health and the fight against obesity seems like an area where the European Union could exercise its leadership and export its standards. The analysis carried out through this paper leads to the conclusion that the EU can become a normative power in the field of public health by not only participating in international settings as a mere observer but also by adopting the role of a norm-shaper and, eventually, even a norm-maker.

Keywords: European Union, tobacco control, health, World Health Organization, international organizations, obesity, food, normative power

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Introduction

The Treaties establish a clear mandate towards the European Union (hereinafter, the EU) requiring an enhanced influence at the global level. The Union is requested to develop relations and build partnerships with third countries and with international, regional or global organisations. It is also specified that it should “*promote multilateral solutions to common problems, in particular in the framework of the United Nations*”¹ and that it should promote its values and interests in its relations with the wider world.²

The role of the EU is however limited by the principle of conferred powers as established in Article 5 TEU. This provision states that the Union can only act where competences have been conferred upon it by the Treaties. Against this background, it will be acknowledged that specific provisions strongly limit the competence of the Union in the field of public health both at the internal and the external levels.³ However, the participation of the EU in the negotiation of the Framework Convention on Tobacco Control (hereinafter, the FCTC) is a perfect illustration of how the Union can become a global leader in a field where its competence was initially disputed.

The FCTC is the only international convention adopted so far under the normative powers of the World Health Organization (hereinafter, WHO).⁴ It was adopted in May 2003 and it entered into force in February 2005. It currently has 180 parties, including the EU. Modelled on previous multilateral environmental agreements, the FCTC seeks to establish a common framework to regulate the global trade, marketing and consumption of tobacco

¹ Article 21(1) TEU.

² Article 3(5) TEU.

³ See particularly Article 168(1) and (3) TFEU.

⁴ Framework Convention on Tobacco Control, Geneva, 21 May 2003, United Nations Treaty Series Vol. 2302, No 41032, pp. 166-337.

products. Such framework provisions are then developed under a number of guidelines and a protocol.⁵

In order to assess the role of the European Union in this context, it is first necessary to review the circumstances that led to the possibility for the EU to participate in the negotiations of, and to become a contracting party to, the FCTC. While barriers at the internal and external levels existed, the conditions were eventually met for the EU to have a role to play.

It will then be relevant to assess how the EU performed during the negotiations and the implementation of the FCTC. It will be put forward that the Union did not only get an enhanced status, it actually played a crucial role at different stages of the negotiations. The result was the adoption of a text that is quite similar to tobacco control legislation within the European Union.

The example of the FCTC will lead, in the final part, to a number of conclusions in terms of the role that the EU could play in global health. Not only does this illustration point out to the fact that the EU could seek an enhanced role in the World Health Organization (hereinafter, the WHO). It also puts forward that the EU could pursue a leading role in the negotiation of other international agreements in the field of public health. This could position the EU as a rule-maker in this area.

The analysis developed in this paper is illustrative of the evolutionary role that the EU can play in international fora. Such increasing leadership in the global scene is an opportunity for the Union to act as a normative power in the field of public health.

I. The participation of the EU in the negotiation of the FCTC

The participation of the EU in the negotiation of the FCTC was a major step regarding its role in global health. A number of important obstacles had to be overcome to make this situation possible. These obstacles correspond to the two dimensions that have to be looked at when assessing whether the EU can participate in an international organisation or an international agreement. It is commonly accepted that the Union can hold a position in an international organisation or an international agreement if they deal with matters that fall within the competence of the Union and if the statute of the international institution allows for the participation of Regional Economic Integration Organisations.⁶ In the field of public health, the EU only has a limited competence (A). Moreover, from an external

⁵ For a general description of the FCTC, see BURCI Gian Luca, *Health*, in KATZ COGAN Jacob, HURD Ian, JOHNSTONE Ian, "The Oxford Handbook of International Organizations", Oxford, Oxford University Press (2016), pp. 447-471; BURCI Gian Luca, VIGNES Claude-Henri, *World Health Organization*, The Hague/London/New York, Kluwer Law International (2004), 256 p., pp. 126-131.

⁶ WESSEL Ramses A., *The Legal Framework for the Participation of the European Union in International Institutions*, Journal of European Integration (2011), Vol. 33, No. 6, pp. 621-635, p. 624.

perspective, the WHO system did not make it automatic for the EU to have a role to play at that level (B).

A. Internal and external competences of the EU in the field of tobacco control

When assessing whether the EU can be a party to an international agreement, it is first essential to look at the division of competences between the Union and its Member States. Only where the field falls within the competence of the EU, will the possibility for the Union to become a party to an international agreement exist.⁷

The FCTC has as its main objective the protection of ‘present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke’.⁸ The Convention is therefore a public health instrument which implies that it is the competence of the Union in the field of public health that has to be assessed.

While the Union only has a limited competence in the area of public health both at the internal (1.) and the external levels (2.), it will be acknowledged that the EU has adopted legislation in the area of tobacco control by using alternative legal bases which has allowed it to participate in the negotiation of the FCTC (3.).

1. The internal division of competences in the field of public health as provided for by the Treaties

At the time where the FCTC was negotiated, public health was dealt with in the Treaties under Article 152 TEC. The importance of this field was underlined in the first paragraph of the article, where it was stated that a high level of human health protection had to be ensured in the definition and implementation of all Community (now, Union) policies and activities.

However, it was also highlighted in this paragraph that Community action should only complement Member States’ policies. This was repeated in paragraph 5 making it very explicit that the Community only had a coordinating competence in this area.

In terms of tobacco control, the Treaties did not make any explicit reference to this field. It was only mentioned in paragraph 1 that the Community should “*complement the Member States’ action in reducing drugs-related health damage, including information and prevention*”.⁹ It was

⁷ Art. 216(1) TFEU.

⁸ Art. 3 FCTC.

⁹ Art. 152(1) TEC.

therefore apparent that the Community could not adopt any harmonising measure to fight tobacco consumption.

While this is the version of the Treaties that was applicable at the time of negotiation of the FCTC, it is interesting to analyse how these provisions have evolved with the modifications brought by the Treaty of Lisbon. Public health is now dealt with in Article 168 TFEU. In this version of the Treaties, public health is conferred an enhanced role. The Treaties provide that a high level of human health has to be ensured in defining and implementing all Union policies and activities.¹⁰ A high level of protection needs also to be ensured when adopting harmonising measures on the basis of Article 114 TFEU.¹¹ However, public health is not mentioned at all in Article 3 TEU establishing the goals of the European Union. Moreover, Article 168 TFEU highlights that Union action must complement national policies, thus making it rather clear that the EU still has a coordination competence in this field.¹²

In the more specific area of tobacco control, such measures are now explicitly mentioned in the Treaties although the complementary nature of the Union competence in this area is also underlined. Article 168(5) TFEU states that the institutions may adopt “*incentive measures (...) which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonization of the laws and regulations of the Member States*”. It has therefore been concluded that the scope of EU competence in the field of public health has remained mostly the same.¹³

Having considered the internal competence of the Union to adopt legislation on tobacco-control issues, it is also relevant to take a look briefly at the Treaties with regard to the external dimension of the Union’s competence in the field of public health.

2. External competence in the field of public health

The assessment of the external competence of the Union in the field of public health leads to a similar conclusion. Article 3(5) TEU establishing the common provisions on the Union’s relations with the wider world makes no reference to public health. Article 21 TEU develops that provision and, while it goes much more into detail on the external actions to be developed by the Union, it does not contain any duty in the area of public health. The most Article 21 TEU provides for is the need to promote multilateral solutions to common problems in the framework of the United Nations, thus requiring some sort of participation at the World Health Organization.¹⁴ The limited external competence of the Union in the

¹⁰ Art. 9 TFEU and Art. 168(1) TFEU.

¹¹ Art. 114(3) TFEU.

¹² Art. 168(1) and (7) TFEU.

¹³ ALEMANNO Alberto, *Out of Sight Out of Mind: Towards a New EU Tobacco Products Directive*, Columbia Journal of European Law (2012), Vol. 18, Issue 2, pp. 197-242, p. 209.

¹⁴ Article 21(1) TEU.

public health field is confirmed by Article 168(3) TFEU. This provision reproduces Article 152(3) TEC and states that “*the Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health*”. There is here an explicit power for the institutions to act at the international level. However, this provision states very clearly that the sole role for the European Union is to “*foster cooperation*”. Although it is not excluded, the Union is not explicitly granted a competence to conclude international agreements in the field of public health.¹⁵

These provisions make it clear that the European Union is expected to act at the international level in the area of public health, particularly in the framework of the United Nations and, as a consequence, through the World Health Organization. However, its competence to adopt binding agreements seems rather limited which is consistent with the internal competence described above.

The limited internal and external competence awarded by the Treaties has not been an obstacle for the Union to adopt tobacco-control legislation. This has been achieved by using alternative legal bases and, more specifically, through the internal market provisions. This has led to an expansion of the Union’s competence, both at the internal and the external levels.

3. The use of Article 114 TFEU and its validity

The limited competence in the field of public health has made it more difficult for the Union to adopt measures in this area but it has not been an absolute impediment. The EU has used alternative legal bases such as provisions on the common agricultural policy,¹⁶ on the environmental field¹⁷ and, more importantly, on harmonisation in the area of the internal market.

Article 114 TFEU allows for the adoption of “*measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*”. It is explicitly stated that this provision can be used for proposals concerning health where “*a high level of protection*” has to be ensured.¹⁸

¹⁵ For a comparison, see Article 191(4) TFEU on the environmental policy: “Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation **may be the subject of agreements between the Union and the third parties concerned**” (emphasis added).

