Fat Taxes in the European Union between Fiscal Austerity and the Fight Against Obesity

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Fat taxes in the EU
between fiscal austerity and the fight against obesity

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Introduction

To discourage unhealthy eating and limit the population’s intake of fatty foods, thereby alleviating the current obesity ‘epidemic’, an increasing number of countries across the industrialised world are considering levying taxes on unhealthy food.1 A ‘fat tax’ may be defined as a tax or surcharge placed upon fattening foods, beverages or individuals with the aim to decrease consumption of foods that are linked to obesity.2 This is not an entirely new idea – some theorists, starting with Arthur Pigou, a 20th-century English economist, have long presented the arguments for imposing special taxes on goods and services whose prices do not reflect the true social cost of their consumption.3 Examples of Pigouvian taxes are duties on cigarettes, alcohol, gambling and environmental emissions. Support for another such tax, a fat tax, is now spreading across the European Union. On 1 October 2011, Denmark introduced a tax on foods by targeting those products that are high in saturated fat. The Danish Act (hereinafter, Act)4 confirms the trend in

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1 See e.g. OECD, Obesity and the Economics of Prevention: Fit not Fat (2010).
4 Fedtafgiftsloven, full title: Lov om afgift af mættet fedt i visse fødevarer (Act on a tax on saturated fat in specific food), LOV nr 247 af 30/03/2011 Gældende (Fedtaftgiftsloven), published on 31 March 2011. Available at: https://www.retsinformation.dk/Forms/R0710.aspx?id=136314#Not1.
various EU Member States to tax certain foods or consider taxing them in the future. On 1 September 2011, Hungary introduced a tax on products considered excessively salty, sweet or with high caffeine levels, Act CIII of 2011 on the Public Health Product Tax, also known as the ‘crisps tax’ (chipsadó), which is levied on the producer or first distributor. The French Government will increase excise taxes on soft drinks in 2012. Inspired by the French example, the Irish government is also considering introducing a tax on carbonated soft drinks to help combat obesity. Finally, the Prime Minister of the UK has announced on 4 October 2011 that he is considering the possibility of introducing a Danish-style fat tax to address obesity.

This essay provides a brief analysis of the genesis, rationale and legal implications of these national fat tax schemes, especially the recently implemented Danish measure. It focuses in particular on how these product-specific taxes are handled under EU and WTO law.

The Genesis

The concept of modern food taxes was pioneered by Kelly Brownell, an internationally renowned expert in obesity based at Yale University. Professor Brownell observed in the early 1990s that foods high in fat and low in nutritional value were among the cheapest on the market and subsequently proposed the creation of a food tax. The stated aim of this fiscal measure was not only to offset this price imbalance but also to collect resources to be invested in nutrition programs. The proposal elicited a lively debate: opponents claimed that it interfered with individual rights, and as such qualified as a paternalistic measure. Yet, since the establishment of its Global Strategy on Diet, Physical Activity and Health in 2004, the World Health Organization has considered fat taxes


7 ‘France to impose fat tax on sugary drinks such as Coca-Cola and Fanta’, The Daily Mail, 6 October 2011. http://www.dailymail.co.uk/news/article-2045980/France-impose-fat-tax-sugary-drinks-Coca-Cola-Fanta.html#ixzz1axX0NesP

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


10 See e.g. Kelly Brownell, Food Fight: The Inside Story of the Food Industry, America’s Obesity Crisis, and What We Can Do About It (McGraw-Hill, 2004).
as a relevant policy option for encouraging people to make healthier eating choices.\textsuperscript{11} While this is consistent with growing worldwide interest in the effect of fiscal policy on diet, there is little data supporting the effectiveness of taxes in this context\textsuperscript{12} – as illustrated below, the available evidence on the use of food taxes as a public health strategy is in fact rather modest.\textsuperscript{13}

**The Rationale**

The rationale of a fat tax seems clear. Make ‘bad’ food more expensive, ‘good’ food relatively less so, and people will probably shift at least some of their purchases to those healthier options. Fattening foods tend to be cheap and fresh produce and meat are often among the priciest food products.\textsuperscript{14} A tax can theoretically help offset that imbalance, nudging people to eat more of what is good for them and less of what is not. Scientific research shows that taxing soft drinks and pizza can decrease the amount of calories that people consume from these foods. Cross-sectional, prospective, and experimental studies have found an association between obesity and the consumption of sugar-sweetened drinks.\textsuperscript{15} However, experimental studies have not always found an association, and the size of the effect can be very modest. There is even evidence that such taxes can have the perverse effect of increasing consumption of fatty or salty foods. While studies show that eating behaviour may be more responsive to price increases than to nutritional education,\textsuperscript{16} there is also evidence that obese individuals are less responsive to changes in the price of food than normal-weight individuals. Indeed, a fat tax may have less impact than its advocates expect. Some studies on the effect of cigarette and alcohol ‘sin taxes’ suggest heavy users are less influenced by price changes than others, so that a fat tax may do little to improve health, at least for today’s junk-food addicts. This suggests that fat taxes are more likely to prevent obesity than to tackle it.