¹⁶ Art. 38 TFEU; see ECJ, Case C-269/97 *Commission v Council (Beef labelling)*, EU:C:2000:183.

¹⁷ Art. 192 TFEU; see ECJ, Case C-155/91 *Commission v Council (Waste Directive)*, EU:C:1993:98.

¹⁸ Art. 114(3) TFEU.

Article 114 TFEU was used as the legal basis of the first Tobacco Advertising Directive¹⁹ and has been used ever since in the area of tobacco control.

While the use of this provision was successfully challenged by Germany in the adoption of the first directive,²⁰ the Court of Justice of the European Union (hereinafter, CJEU) declared the validity of Article 114 TFEU as a legal basis of the second Tobacco Advertising Directive²¹ and has also accepted it in the case of the very recent Tobacco Products Directive.²² The relevance of this provision is paramount because the Union and the Member States have a shared competence on internal market matters.²³ The European Union has therefore used its internal market powers to expand its competence in the field of public health.

Similarly, the EU has used alternative legal bases to adopt international agreements in this field. Indeed, the Council Decision concerning the conclusion of the FCTC takes as legal bases Articles 114 (internal market), 207 (common commercial policy) and 168 (public health) TFEU together with Article 218 TFEU as a procedural legal basis.²⁴ In the external action of the European Union, the use of such legal bases is even more relevant. Under Article 207 TFEU, the Union has an exclusive competence and, what is more, such exclusivity has also been inferred from Article 114 TFEU.²⁵ Advocate General Kokott contends that, where Article 114 TFEU is deemed to be the correct legal basis, the Union can still have an exclusive competence to conclude an international agreement based on Article 3(2) TFEU.²⁶ Such exclusivity would notably take place where the international agreement concerns an area that has been largely covered by harmonised rules.²⁷ It can be inferred from this reasoning that the Union could have an implied exclusive competence in the field of tobacco control, on the basis of Articles 114 and 207 TFEU, due to the large amount of internal legislation that exists in the field.

As a consequence, and despite the competence limitations imposed by Article 168 TFEU, the possibility for the Union to participate in the negotiation of the FCTC could be inferred from its internal market competence and the extensive legislation adopted in the field of

¹⁹ Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, [1998] OJ L 204/37.

²⁰ ECJ, Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising I)*, EU:C:2000:544.

²¹ ECJ, Case C-380/03 *Germany v Parliament and Council (Tobacco Advertising II)*, EU:C:2006:772; Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, [2003] OJ L 152/16.

²² Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, [2014] OJ L 127/1; ECJ, Case C-547/14 *Philip Morris Brands and Others*, EU:C:2016:325; ECJ, Case C-477/14 *Pillbox 38*, EU:C:2016:324; ECJ, Case C-358/14 *Poland v Parliament and Council*, EU:C:2016:323.

²³ Articles 114(1) and 4(2)(a) TFEU.

²⁴ Council Decision 2004/513/EC of 2 June 2004 concerning the conclusion of the WHO Framework Convention on Tobacco Control, [2004] OJ L 213/8.

²⁵ Opinion of Advocate General Kokott in Case C-137/12 *Commission v Council*, EU:C:2013:441.

²⁶ *Ibid.*, para. 99.

²⁷ *Ibid.*, paras. 110-113.

tobacco control. This does not mean that Article 168 TFEU is completely irrelevant as it gives valuable information on how public health measures should be designed. Accordingly, this provision is always mentioned amongst the legal bases of tobacco control legislation. However, it is the internal market provision that grants the Union the competence to adopt harmonising legislative acts.

B. The possibility for Regional Economic Integration Organisations to participate in the negotiation of the FCTC

For the European Union to be able to participate in the negotiation of an international agreement, it is not enough that the matter discussed falls within its competence. It is also necessary that the negotiating directives of the international agreement allow for such participation.

This is an important question as most international organisations and agreements accept States but not other entities. In the case of the FCTC, this issue was particularly relevant because the convention was negotiated within the framework of the WHO, where the EU does not have a full member status (1.). However, the World Health Assembly (hereinafter, WHA) made the necessary arrangements for the participation of the European Union (2.).

1. The status of the European Union within the World Health Organization

Despite the wording of Article 168(5) TFEU, the EU only holds an observer status in the WHO. While strong relations exist between both organisations since 1948, the WHO Constitution restricts membership to States and the EU has therefore not been able to join.²⁸

As a consequence, relations between the EU and the WHO have been established through exchanges of letters, the most recent one having taken place in 2000.²⁹ This cooperation document underlines that both the World Health Organization and the European Commission have roles and duties that extend worldwide, that they are both committed to a high level of human health protection and that an effective cooperation would benefit not only the Member States of the European Union but also other countries represented at the WHO.³⁰ As a consequence, the Memorandum attached to this exchange of letters gives the EU an observer status. This means that the EU can attend plenary meetings of the World Health Assembly and deliberations of the Executive Board, it can make statements, have access to non-confidential documents and submit memoranda to the Director-General.³¹

²⁸ Art. 3 WHO Constitution.

²⁹ Exchange of letters between the World Health Organisation and the Commission of the European Communities concerning the consolidation and intensification of cooperation - Memorandum concerning the framework and arrangements for cooperation between the World Health Organisation and the Commission of the European Communities, [2001] OJ C 1/7.

³⁰ Exchange of letters, *ibid.*, para. 4.

³¹ Memorandum, *ibid.*, section D.

Although this allows the Union to have a certain influence, it has to be admitted that its role is nonetheless quite limited.

However, it is interesting to note that the Memorandum provides for the possibility, for the Director-General of the WHO, to draw the attention to the competent governing body to the question of “*the participation of the Commission on the work of that body in specific cases, such as, for example, the negotiation of international agreements and on the status of the European Communities under such agreements*”.³² This last sentence is undoubtedly an open door for an enhanced role of the European Union in the rule-making activities of the WHO. However, it only offers a hypothetical possibility and the only duty of the Director General is “*to draw the attention*” to the governing body. It is therefore interesting to analyse how the participation of the Union in the negotiations of the FCTC was ultimately made possible.

2. The FCTC and the participation of Regional Economic Integration Organisations

The FCTC is the first convention negotiated under the auspices of the WHO and adopted by the World Health Assembly. It was unknown at the time who would be able to negotiate such a normative act and whether it would be limited to Members of the WHA or not.

It was the Resolution adopted by the World Health Assembly in 1999 to establish an inter-governmental body to negotiate the FCTC that answered those questions and made it possible for the EU to fully participate in the negotiations. This text provides that “*regional economic integration organizations [hereinafter, REIOs] constituted by sovereign States, Members of WHO, to which their Member States have transferred competence over matters governed by this resolution, including the competence to enter into treaties in respect to these matters, may actively participate, in accordance with Rule 55 of the Rules of Procedure of the Health Assembly, in the drafting and negotiations of the intergovernmental negotiating body referred to under paragraph (1) and in the preparatory work of the working group referred to under paragraph (2)*”.³³

The EU was also awarded the possibility to become a contracting party to the Convention. This was made effective through Article 35(1) of the FCTC which provides that the Convention is subject “*to formal confirmation or accession by regional economic integration organizations*”. This marks an important difference in comparison to the International Health Regulations, adopted by the WHO in 2005. While the EU was able to participate in the negotiations of this text, there is no provision allowing the EU to become a contracting party.³⁴

³² Ibid., section D, para. 1(4).

³³ World Health Organization, Towards a WHO framework convention on tobacco control, 25 May 1999, Resolution WHA52.18, para. 1(3).

³⁴ WU Chien-Huei, *EU's Participation in the WHO and FCTC: A Good Case for "EU as a Global Actor"*?, Asian Journal of WTO & International Health Law and Policy (2010), Vol. 5, pp. 467-496, pp. 482-483.

The inclusion of a REIO clause in an international agreement has been considered as a major step. Up until then, the participation of such organisations in the UN system had been limited to an observer or full participant status.³⁵

The door was therefore open for the EU to fully participate in the negotiations. The Decision of the Council of 22 October 1999 authorising the European Commission to negotiate the FCTC on behalf of the EU was then the final step that made all the conditions fulfilled for the negotiations to be pursued.³⁶

II. The EU as a leader in the negotiation and implementation of the FCTC

A. The negotiation of the FCTC: the European Union, united in diversity?

The negotiation of the FCTC is a good example of the difficulties that the EU might encounter when positioning itself in an international organisation. The Union has always highlighted the need for unity in its international representation.³⁷ In the case of the FCTC, the EU managed to become a negotiator and was therefore likely to defend a much more homogeneous position but a number of obstacles were to be found on the way (1.). Despite the difficulties, the EU ultimately managed to play a leading role and the final text arising from the negotiations was quite similar to what already existed within the EU (2.).

1. Obstacles to a common approach towards the FCTC negotiations

a. The reluctance of the United Kingdom and Germany upon the negotiations

In 1993, when the negotiations of the FCTC started, the European Union had already adopted a number of acts aiming at controlling tobacco consumption. It is interesting to recall at this point that cancer was actually the first major public health activity put in place at EU level, in 1987, through the “Europe Against Cancer” programme.³⁸ This was followed by a number of Directives adopted between 1989 and 1992 on tobacco control.³⁹

³⁵ CHAMORRO Lourdes, *Law and the EU Role in Global Health Strategies: The Case of the FCTC*, in EMMERLING Thea, KICK-BUSCH Ilona, TOLD Michaela (eds), “The European Union as a Global Health Actor”, Singapore/New Jersey/London, World Scientific Publishing (2016), pp. 251-269, p. 253.

³⁶ Council Decision of 22 October 1999 authorising the European Commission to negotiate, on behalf of the European Community, an international framework convention on tobacco control, Council Document 11959/99 (access restricted). The mandate was extended in 2001; see Decision giving the Commission additional authorization to negotiate a WHO Framework Convention on Tobacco Control, ST 6803 2001 INIT (access restricted).

³⁷ ECJ, Opinion 2/91, EU:C:1993:106, para. 36; ECJ, Opinion 1/94, EU:C:1994:384, para. 108.

³⁸ GUIGNER Sébastien, *La Dynamique d'Intégration par Sédimentation : Retour sur l'Inscription de la Santé dans les Compétences de l'Union*, in Estelle Brosset (ed), “Droit Européen et Protection de la Santé : Bilan et Perspectives”, Brussels, Bruylant (2015), pp. 35-63, p. 38; European Commission, *Press Release*, 1986, IP/86/76, available at http://europa.eu/rapid/press-release_IP-86-76 (consulted on 5 April 2017); European Commission, *Proposal for a Council Resolution on a Programme of Action of the European Communities on Cancer Prevention*, COM(85) 628 final, [1985] OJ C 336/11.

³⁹ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, [1989] OJ L 298/23; Council

However, these actions at the internal level were not positively perceived by all Member States and this had an impact on the FCTC negotiations.

A first concern came from the United Kingdom which requested a limitation in the negotiating mandate of the European Commission. As a consequence, a joint statement was made by the Council and the Commission establishing that the negotiating directives would only cover matters falling within EU competence under Article 95 (now 114, internal market) and 152 (now 168, public health) of the Treaties. Such mandate was however extended in 2001 to include other areas that fell within Union competence.⁴⁰

The second conflict came from Germany, which had opposed tobacco control legislation from the very beginning. The action brought by this Member State before the Court of Justice of the European Union against the first Tobacco Advertising Directive led to the annulment of this legal text, thus hampering the proper development of this field.⁴¹

Following the judgment of the Court in the *Tobacco Advertising I* case, the institutions adopted a new Directive. However, another action was brought by Germany. While in its second judgment the CJEU confirmed the validity of the second directive,⁴² this judgment had not been delivered yet at the time where the FCTC negotiations took place. Germany stated that its opposition to the EU tobacco directives was not an unwillingness to fight tobacco consumption but rather that it considered that this was a matter that was to be decided at the national level. However, the European Commission criticised this statement. Commissioner Byrne stated in 2002 that Germany finally had the opportunity to push for tobacco control legislation from a national perspective through the negotiation of the FCTC and, still, it continued “*to block proposals on issues such as a ban on advertising or passive smoking. Surprised?*”.⁴³

Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products, [1989] OJ L 359/1; Council Directive 90/239/EEC of 17 May 1990 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the maximum tar yield of cigarettes, [1990] OJ L 137/36; Council Directive 92/41/EEC of 15 May 1992 amending Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products, [1992] OJ L 158/30; Council Directive 92/78/EEC of 19 October 1992 amending Directives 72/464/EEC and 79/32/EEC on taxes other than turnover taxes which are levied on the consumption of manufactured tobacco, [1992] OJ L 316/5; Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes, [1992] OJ L 316/8; Council Directive 92/80/EEC on the approximation of taxes on manufactures tobacco other than cigarettes, [1992] OJ L 316/10; see HERVEY Tamara K., McHALE Jean V., *European Union Health Law: Themes and Implications*, Cambridge, Cambridge University Press (2015), 748 p., pp. 390-391.

⁴⁰ Proposal for a Council Decision concerning the conclusion of the World Health Organisation Framework Convention on Tobacco Control, COM(2003) 897 final; EGGERS Barbara, HOFFMEISTER Frank, *UN-EU Cooperation on Public Health: The Evolving Participation of the European Community in the World Health Organization*, in WOUTERS Jan, HOFFMEISTER Frank, RUYTS Tom, “The United Nations and the European Union: An Ever Stronger Partnership”, The Hague, TMC Asser Press (2006), pp. 155-171, p. 163; WOUTERS Jan, DE MEESTER Bart, *Safeguarding Coherence in Global Economic Policy Making: The Triangle EU-UN-WTO*, Leuven Interdisciplinary Research Group on International Agreements and Development (LIRGIAD) Working Papers (2005), Vol. 6, pp. 1-33, pp. 20-21.

⁴¹ ECJ, *Tobacco Advertising I*, *ibid*.

⁴² ECJ, *Tobacco Advertising II*, *ibid*.

⁴³ European Commission, *Commissioner David Byrne at WHO ministerial in Warsaw - Commitment to turning the tide on the tobacco epidemic*, Warsaw, 19 February 2002, IP/02/274.

The pending case before the CJEU was indeed used by Germany to block the EU position on what the final text of the FCTC should look like. This country therefore joined the “big four”, that is, the four countries that tried to avoid a strong convention and that advocated instead for flexible and broad terms: Germany, Japan, USA and China.⁴⁴

The opposition of Germany to a strong convention put at risk the unity of representation of the European Union, as the next paragraph acknowledges.

b. But who talks on behalf of the European Union? Representation issues during the FCTC negotiations

A second obstacle during the negotiations originated in the double representation of the European Union. As public health is a field where the Union only has a complementary competence, it was not always for the EU to express the position shared by the Union and all Member States.⁴⁵

According to the WHA Resolution, the European Union could only participate in the negotiations over matters to which Member States had transferred competence. This did not cover the whole scope of the FCTC. For example, it has been pointed out that the labelling and advertising of tobacco products are areas where the EU has largely legislated, while education and public awareness remain under the responsibility of Member States. As a consequence, and depending on the matter under discussion, at times it would be for the European Commission to represent the Union and the Member States and at other times it would be for the rotating Presidency of the Council.⁴⁶

Deciding whether a matter was predominantly EU or Member States competence was to be decided by consensus and, when such consensus could not be reached, it would be for the Permanent Representatives Committee (COREPER) or the Council to decide. These rules were likely to lead to internal conflicts since the division of competences between the Union and the Member States is sometimes unclear.

The negotiation of Article 13 of the FCTC on tobacco advertising, promotion and sponsorship confirmed those fears. Some Member States were of the opinion that a strong text on advertising, close to the one of the EU directive, should be proposed. However, Ger-

⁴⁴ GRÜNING Thilo, WEISHAAR Heide, COLLIN Jeff, GILMORE Anna B., *Tobacco Industry Attempts to Influence and Use the German Government to Undermine the WHO Framework Convention on Tobacco Control*, Tobacco Control (2012), Vol. 21, pp. 30-38, p. 30.

⁴⁵ On the representation of the European Union in international organisations, see KADDOUS Christine, *The European Union in International Organisations – Functional Necessity or General Aspiration?*, in KADDOUS Christine (ed), “The European Union in International Organisations and Global Governance”, Oxford/Portland, Hart Publishing (2015), pp. 1-25, p. 5.

⁴⁶ CHAMORRO Lourdes, *ibid.*, p. 255.

many did not consider the Tobacco Advertising Directive as being part of the *acquis communautaire* and opposed a strong text reflecting the EU position in this area.⁴⁷ The tension between the European Union and Germany was thus particularly visible. The issue was therefore sent to COREPER in order to get a unified position. However, during the fifth Intergovernmental Negotiating Body (INB) the opposing views were made public: some Member States supported a total ban on advertising, Germany opposed such a measure and other Member States did not intervene.⁴⁸

Eventually, and after tough negotiations, a compromise was reached where a total ban on tobacco advertising was adopted but paragraph 3 of Article 13 of the FCTC provided for an exception when the Constitution of a party would not permit for such a total ban.⁴⁹ Additionally, a Declaration from the European Union added to the FCTC provided that: “*The Community and its Member States declare that a Member State of the European Community whose national constitution or constitutional principles do not permit the introduction of a comprehensive ban on tobacco advertising, promotion and sponsorship may make use of the provision enshrined in Article 13(3) of the Framework Convention on Tobacco Control to accommodate regulations so as to respect national constitutional constraints*”.⁵⁰

The previous examples acknowledge some of the difficulties that the EU had to confront during the FCTC negotiations. The discrepancies of some Member States could have put at risk the outcome of the negotiations as they could have led to divergent positions amongst them, therefore affecting the credibility of the European Union. However, and despite those obstacles, the following section acknowledges that the EU is considered to have played a leading role during that time.

2. Overcoming the challenges: the European Union as a positive force during the negotiations

The leading role of the Union during the negotiation process is illustrated by different aspects. Not only was the EU assigned relevant positions within the negotiations (a), but the text delivered at the end was actually quite similar to what already existed within the EU (b).

⁴⁷ McNEILL Ann, ROSS Hana, JOOSSENS Luk et al., *Tobacco or Health in the European Union: Past, Present and Future*, ASPECT Report for the European Commission (2004), available at http://ec.europa.eu/health/archive/ph_determinants/life_style/tobacco/documents/tobacco_fr_en.pdf (consulted on 9 June 2017), p. 127; GUIGNER Sébastien, *The EU and the Health Dimension of Globalization: Playing the World Health Organization Card*, in ORBIE Jan, TORTELL Lisa, “The European Union and the Social Dimension of Globalization: How the EU Influences the World”, Oxon/New York, Routledge Publishing (2009), pp. 131-148, p. 141.