\textsuperscript{12} See e.g. World Bank, *Repositioning Nutrition as Central to Development: a Strategy for Large-Scale Action* (Washington: The World Bank, 2006)

\textsuperscript{13} See e.g. A. M. Thow, S. Jan, S. Leeder and B. Swinburn. ‘The impact of fiscal policy interventions for diets, obesity and chronic disease: a systematic review’ *Bulletin of the World Health Organization*, 88 (2010), 609-14

\textsuperscript{14} For an explanation of why junk food is cheaper than healthier alternatives, see Michael Pollan, *The Omnivore’s Dilemma* (2009).


Advocates of the taxes usually point to the positive effect taxes have had on alcohol and tobacco use. However, taxation structures that worked for tobacco (i.e. an excise tax on a single substance that is proven to be harmful) may not be automatically transferable to food, which is essential for life and as such tends to involve more complex choices.

**Distributive Justice**

Fat taxes are also questioned on the grounds of distributive justice. Since the poor spend a greater proportion of their income on food, and in particular on unhealthy cheaper food, there is a risk that a junk food tax may be regressive. Certain studies have found that food taxes are only slightly regressive, however, and that lower-income households reduce their consumption proportionately more than wealthier households, as has been observed with tobacco taxes. To make a fat tax less burdensome for the poor, proponents recommend earmarking the revenues to subsidise healthy foods and health education. Combining food taxes with subsidies might help alleviate potential regressivity by enabling consumers to switch to more healthy products without incurring additional costs. Moreover, proponents generally argue that a fat tax may be less regressive than it appears to the extent that it lowers medical expenditures among the poor. This seems to be true insofar as there is a higher incidence of diet-related illnesses among the poor than in the general population. Unlike placing restrictions on foods or ingredients, a fat tax would not limit consumer choice, only change relative prices. Yet, unlike smoking or excessive gambling and drinking, eating unhealthy food does not directly impair the well-being of anyone else. This seems to reduce the case for the introduction of fat taxes and makes them more controversial. A more direct, yet contentious, approach would simply be to tax people on the basis of their weight. Japan implemented a measurement of waist sizes during 2008 to help avoid the obesity epidemic confronting the United States. The *New York Times* wrote: ‘To reach its goals of shrinking the overweight population by 10 percent over the next four years and 25 percent over the next seven years, the government will impose financial penalties on companies and local governments that fail to meet specific targets.

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The country’s Ministry of Health argues that the campaign will keep the spread of diseases like diabetes and strokes in check’. The average male waist size in Japan is smaller than the average in the EU and the US.

**The Danish Fat Tax**

On 1 October 2011, the Danish Fat Tax Act came into effect. The tax of DKK 16 (around EUR 2.15) per kilogram of saturated fat is imposed on all food products produced in and imported into Denmark. The scope of the new legislation is established in Article 1 of the Act, which specifies that the following products are taxable: meat, certain dairy products, animal fats, edible oils and other fats, margarine, spreadable composite products, and other products which can be considered as substitutes or imitations of the above. The tax does not apply to products containing less than 2.3% per weight of saturated fat, which means that most types of milk are exempt. Goods for export, animal feed, additives, certain food supplements and medicines are also exempt.