⁴⁸ GUIGNER Sébastien, *The EU and the Health Dimension of Globalization*, *ibid.*, p. 142.

⁴⁹ EGGERS Barbara, HOFFMEISTER Frank, *ibid.*, p. 164.

⁵⁰ Framework Convention on Tobacco Control, *Interpretative declaration of the European Community made upon signature and confirmed upon formal confirmation*, available at <http://www.who.int/fctc/declarations/en/> (consulted on 29 May 2017)

a. The role of the European Union during the negotiations

The success of the European Union during the FCTC negotiations lies in different reasons. First of all, the European Union was represented by the European Commission during the negotiations in accordance with the negotiating mandates granted by the Council in 1999 and 2001.⁵¹ It has been considered that the agreement amongst Member States to grant the Commission the authority to negotiate this convention on behalf of the Union was already a relevant message to consolidate the authority of the European Union during the negotiations.⁵²

Secondly, during the negotiations, the European Union was able to align not only all Member States but also third countries with special relations with the EU, such as the accession and candidate countries, in areas of exclusive competence.⁵³ This can be explained by the fact that, in 2003, a large number of countries were about to join the European Union and they would therefore have to implement the existing EU tobacco control legislation anyway.

This strategy was however very useful to the European Union as it allowed what has been referred to as a snowball effect.⁵⁴ By adding the accession and candidate countries, the EU position represented most of the WHO European region. The other States of the region would then be easily convinced as they did not have strong interests in tobacco, they did not have national legislation conflicting with the FCTC and they were dependent on the funding of the regional office which actually came from EU Member States.⁵⁵

Finally, the European Union was allowed to participate as a member of the Intergovernmental Negotiating Body (INB) which would be in charge of drafting and negotiating the FCTC and related protocols.⁵⁶ This allowed the European Union to have a greater influence on the outcome of the negotiations as the next paragraph puts forward.

b. The outcome of the negotiations: the EU system as a role model?

The leadership of the European Union can also be inferred from the outcome of the negotiations. Indeed, it can be noted that the final text of the FCTC is quite close to the tobacco control legislation that already existed in the EU before the adoption of the Convention.⁵⁷

⁵¹ EGGERS Barbara, HOFFMEISTER Frank, *ibid.*, p. 163; MAMUDU Hadii M., STUDLAR Donley T., *Multilevel Governance and Shared Sovereignty: European Union, Member States, and the FCTC*, Governance: An International Journal of Policy, Administration and Institutions (2009), Vol. 22, Issue 1, pp. 73-97, p. 86.

⁵² MAMUDU Hadii M., STUDLAR Donley T., *ibid.*, p. 86.

⁵³ CHAMORRO Lourdes, *ibid.*, p. 257; McNEILL Ann, ROSS Hana, JOOSSENS Luk *et al.*, p. 126.

⁵⁴ GUIGNER Sébastien, *The EU and the Health Dimension of Globalization*, *ibid.*, p. 139.

⁵⁵ *Ibid.*, p. 140.

⁵⁶ World Health Organization, *Towards a WHO framework convention on tobacco control*, 24 May 1999, Resolution WHA52.18, para. 2(3).

⁵⁷ GUIGNER Sébastien, *The EU and International Health Organisations: From the « State of Nature » to the « Social Contract »*, ECPR Joint Sessions for the Workshop 'New International Roles for the EU?' (13-18 April 2004), p. 22; WU Chien-Huei, *ibid.*, p. 480.

The influence of EU legislation on the FCTC was apparent from the very beginning. In February 2000, a provisional text of the provisions to be included in the FCTC was adopted. Apart from a number of international treaties, the only additional sources that were used to draft this text were the proposal for an EU Tobacco Products Directive and the Canadian proposal for a regulation on the information of tobacco products.⁵⁸

The final text is also revealing. For example, it has been acknowledged that Article 11 on the packaging of tobacco products was very similar to the packaging provisions contained in the EU Tobacco Products Directive and that the terms of the provision were based on formulations proposed by the European Union during the INBs.⁵⁹ A brief comparison of both texts confirms these statements.

Article 11(1)(a) of the FCTC provides that parties should adopt measures to make sure that tobacco product packaging does not create “*the false impression that a particular tobacco product is less harmful than other tobacco products*”. This provision is very similar to Article 7 of Directive 2001/37 which states that “*texts, names, trade marks and figurative or other signs suggesting that a particular tobacco product is less harmful than others shall not be used on the packaging of tobacco products*”.

Article 11(1)(b) of the FCTC provides that tobacco products packaging should “*carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages*”. The use of health warnings is also provided for in Article 5(2) of Directive 2001/37 and paragraph 5 states that such warnings should cover not less than 30% of the external area of the tobacco product. This requirement is also included in Article 11(1)(b)(iv) of the FCTC.

Article 11(1)(b)(v) of the FCTC allows for the use of health warnings in the form of pictures or pictograms. Article 5(3) of the Directive provides that the Commission should “*adopt rules for the use of colour photographs or other illustrations to depict and explain the health consequences of smoking*”.

Article 11(2) requires the packaging of tobacco products to contain information on relevant constituents and emissions of the products. This is also similar to Article 5(1) of the Directive which states that the tar, nicotine and carbon monoxide yields of cigarettes should be printed on the packaging.

As a consequence, it can be inferred that the role played by the European Union during the negotiations was not merely the one of an observer with an ability to vote. The Union was

⁵⁸ World Health Organization, *Texte provisoire des projets de dispositions qu'il est proposé d'inclure dans la convention-cadre de l'OMS pour la lutte antitabac*, 29 February 2000, A/FCTC/WG2/3, p. 32; Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, [2001] OJ L 194/26.

⁵⁹ GUIGNER Sébastien, *The EU and the Health Dimension of Globalization*, *ibid.*, p. 140.

indeed a real rule-shaper. What is more, the role of the Union was not limited to the negotiation of the convention. Indeed, it has gone beyond its basic obligations during the implementation of this legal text.

B. The implementation of the FCTC and the position of the EU: an increasing uniformity

The implementation of the FCTC is very representative of the increasing uniformity in the position of the European Union towards tobacco control. While some discrepancies had been noted during the negotiations between Member States, the EU can be characterized as a strong actor in the implementation.

1. At the international level, a will to push forward the FCTC

At the international level, the EU has been an important actor. The FCTC is only a basic text with some general principles. However, it requires the adoption of Guidelines and Protocols that go into detail on some aspects. The European Union has had an important influence on those developments.

Article 7 of the FCTC requires the Conference of the Parties to implement Articles 8 to 13 through guidelines. In order to adopt those guidelines, the Conference of the Parties establishes a working group. Parties can volunteer either as key facilitators, either as partners of the working group. While the former guide the overall drafting process, the latter will participate in the preparation of draft guidelines for consideration and adoption by the Conference of the Parties. Key facilitators therefore lead the activities of the working group and have a decisive influence on the final result. States or regional organisations that volunteer for one of those positions are therefore parties with an interest or expertise in the subject matter to be discussed.⁶⁰

The EU has been the key facilitator for a number of Guidelines and has been represented in the working groups of all of the others. Not surprisingly, the Guidelines where the EU has been a key facilitator include the ones on tobacco advertising (Article 13) and packaging and labelling (Article 11). However, it has been acknowledged that the strong implication

⁶⁰ LANNAN Kate, *The WHO Framework Convention on Tobacco Control: The International Context for Plain Packaging*, in VOON Tania, MITCHELL Andrew D, LIBERMAN Jonathan with AYRES Glyn (eds), "Public Health and Plain Packaging of Cigarettes: Legal Issues", Cheltenham/Northampton, Edward Elgar Publishing (2012), pp. 11-30, p. 18; FAID Miriam, GLEICHER David, *Dancing the Tango: The Experience and Roles of the European Union in Relation to the Framework Convention on Tobacco Control*, Global Health Europe (2010) available at http://ec.europa.eu/health/sites/health/files/tobacco/docs/tobacco_tango_en.pdf (consulted on 29 May 2017), p. 9.

of the Union has also been present in areas where the EU does not have an exclusive competence.⁶¹ The EU therefore demonstrates a strong interest in the implementation of the FCTC through this mechanism.

Article 33 allows the Conference of the Parties to adopt Protocols to the Convention. The first one was adopted in 2012 and is the Protocol to Eliminate Illicit Trade in Tobacco Products. The involvement of the EU during the negotiations of this text is striking. The EU held the Chairmanship during the whole process.⁶² More specifically, Ian Walton-George, from OLAF, was elected Chairman as he was considered an expert at fighting cigarette smuggling and counterfeiting.⁶³ His expertise was based on the conclusion of several agreements with the tobacco industry, the first one having been concluded in 2004 with Philip Morris International as a consequence of a dispute that had arisen between the EU and PMI.⁶⁴ Holding the chairmanship has been considered to significantly strengthen one's influence over the outcome of a multilateral negotiation. Chairs manage the agenda, deal with negotiation deadlocks, carry out the administrative and procedural tasks and, most importantly, collect information and have access to confidential information. In more general terms, chairs enjoy a wider legitimacy and authority, thus being able to have a greater influence on the outcome.⁶⁵ In the case of the EU chairmanship, such influence is definitely noticeable.

The EU's experience had already been noted during the FCTC negotiations. Article 15 of the FCTC contains a number of elements based on the PMI Agreement. As a consequence, it came as no surprise when the final text of the Protocol was also similar to this agreement.⁶⁶ This was actually already announced by Ian Walton-George himself in 2005 when he stated that "*a Protocol on Tracking and Tracing, based on provisions of the Agreement with PMI, would be a major positive step*".⁶⁷ As a Chairman, the representative of the Union was able to submit a number of texts that formed the basis for the negotiations. As a result, the Proto-

⁶¹ FAID Miriam, GLEICHER David, *ibid.*

⁶² World Health Organization, *Officers of the Intergovernmental Negotiating Body on a protocol on illicit trade in tobacco products*, 13 February 2008, FCTC/COP/INB-IT/1/5; BURCI Gian Luca, *The European Union and the World Health Organization: Interactions and Collaboration from a Governance and Policy Perspective*, in KADDOUS Christine (ed), "The European Union in International Organisations and Global Governance: Recent Developments", Oxford/Portland, Hart Publishing (2015), pp. 155-174, p. 167.

⁶³ BOISTER Neil, *The European Anti-Fraud Office and the Protocol to Eliminate Illicit Trade in Tobacco Products*, in MITCHELL Andrew D, VOON Tania, "The Global Tobacco Epidemic and the Law", Cheltenham/Northampton, Edward Elgar Publishing (2014), pp. 64-86, p. 69.

⁶⁴ Anti-contraband and anti-counterfeit agreement and general release among Philip Morris International Inc., Philip Morris Products Inc., Philip Morris Duty Free Inc., and Philip Morris World Trade Sarl, the European Community represented by the European Commission and each Member State listed on the signature pages hereto, 9 July 2004, available at <https://www.sec.gov/Archives/edgar/data/1413329/000119312508023093/dex107.htm> (consulted on 16 June 2017). This agreement was also available on the website of OLAF but was removed in 2016.

⁶⁵ FAID Miriam, GLEICHER David, *ibid.*, p. 15; BLAVOUKOS Spyros, BOURANTONIS Dimitris, *The Chair in the UN Context: Assessing Functions and Performance*, Netherlands Institute of International Relations 'Clingendael' Discussion Papers in Diplomacy (2005), pp. 1-24, pp. 3-4.

⁶⁶ BURCI Gian Luca, *ibid.*, p. 167.

⁶⁷ Cited in BOISTER Neil, *ibid.*, p. 69.

col includes many elements for which the EU had been advocating and underlines the leadership position of the EU in this area. This has been considered as a “*unique achievement*” and “*a reflection of the leading role that the EU had played during the FCTC negotiations*”.⁶⁸

2. At the internal level, a strong commitment towards the FCTC

The commitment of the European Union towards the FCTC is also reflected by the strict implementation of the international text at the internal level. This conclusion can be reached when taking different elements into consideration.

a. The EU legislator as the main implementer of the FCTC

At the legislative level, it is interesting to notice that there has been a support for the FCTC at an early stage. In 2003, the Council issued a Recommendation on the prevention of smoking and on initiatives to improve tobacco control.⁶⁹ While being adopted when no agreement had still been reached at the international level, this text already refers to the FCTC. It is stated that “*it is important to ensure that the measures contained in this recommendation are consistent with the draft elements of the FCTC presently under discussion*”.⁷⁰ A reference to the FCTC is also contained in the second Tobacco Advertising Directive.⁷¹ Although the text of this piece of legislation is very short, it is stated that the rights contained in the Directive should be complementary to the ones that were likely to be adopted as a result of the negotiations on the FCTC.⁷²

The 2014 Tobacco Products Directive is also a good illustration.⁷³ As a much more recent piece of legislation, it also provides an interesting example of the evolution of the European Commission’s reasoning. This Directive provides for harmonised rules on the ingredients of tobacco products, their labelling and packaging, and on particular sorts of tobacco products such as electronic cigarettes or flavoured products. It is striking to note that the EU legislator makes a reference to the FCTC from the very beginning. In the Preamble, it is stated that “*legislative action at Union level is also necessary in order to implement the WHO Framework Convention on Tobacco Control (FCTC)*”.⁷⁴ References to the FCTC are also made in subsequent paragraphs. For example, it is mentioned that a modification of the labelling requirements is “*necessary to align the rules that apply at Union level to international developments*” as the

⁶⁸ CHAMORRO Lourdes, *ibid.*, p. 261.

⁶⁹ Council Recommendation of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control, [2003] OJ L 22/31.

⁷⁰ *Ibid.*, Recital 20.

⁷¹ Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, [2003] OJ L 152/16.

⁷² *Ibid.*, Recital 8.

⁷³ Directive 2014/40/EU, *ibid.*

⁷⁴ *Ibid.*, Recital 7 And Art. 1.

FCTC guidelines “call for large picture warnings on both principal display areas, mandatory cessation information and strict rules on misleading information”.⁷⁵ The Protocol is also mentioned in the Directive as it is recalled that “the FCTC requires the Union to combat illicit tobacco products, including those illegally imported into the Union”.⁷⁶ While it is quite obvious from these elements that the main driver for the reform of the Tobacco Products Directive was the implementation of the FCTC, it is interesting to note that the European Commission stated that the new piece of legislation aimed at facing new international, scientific and market developments. The Commission tried, through this statement, to clarify that the Directive was not a pure public health instrument, thus avoiding any issues with the legal bases.⁷⁷

From a legislative perspective, it is lastly useful to take a look at the implementation of the Protocol on Illicit Trade of Tobacco Products. As previous sections have put forward, the role of the Union during the negotiations of the Protocol was essential. It is therefore not surprising that the EU was willing to implement it in the most appropriate way. The Union therefore ratified the Protocol in June 2016 and it decided not to prolong the PMI Agreement which expired on 9 July 2016.⁷⁸ While the Protocol is still not in force because fourteen ratifications are still needed, the Tobacco Products Directive has already adopted some of the measures required by the Protocol. Accordingly, Article 15 introduces a number of rules on the traceability of tobacco products and requires a unique identifier for all of them. Additionally, Article 16 provides that, in addition to the unique identifier, tobacco products should carry a tamper proof security feature.⁷⁹

b. The Court of Justice of the European Union: an engaged actor towards the FCTC

The Court of Justice of the European Union has also been an engaged actor towards the FCTC. A first reference to this text was made in the *Tobacco Advertising II* judgment.⁸⁰ The Court referred amongst others to the fact that there were disparities in the legal regimes of EU Member States to justify the need to adopt a harmonising measure. However, in this case, the CJEU considered that the FCTC could not be taken into account because it entered into force after the Directive.

The situation substantially changed when the more recent judgments on the Tobacco Products Directive were delivered.⁸¹ The CJEU takes the FCTC very much into account on

⁷⁵ Ibid, Recital 24.

⁷⁶ Ibid., Recital 29.

⁷⁷ ALEMANNIO Alberto, *ibid.*, p. 211.

⁷⁸ European Commission, *Expiry of the Agreement with Philip Morris International*, 6 July 2016, available at https://ec.europa.eu/commission/commissioners/2014-2019/georgieva/announcements/expiry-agreement-philip-morris-international_en (consulted on 12 May 2017).

⁷⁹ On the expiry of the PMI Agreement and its implications, see KADDOUS Christine, RUIZ CAIRÓ Elisabet, BIERMÉ Margaux, *Politique commerciale commune*, *Annuaire de Droit Européen* 2016 (forthcoming).

⁸⁰ ECJ, Case C-380/03 *Germany v Parliament and Council*, EU:C:2006:772, paras. 48-51.

⁸¹ ECJ, *Philip Morris*, *ibid.*; ECJ, *Pillbox* 38, *ibid.*; ECJ, *Poland v Parliament and Council*, *ibid.*

different grounds. First, when assessing the appropriateness of adopting harmonised rules on labelling and packaging requirements, the Court closely relies on the FCTC Guidelines. It is recalled that they do not have binding force. However, it is stated that they “*are based on the best available scientific evidence and the experience of the Parties to the FCTC*” and therefore “*are intended to have a decisive influence on the content of the rules adopted in the area under consideration, as is confirmed by the EU legislature’s express decision to take those recommendations into account when adopting Directive 2014/40*”.⁸² The strength of the terms used by the CJEU in relation with the Guidelines is highlighted in the judgment of the UK High Court following the preliminary ruling in *Philip Morris*. Justice Green states that “*it might be going too far to say, in relation to non-mandatory parts of the FCTC, that both the FCTC and the WHO Guidelines are “decisive”*” although it is admitted that they are important and relevant for the interpretation of the Tobacco Products Directive.⁸³ Accordingly, the Court seems to be turning non-binding international instruments into a binding one. Second, the Court also relies on the FCTC when assessing whether the health warnings imposed by the Directive are appropriate and necessary.⁸⁴ As a consequence, there seems to be an increasing influence of international law, through the FCTC, on EU law. While the FCTC has already been considered by the CJEU in its taxation case law,⁸⁵ the novelty here is on an in-depth analysis of this legal instrument in a traditional tobacco case.⁸⁶ From this point of view, it is particularly relevant that the Court does not only focus on the FCTC itself but also on a soft international law instrument such as the Guidelines.⁸⁷ All in all, it seems that, by relying on this international instruments, the CJEU is strengthening the legitimacy and authority of EU legislation on tobacco control.⁸⁸

III. The implications for the EU as a global actor in the field of public health

The last chapter has put forward the very relevant role of the European Union during the negotiation and implementation of the FCTC and its protocol and guidelines. This seems to acknowledge an enhanced role for the European Union in the field of public health. In an area where the EU merely has the competence to support, coordinate or supplement the actions of the Member States, it looks as if the Union was nonetheless able to export its norms and expertise in the field. A few questions seem relevant in this regard. First, we

⁸² ECJ, *Philip Morris*, *ibid.*, paras. 112-113.