The obligation to pay the tax is incumbent upon those who produce the food in Denmark commercially, receive the food from another EU country, import food into Denmark from a country outside the EU or from areas located in the EU but outside of the EU’s fiscal territory, or sell food from another EU country in such a way that the goods are directly or indirectly sent or transported by the seller or on behalf of the seller to non-commercial purchasers in Denmark (i.e., distance selling) (hereinafter, the taxable parties). Both producers and importers of these goods must register for the tax on saturated fat with the Danish Customs and Tax Administration. The base amount on which the tax is to be paid is the weight of saturated fat in the food. For meat products, standard rates per kilogram have been set in an Annex to the Act (for example, for beef with a saturated fat content of 5.2 g per 100 g, the tax per kg of beef will be DKK 0.83, or EUR 0.11). Under certain conditions, the tax can also be paid according to the saturated fat content in a cut. There are several options to determine the base amount on which the tax is to be paid. The taxable party can use publicly available food information, which sets average standards for the levels of saturated fat in specific foodstuffs. The base amount can also be determined based on a technical analysis of the specific food. And finally, nutrition labelling can be used. Nutrition labelling is currently not mandatory in the EU, but it is set to become so soon: a mandatory nutrition declaration (including the indication of saturated fat per 100 g or 100 ml in a product) will have to be implemented by operators within a five-year period after the EU Food Information Regulation, which was adopted

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21 For an analysis of the genesis and rationale of the Danish fat tax, see e.g. Wencke Gwozdz, *Showcase: On the Way to a Fat Tax in Denmark* (Corpus, 2010).
by the EU Council on 29 September 2011, comes into effect (i.e., on the 20th day following its publication in the Official Journal).

The Danish fat tax also applies to imported products. Article 8 of the Act establishes that, where such food is received, imported or sold by distance selling in Denmark, a tax is to be paid to the treasury on the contents used in the production of food. Danish importers of products covered by the Act must therefore obtain a declaration of fat content from the foreign supplier. Where taxable parties are unable to document the weight of saturated fat, the tax is to be paid based on the total amount of both saturated and unsaturated fat in the food or, if this also cannot be provided, on the basis of the net weight of the food product. According to Article 22 of the act, fines are imposed on anyone who knowingly or recklessly submits incorrect or misleading information, violates certain provisions of the Act (Article 4(1), Article 4(3)(1) or (2), Article 4(4), Article 10(1) or (3), Article 14(2)(1) Article 15, Article 16, Article 19(1)–(3) and (5)–(7) or Article 20(1) (7)) or transfers, obtains or acquires goods (or attempts to do so) on which tax has not been paid and which should have been paid in accordance with the Act.

In the light of the above, it can be expected that the taxable parties will ultimately pass on the tax to the final consumer. The implementation of the tax scheme imposes quite a burden on producers, importers and outlets, as there is a heavy degree of bureaucracy involved in establishing the amount of tax on domestically produced or imported goods. For instance, declarations from producers are required for the saturated fat content in the actual product as well as for the amount used in its preparation. In addition, it has been reported that the Danish authorities reserve the right to impose a flat fee on the importer when the fat content of an imported product is not sufficiently indicated.22

Legal Implications

Fat taxes under EU law

The Danish fat tax, the Hungarian ‘crisps tax’, and similar measures which might be introduced in individual EU Member States in the future appear to be indirect internal taxes that are not harmonised at the EU level. In principle, EU law allows Member States to introduce and maintain non-harmonised internal taxes and freely establish their modalities. However, such taxes must comply with the Treaty on the Functioning of the European Union (hereinafter, TFEU), in particular

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with Article 110 thereof, which prohibits internal discriminatory taxation, direct or indirect, on products from other Member States, in excess of that imposed on similar domestic products. The same provision also prevents Member States from imposing on products from other Member States any internal taxation ‘of such a nature so as to afford indirect protection to other products’. This calls for a close analysis of whether these taxes create a higher tax burden on imported products. The Danish and Hungarian governments have notified the European Commission of these taxes under the Directive 98/34/EC procedure.\(^{23}\) In both cases it was noted that the measure ‘had no significant impact on international trade’.\(^{24}\)

If several Member States adopt such taxes, the EU may consider stepping in so as to adopt an EU-wide fat tax. The first obstacle faced by the EU in the establishment of such a tax would be the issue of competence: to what extent could an EU-wide fat tax on public health grounds be imposed? Both health policies and taxation are the eminent domain of the Member States. Even after the entry into force of the Treaty of Lisbon, the main responsibilities for both policies still lie with the Member States. Indeed, it is generally believed that the EU’s scope of competence in the field of public health remains largely unchanged under the TFEU as this document did not introduce any extension of the Union’s powers in health and tax matters.\(^{25}\) Under Article 6 a) TFEU, Article 168 sect. 2, the EU’s competence is restricted to a coordinating function, supporting and supplementing the measures adopted by the Member States. However, Article 9 TFEU states that the protection of public health is one of the basic requirements that the EU has to take into account in the enactment of any of its policy or activities.\(^{26}\) It is by relying on a combining reading of these provisions as well as the legal basis of its internal market that the EU has developed, over time, an effective prevention policy against tobacco consumption. In so doing, the EU provided significant impetus for the Member States that had until then been reluctant to adopt preventive measures at a national level. The long overdue tobacco product advertising and mandatory warning claims were thus initiated by

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\(^{23}\) Directive 98/34/EC establishes a procedure which imposes an obligation upon EU Member States to notify the Commission and each other of all draft technical regulations concerning products before they are adopted in national law.