⁸³ High Court of Justice, *British American Tobacco (UK) Limited and Others v Secretary of State for Health* [2016] EWHC 1169 (Admin), para. 260.

⁸⁴ ECJ, *Philip Morris*, *ibid.*, paras. 204-208.

⁸⁵ ECJ, Case C-197/08 *Commission v France*, EU:C:2010:111; ECJ, Case C-198/08 *Commission v Austria*, EU:C:2010:112; ECJ, Case C-221/08 *Commission v Ireland*, EU:C:2010:113.

⁸⁶ VARVASTIAN Samvel, *Promoting Human Health and the Functioning of the Internal Market: The Reaffirmation of the Tobacco Products Directive’s Key Objectives in Poland v. Parliament and Council, Pillbox 38 and Philip Morris Brands and Others*, *European Public Law* (2017), Vol. 23, Issue 2, pp. 271-284, p. 281.

⁸⁷ ELSMORE Matthew J., *Does Judicial Clean Sweep for the New EU Tobacco Directive Mean a New-Fangled Mirth of May?*, SSRN (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809137 (consulted on 29 May 2017), p. 3.

⁸⁸ *Ibid.*, p. 18.

could wonder whether the enhanced role during the negotiations of an international agreement of the World Health Organization could lead to an increased role in the WHO itself (A). Second, it could be considered whether the expertise within the FCTC could be used by the EU to advance other international agreements in the field of public health (B).

A. Implications for the role of the EU in the World Health Organization

The analysis made in this article could lead to the conclusion that an enhanced role for the European Union in the World Health Organization should be sought. Both the Treaties and the Court of Justice of the European Union favour the participation of the Union in international organisations.⁸⁹ However, it is argued that the circumstances that led to the EU becoming a contracting party to the FCTC are quite unique (1.). Additionally, it is uncertain whether such an enhanced role would be desirable, as a brief comparison with the position of the EU in the Food and Agriculture Organization (FAO) demonstrates (2.).

1. The uniqueness of the circumstances leading to an enhanced role in the FCTC

In general terms, a strong membership status of the European Union in an international organisation has been related with an expansion of intra-EU competences in a given field.⁹⁰ This has been seen in the case of tobacco control measures, where the involvement of the European Union in the FCTC negotiations has led to its leading role in the field of tobacco control within the Union. The EU has indeed adopted new legislation and has heavily relied on the FCTC in that regard. As a consequence, participating in the negotiation of and becoming a contracting party to the FCTC has had a very positive influence in the activity of the EU. We could therefore advocate for the need for the EU to become a full member to the WHO as this could lead to the same positive results in a broader range of areas.

However, it has been supported that the involvement of the European Union in the FCTC negotiations was the result of the convergence of a number of circumstances, namely, the existence of a legal basis for the adoption of tobacco control legislation, the internal legislative developments in the field, the strong commitment to tobacco control by the institutions and an international political momentum as well as a supportive environment from civil society.⁹¹

⁸⁹ Article 21(1) TEU; WOUTERS Jan, ODERMATT Jed, RAMOPOULOS Thomas, *The EU in the World of International Organizations: Diplomatic Aspirations, Legal Hurdles and Political Realities*, in SMITH Michael, KEUKELEIRE Stephan, VANHOONACKER Sophie, "The Diplomatic System of the European Union: Evolution, Change and Challenges", Oxford, Routledge (2015), pp. 94-111, p. 98.

⁹⁰ DEBAERE Peter, DE VILLE Ferdi, ORBIE Jan, SAENEN Bregt, VERSCHAEVE Joren, *Membership: The Evolution of EU Membership in Major International Organisations*, in ORSINI Amandine (ed), "The European Union With(in) International Organisations: Commitment, Consistency and Effects across Time", Farnham, Ashgate (2014), pp. 35-55, p. 48.

⁹¹ CHAMORRO Lourdes, *ibid.*, p. 254.

These circumstances are less likely to occur in the case of the World Health Organization. The advantage of the FCTC was that the material scope covered by the negotiations was limited to a very specific field where the EU had already played a significant role at the internal level. The World Health Organization is a much more general body that covers a wide field of action and the conditions established above would therefore not be fulfilled.

More importantly, there is a fundamental barrier to the EU becoming a full member of the WHO. The WHO Constitution does not allow for membership of non-State actors. As a consequence, this basic text should be amended accordingly and this poses two sorts of problems.

First, and in accordance with Article 73 of the WHO Constitution, amendments require the adoption by two thirds of the Health Assembly and the acceptance by two thirds of the Members in accordance with their respective constitutional processes. This could be problematic for several third countries that could see European States strengthening even more their links and the European position becoming even more difficult to change. Additionally, some EU Member States could also hesitate to accept the EU membership in the WHO as they could fear “*a silent ‘competence creep’ and a loss of standing in international fora*”.⁹²

Second, the EU membership status in international organisations has been described as being “sticky”, meaning that the initial status that the EU gets in an organisation will remain the same over decades.⁹³ From this perspective, it is unlikely for the EU to get an enhanced status in the WHO. However, some circumstances can lead to a change. In the case of the Food and Agriculture Organization, for example, a period of “europtimism” under the Delors Commission, the loss of national sovereignty over agriculture, and the end of the Cold War leading to less opposition from previous eastern bloc countries allowed the EU to become a full member.⁹⁴ While europtimism is not the current trend in the EU, we could think about different reasons that could be put forward when making a balancing exercise. We could mention the increasing relevance of international health threats and the need to deal with them in a coherent manner. The success of the FCTC and the leading role of the EU described above could also be taken into account.⁹⁵

In addition to the problems coming from the WHO side, it is also unlikely that an enhanced role in the WHO would be one of the priorities of the European Union. When looking at

⁹² WOUTERS Jan, CHANÉ Anna-Luise, *Brussels Meets Westphalia: The European Union and the United Nations*, in EECKHOUT Piet, LÓPEZ-ESCUADERO Manuel, “The European Union’s External Action in ‘Times of Crisis’”, Oxford/Portland, Hart Publishing (2016), pp. 299-324, p. 321.

⁹³ DEBAERE Peter, DE VILLE Ferdi, ORBIE Jan, SAENEN Bregt, VERSCHAEVE Joren, *ibid.*, p. 49.

⁹⁴ *Ibid.*

⁹⁵ The example of the enhanced participation acquired by the European Union in the World Customs Organization after becoming a party to a number of conventions concluded under the auspices of this international organisation could be used in the framework of the World Health Organization. See BOISSON DE CHAZOURNES Laurence, *Interactions between Regional and Universal Organizations: A Legal Perspective*, Leiden/Boston, Brill Nijhoff (2017), 382 p., p. 77. However, the competence of the European Union in both fields is very different.

the participation of the Union in international organisations, there seems to be other fora where the need for a stronger position should be sought. The case of the International Labour Organization is the most obvious example.⁹⁶

Even if we admit the possibility of the EU to become a full member of the WHO, we should then wonder whether such possibility is desirable. A brief comparison with the position of the EU in the Food and Agriculture Organization (hereinafter, the FAO) is relevant in this respect.

2. The desirability of becoming a full member of the WHO: a brief comparison with the FAO

Not only the upgraded status in the WHO needs to be possible but it also needs to be desirable. When deciding whether the Union should seek an enhanced role in an international organisation, a number of factors need to be taken into account (a); even where those factors are met and the Union succeeds at getting a full member status, the result is not always without difficulties, as the example of the FAO shows (b). This calls into question the desirability for the Union to seek an enhanced role in the WHO.

a. Seeking an enhanced status in an international organisation: what should be taken into account?

It has been considered that, when evaluating whether seeking for an enhanced role in an international organisation, the European Union should take several factors into account. Hence, it should try to be represented in organisations that work in areas falling within the competence of the Union or in areas where the Union has already legislated. The European Union should also take into account the advantages that can derive from an upgraded status, that is, whether the implications of not being a mere observer but rather an enhanced observer or a full member are substantial. On this issue, it has been stated that the new status “*should ideally result in more than mere cosmetic changes or greater “visibility”*”.⁹⁷

The question that arises then is whether those conditions are met in the case of the World Health Organization. While the EU only has a limited competence in the area of public health, it is true that it has legislated on many aspects surrounding public health and having an impact on it. EU legislation goes from tobacco control, to the use of additives in food or the regulation of cosmetic products which can have an impact on health.

⁹⁶ See KISSACK Robert, *The Performance of the European Union in the International Labour Organization*, Journal of European Integration (2011), Vol. 33, Issue 6, pp. 651-665. For an enlarged review of the international organisations where the EU could seek for an enhanced status, see WOUTERS Jan, ODERMATT Jed, RAMOPOULOS Thomas, *ibid.*; see also BOISSON DE CHAZOURNES Laurence, *ibid.*, pp. 74-80.

⁹⁷ WOUTERS Jan, ODERMATT Jed, RAMOPOULOS Thomas, *ibid.*, p. 102.

Moreover, the differences between being a Member or being an observer are quite important. Observers cannot attend any meeting they wish, they can only make statements upon invitation of the President and with the consent of the Health Assembly or committee, they don't have access to all information and they cannot freely share memoranda with Members.⁹⁸ As a consequence, it is not only the right to vote that is at stake for observers, but many other activities that are restricted. From this perspective, seeking for an enhanced status seems quite an obvious goal to pursue.

b. The example of the FAO: the exposure to reality

A discussion on the EU membership status in the FAO is an interesting illustration of the implications of an enhanced role in the WHO. The FAO Constitution was modified in 1991 to allow for regional economic organisations to be admitted as members. As a full member, the EU has a right to vote but its vote cannot be added to the ones of the Member States. As a consequence, it will be either for the EU either for the Member States to vote on a given issue, leading to a system of alternative exercise of the voting rights.⁹⁹ This system is very complex and has led to frequent discussions and to the introduction of an action before the Court of Justice of the European Union.¹⁰⁰

This example shows how difficult it can be for the Union and the Member States to coordinate positions and to play a role in an international organisation where they all have a full member status. As a consequence, the European Commission considers the application of the FAO arrangements quite inefficient and it is quite unlikely that it wants to extend it to a wide number of organisations.¹⁰¹

The counter-example of the WTO could be mentioned here as it is an example of an organisation where the participation of the Union goes quite smoothly with no major issues having been raised. However, this has been considered as a unique situation as the Union has an exclusive competence concerning the common commercial policy and the Commission has a strong expertise in this field.¹⁰² Moreover, it has also been noted that voting rarely takes place at the WTO which limits the potential conflicts between the Union and its

⁹⁸ Rule 45 Rules of Procedure of the World Health Assembly; Memorandum, *ibid.*, para. D.1.

⁹⁹ The General Rules of the FAO and the internal arrangements between the European Commission and the Council specify these principles; see Rule XLI(2) General Rules of the FAO; see also Arrangement concerning preparation for the meetings of the FAO as well as interventions and voting, 18 December 1991, Council documents 10478/91, updated by Council document 9050/92, 7 October 1992 and Council document 8460/95, 26 June 1995 (unpublished), cited in WOUTERS Jan, CHANÉ Anna-Luise, ODERMATT Jed, RAMOPOULOS Thomas, *Improving the European Union's Status in the United Nations and the UN System: An Objective without a Strategy?*, in KADDOUS Christine (ed), *The European Union in International Organisations and Global Governance. Recent Developments*, Oxford/Portland, Hart Publishing (2015), pp. 45-76, p. 64; also cited in European Commission, *The Role of the European Union in the Food and Agriculture Organisation (FAO) after the Treaty of Lisbon: Updated Declaration of Competences and New Arrangements between the Council and the Commission for the Exercise of Membership Rights of the EU and its Member States*, 29 May 2013, COM(2013) 333 final.

¹⁰⁰ ECJ, Case C-25/94 *Commission v Council*, EU:C:1996:114.

¹⁰¹ WOUTERS Jan, ODERMATT Jed, RAMOPOULOS Thomas, *ibid.*, p. 98.

¹⁰² *Ibid.*, p. 103.

Member States.¹⁰³ The case of the FCTC could however prove to be useful in this regard. Although it is an international agreement and not an international organisation, the arrangements for the participation to the debate and regarding the voting rights are much more similar to what exists in the FAO. It is interesting to note that, despite the complexity of the rules, the EU and Member States were able to work together in an efficient way.

However, if the EU joined the World Health organization, the situation would most probably be more similar to the one in the FAO. Most of the matters discussed in the WHO are of shared competence or of exclusive competence of the Member States. Moreover, and contrary to the FCTC, the WHO deals with a large number of topics for which the competence of the Union varies greatly. As a consequence, it is questionable whether the EU membership in the WHO is actually desirable.

Alternatively, the European Union could perhaps seek for an enhanced status allowing it to attend any meetings and fully participate to the debates, submit memoranda to other Members of the WHO and not only to the Director General and have access to confidential information. Such enhanced status is considered in the Rules of Procedure of the WHO, where the status of “Associate Member” is established.¹⁰⁴ Contrary to observers, Associate Members “*may participate equally with Members in meetings of the Health Assembly and of its main committees*” except for the right to vote. This could be an interesting alternative for the Union although, as things stand right now, it is unlikely that fighting for an enhanced status at the WHO is one of the priorities of the Union.

B. The implications for the role of the EU in the negotiation of other public health international agreements: a precedent for the fight against obesity?

Even if we admit that an enhanced role of the European Union in the World Health Organization is both unrealistic and not even that attractive, the truth is that the role of the Union in the negotiation of the FCTC does set a precedent. This success story makes the EU legitimate to call for the negotiation of other international agreements in the field of public health where it could play a leading role and become a contracting party.

When looking at the different areas where this goal could be achieved, the fight against obesity seems to be one of the most appropriate fields. After a brief introduction on the need to negotiate a multilateral agreement to fight against obesity (1.), it will be acknowledged that a considerable amount of legislation has already been adopted within the European Union in related areas (2.). It will then be argued that the EU holds a full member status in the FAO and the Codex Alimentarius Commission making the participation of

¹⁰³ VAN VOOREN Bart, WESSEL Ramses A., *EU External Relations Law: Text, Cases and Materials*, Cambridge, Cambridge University Press (2014), 579 p., p. 255.

¹⁰⁴ Rule 44 Rules of Procedure of the World Health Assembly.

the Union in the negotiation of such an international agreement both realistic and desirable (3.).

1. The need for a multilateral agreement to fight against obesity modelled on the FCTC

Different sources have been advocating for a multilateral agreement on healthy diets or to fight obesity and some authors have taken as a model the Framework Convention on Tobacco Control.¹⁰⁵ The similarity between both challenges is highlighted in this context and the sorts of measures that should be developed are also considered quite similar.

Of course, differences between both sectors are also obvious. It has been noted, for example, that international negotiations on the fight against obesity would require a stronger engagement with developing countries which do not feel that much concerned about this issue so far.¹⁰⁶ While this might have been true in the past, developing countries are however likely to feel increasingly concerned. Overweight above 60% of the population exists in Europe, North America and Australia but also in a number of Latin American and Middle East countries.¹⁰⁷ Moreover, WHO has reported that the majority of overweight children live in developing countries where the increase rate is more than 30% higher than that of developed countries. The number of overweight children in Africa has doubled from 1990 to 2014 and half of the children under five who were overweight in 2014 lived in Asia.¹⁰⁸ Another important difference between tobacco control and obesity control is the aim pursued. In the case of tobacco, “*the ultimate public health goal is the elimination of the industry*” whereas, for obesity, it is the transformation of the food industry to a health-oriented food system.¹⁰⁹ The measures that should be adopted would therefore be quite different as the purpose would not be banning food but restricting the consumption of certain forms of food.

¹⁰⁵ DAYNARD Richard A., *Lessons from Tobacco Control for the Obesity Control Movement*, Journal of Public Health Policy (2003), Vol. 24, Issue 3, pp. 291-295, p. 291; BLOUIN Chantai, DUBÉ Laurette, *Global Health Diplomacy for Obesity Prevention: Lessons from Tobacco Control*, Journal of Public Health Policy (2010), Vol. 31, Issue 2, pp. 244-255, p. 244; World Obesity Federation, Consumers International, *Why we Need a Global Convention to Protect and Promote Healthy Diets*, May 2014, available at https://s3.eu-central-1.amazonaws.com/ps-wof-web-dev/site_media/uploads/convention_briefing_may15.pdf (consulted on 2 June 2017); World Obesity Federation, Consumers International, *Recommendations Towards a Global Convention to Protect and Promote Healthy Diets*, May 2014, available at <http://www.consumersinternational.org/media/1475072/recommendations-for-a-convention-on-healthy-diets-low-res-for-web.pdf> (consulted on 2 June 2017); Consumers International, World Obesity federation, UK Health Forum, Consumer Council of Fiji, El Poder del Consumidor, *Open Letter to the Heads of WHO and FAO Ahead of the Second International Conference on Nutrition Calling for a Global Convention to Protect and Promote Healthy Diets*, November 2014, available at <http://www.consumersinternational.org/media/1524961/open-letter- updated.pdf> (consulted on 2 June 2017).

¹⁰⁶ BLOUIN Chantai, DUBÉ Laurette, *ibid.*, p. 251.

¹⁰⁷ World Health Organization, *Prevalence of Overweight*, 2014, available at http://gamapserver.who.int/gho/interactive_charts/ncd/risk_factors/overweight/atlas.html (consulted on 18 May 2017).

¹⁰⁸ WHO, *Facts and Figures on Childhood Obesity*, 29 October 2014, available at <http://www.who.int/end-childhood-obesity/facts/en/> (consulted on 18 May 2017); WHO, *Obesity and Overweight*, June 2016, available at <http://www.who.int/mediacentre/factsheets/fs311/en/> (consulted on 18 May 2017).

¹⁰⁹ BLOUIN Chantai, DUBÉ Laurette, *ibid.*, p. 252.

However, in both cases the focus is on a disease that, while not raising conflicts between countries, raises problems that all countries share. In both cases the industry lobbying is very strong which can lead to an imbalance of power in the case of small countries.¹¹⁰ Most importantly, the measures adopted by the FCTC for tobacco products seem very much exportable to food products. We can mention here the rules on packaging and labelling requirements, advertising measures, promotion, public awareness and education, or tax measures.¹¹¹

If we consider the necessity of such a global agreement on obesity, then it is only logical to wonder what the role of the European Union could be. The EU has not really attempted to influence international organisations in order to tackle the obesity threat so far.¹¹² However, there are good reasons to think that this could be a sector where the normative power of the Union could be successful, as the next paragraph will put forward.

2. Internal considerations: is there an EU competence in the promotion of healthy diets?

In the area of the promotion of a healthy diet, the internal issues are very similar to the ones presented in the case of tobacco control. Considering that measures adopted in this field fall within the public health provision, the competence of the Union will again be very restricted. Article 168(5) TFEU provides that the institutions may adopt incentive measures to protect and improve human health, in particular to combat the major cross-border health scourges, for the monitoring, early warning of and combatting serious cross-border health threats and to protect public health regarding tobacco and the abuse of alcohol. Contrary to tobacco, the fight against obesity is not explicitly mentioned in this paragraph. However, it has been argued that the use of the expression “in particular” implies that such measures could be within the scope of this provision.¹¹³ In any case, Article 168(5) TFEU explicitly states that harmonisation measures are excluded in these areas. As a consequence, the legal basis to adopt measures in the fight against obesity cannot be the public health provision.

The same conclusion applies if we consider the competence of the Union in the consumer protection field as the Union can only adopt support measures in this field or measures adopted on the basis of the internal market provision.¹¹⁴

It is therefore necessary to analyse whether the Union could legislate in the area of the fight against obesity on the basis of Article 114 TFEU. Indeed, measures tackling obesity can be

¹¹⁰ DAYNARD Richard A., *ibid.*, p. 293.

¹¹¹ World Obesity Federation and Consumers International, *Recommendations Towards a Global Convention to Protect and Promote Healthy Diets*, *ibid.*, Articles 7-13.

¹¹² HERVEY Tamara K., McHALE Jean V., *ibid.*, p. 525.

¹¹³ FAEH Andrea, *Obesity in Europe: The Strategy of the European Union from a Public Health Law Perspective*, *European Journal of Health Law* (2012), Vol. 19, pp. 69-86, p. 72.

¹¹⁴ Art. 169(2) TFEU.

very diverse, ranging from pure public health measures, to the promotion of physical activity or the adoption of food legislation. It is the latter option that has been mostly used by the European Union, hence strongly developing the area of food law.

Promoting safe and healthy food can be useful to fight against obesity. To attain this goal, it is often necessary to regulate the production and commercialisation of foodstuffs. As with tobacco products, having recourse to Article 114 TFEU can then be a suitable solution, particularly taking into account that the target will mostly be foodstuffs produced by multinational companies and therefore sold in the whole internal market.

Taking Article 114 TFEU as a legal basis, the European Union has adopted a number of legislative acts which have as the main or secondary goal the promotion of a healthy diet. The General Food Regulation settles general principles of food law and food safety and establishes the European Food Safety Authority.¹¹⁵ On more specific terms, there is a Regulation on the provision of food information to consumers;¹¹⁶ a Regulation on nutrition and health claims;¹¹⁷ a Directive on food supplements;¹¹⁸ a Regulation on food for specific groups, including children;¹¹⁹ and a Directive on advertising that lays down some principles applicable to food advertising.¹²⁰ The European Parliament has been considered to be permeable to the food industry lobby which has led to lighter legislation than initially proposed by the Commission.¹²¹ However, all these measures can still have an impact on the fight against obesity by dealing with, even if to a smaller scale, the information that is provided to consumers.

In addition to these texts, the European Union has developed a number of initiatives to fight against obesity as such. However, in these cases, the Union only has a supportive role

¹¹⁵ Regulation (EC) No 178/2002 of the European Parliament and of the Council of the 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, [2002] OJ L 31/1.

¹¹⁶ 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, [2011] OJ L 304/18.

¹¹⁷ 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, [2006] OJ L 404/9.

¹¹⁸ Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements, [2002] OJ L 183/51.

¹¹⁹ Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control and repealing Council Directive 92/52/EEC, Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/141/EC, Directive 2009/39/EC of the European Parliament and of the Council and Commission Regulations (EC) No 41/2009 and (EC) No 953/2009 Text with EEA relevance, [2013] OJ L 181/35.

¹²⁰ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L 95/1, Art. 9(2).

¹²¹ HERVEY Tamara K., McHALE Jean V., *ibid.*, p. 417.

and therefore its impact is more limited. In 2007, the Union adopted a Strategy on Nutrition, Overweight, and Obesity-related Health Issues.¹²² In 2014, the High Level Group on Nutrition and Physical Activity adopted an Action Plan on Childhood Obesity¹²³ and the Council adopted conclusions on nutrition and physical activity.¹²⁴ There is also an EU platform for action on diet, physical activity and health.¹²⁵ In more general terms, the promotion of a healthy diet is also tackled in the third EU health programme 2014-2020.¹²⁶

Finally, it is to be mentioned that an increasing role of the Court of Justice of the European Union can be expected in this area. In 2014, the Court dealt with the issue of obesity for the first time in its *Kaltoft* judgment.¹²⁷ The analysis provided in this judgment follows a fundamental rights perspective and it could thus be a sign that obesity will not only be tackled from a consumer-focused approach from now on but also from a patient-focused perspective.

To sum up, it can be considered that the action of the European Union in this area has had two dimensions: a broad dimension where the Union has developed a number of initiatives with an informative function but without any binding nature and a narrower dimension that has focused on food information. It is in the latter area where the EU has developed legally-binding instruments and can therefore be considered to have a competence. However, the former dimension has allowed the Union to develop an overall expertise and a coordinating capacity that could most probably be used at the international level. From an internal perspective, the Union can therefore be considered to have some competence in the field and could legitimately require to actively participate in the negotiation of such an international agreement.

3. External considerations: the membership status of the Union in international food-related organisations

From an external dimension perspective, the leadership role of the EU in the fight against obesity seems rather logical and even easier to reach than in the case of tobacco control. While the FCTC was negotiated under the auspices of the WHO, an international convention on obesity could potentially be negotiated under the supervision of several organisa-

¹²² European Commission, *White Paper on a Strategy for Europe on Nutrition, Overweight and Obesity Related Health Issues*, 30 May 2007, COM(2007) 279 final.

¹²³ European Commission, *EU Action Plan on Childhood Obesity 2014-2020*, 24 February 2014, available at https://ec.europa.eu/health/sites/health/files/nutrition_physical_activity/docs/childhoodobesity_actionplan_2014_2020_en.pdf (consulted on 18 May 2017).

¹²⁴ Council of the European Union, *Council Conclusions on Nutrition and Physical Activity*, [2014] OJ C 213/1.

¹²⁵ European Commission, *EU Platform on Diet, Physical Activity and Health – A European Platform for Action*, 15 March 2005, available at http://ec.europa.eu/health/archive/ph_determinants/life_style/nutrition/platform/docs/platform_charter.pdf (consulted on 18 May 2017).

¹²⁶ Regulation (EU) No 282/2014 of the European Parliament and of the Council of 11 March 2014 on the establishment of a third Programme for the Union's action in the field of health (2014-2020) and repealing Decision No 1350/2007/EC, [2014] OJ L 86/1.

¹²⁷ ECJ, Case C-354/13 *Kaltoft*, EU:C:2014:2463.

tions. There are some issues that indeed correspond to the WHO tasks and which are related with physical activity or diseases related with overweight and obesity. However, other questions that should be tackled by such a convention correspond to activities that are carried out by the FAO or the Codex Alimentarius Commission. This would concern rules on advertising, labelling, or packaging for example.

As a matter of fact, the European Union is a full member both in the FAO and the Codex Alimentarius Commission. Consequently, if those organisations were to be involved in the drafting of such a convention, it would probably seem obvious for other parties to include the EU during the negotiating process. However, even if the text was only negotiated under the WHO premises, the precedent of the FCTC has already proved that the participation of the European Union is not only possible but also highly effective.

Conclusions

The example of the Framework Convention on Tobacco Control sets an interesting precedent for enhancing the role of the European Union as a global health leader. While the Union is currently having a debate on the organisations where it should seek an enhanced status, it is striking to see how it achieved this goal in the framework of an organisation where the discussion did not even seem relevant.¹²⁸ Becoming a member of the World Health Organization does not look like a realistic possibility. However, the EU managed to lead the negotiations of the FCTC and is now an engaged actor in the implementation of this international convention.

The conditions that were met and that allowed for this outcome were quite exceptional. However, they were not absolutely unique and there are other fields where the Union could seek for such a relevant role. While the EU is seen as more of an economic power than a public health reference, it could use its competence and expertise in the area of consumer goods to expand its leadership beyond its borders. This is what happened in the field of tobacco control and it is argued that it could and should be done again with the promotion of healthy diets.

Obesity is becoming an increasing burden at the global level leading to a number of non-communicable diseases and an important cost for all economies. Several sources have raised their voice advocating for an international convention modelled on the FCTC. In this context, the European Union should not hesitate to take the lead since it has the competence, the expertise and the legitimacy to play a leading role in this battle.

This article has put forward that there is an opportunity for the European Union to move from an economic model to a social model not only at the internal but also at the external

¹²⁸ See WOUTERS Jan, ODERMATT Jed, RAMOPOULOS Thomas, *ibid.*, pp. 101-102.

level. However, the question that follows then is whether the approach towards public health in the context of the WHO is consistent with the public health priorities of the Union in other international institutions such as the World Trade Organization. It could therefore be analysed whether a coherence obligation exists at the international level and whether the European Union is complying with it. If it wishes to become a public health leader, then it has to act as one in all relevant international fora.

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List of abbreviations

Art.	Article
CJEU	Court of Justice of the European Union
COREPER	Permanent Representatives Committee
EU	European Union
FAO	Food and Agriculture Organization
FCTC	Framework Convention on Tobacco Control
INB	Intergovernmental Negotiating Body
OLAF	European Anti-Fraud Office
p. / pp.	pages / pages
para.	paragraph
REIOs	Regional Economic International Organisations
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
v.	versus
WHA	World Health Assembly
WHO	World Health Organization

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