\(^{26}\) Article 9 TFEU.
EU legislation.\textsuperscript{27} In any event, although the EU has no competence in terms of direct taxation, it is entitled to ‘adopt provisions for the harmonisation of legislation concerning … excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment of the internal market and to avoid distortion of competition’.\textsuperscript{28} In the light of the above, it remains to be seen whether the EU will, once again, assume a central role in the development of an effective prevention policy for nutrition and obesity. There are signs that the EU is eager to play such a role. Indeed, the Union has already shown political will to embark on this path by adopting a regulation on nutrition and health claims which forces food companies to substantiate their labelling claims, as well as a regulation on the provision of food information, one of whose main goals is to provide help to consumers in making ‘healthy’ choices. Yet, given the significant differences in obesity prevalence among the EU Member States, to establish a EU-wise fat tax would also face the challenge to determine a viable and effective tax rate valid for the whole European territory\textsuperscript{29}.

\textit{Fat taxes under WTO law}

Discrimination against third country products can also be an issue in the implementation of fat taxes. Article III:2 of the WTO’s General Agreement on Tariffs and Trade (hereinafter, the GATT) prevents WTO members from applying to imported products internal taxes in excess of those applied to domestic products. In addition, it prohibits internal taxation applied in a way that protects domestic production. Although the Danish tax is origin-neutral, instances of discrimination relevant to Denmark’s WTO obligations may nevertheless occur where the tax \textit{de facto} favours domestic production of like or ‘directly competitive or substitutable’ products. In addition, the Danish tax may have an impact on the international trade in the products concerned to the extent that it subjects imported products to additional certification requirements (to determine the saturated fat content and therefore the tax base), which may be burdensome and cause administrative delays.


\textsuperscript{28} Article 113 TFEU.

\textsuperscript{29} In Europe, the prevalence of obesity (body mass index \(\geq 30 \text{ kg/m}^2\)) in men ranges from 4.0% to 28.3% and in women from 6.2% to 36.5%. It has been observed considerable geographic variation, with prevalence rates in Central, Eastern, and Southern Europe being higher than those in Western and Northern Europe. See Berghöfer A, Pischon T, Reinhold T, Arovian CM, Sharma AM, Willich SN. Obesity prevalence from a European perspective: a systematic review. BMC Public Health 2008;8:200.
Conclusion
It has long been evident to public health experts that dietary factors have a major impact on mortality and morbidity. Tackling obesity is now becoming an important challenge for regulators as well. This seems especially true after global leaders reached a consensus in the UN General Assembly on concrete actions to tackle non-communicable diseases (NCDs) via the adoption of the Political Declaration on the Prevention and Control of NCDs on 19 September 2011, eleven years after the adoption of the Global Strategy for the Prevention and Control of NCDs by the World Health Assembly. NCDs, including cancer, heart disease, diabetes and lung disease, are responsible for 36 million deaths every year, and are considered to be the leading cause of disease and death worldwide. They share four major causative risk factors: tobacco use, harmful use of alcohol, unhealthy diet and lack of physical activity. As the Political Declaration on the Prevention and Control of NCDs makes clear, the consequences of these risk factors go far beyond health consequences and include serious social and economic dimensions. Despite a general recognition of the global burden of NCDs and the urgent need for greater measures to prevent and control these diseases, the declaration lacks specific targets, including an overall goal of reducing preventable death. However, states committed to ‘advance in the implementation of … interventions in order to reduce the impact of the NCD risk factors … through the implementation of relevant international agreements and strategies, and education, legislative, regulatory and fiscal measures, without prejudice to the right of the sovereign Nations to determine and establish their taxation policies’ (emphasis added).\(^{30}\) In particular, they commit to ‘promote the development and initiate the implementation, as appropriate, of cost-effective interventions to reduce salt, sugar and saturated fats, and eliminate industrially produced trans-fat in goods, including through discouraging the production and marketing of foods that contribute to unhealthy diets’.\(^ {31}\) Therefore, although fat taxes are not expressly mentioned in the text, the declaration clearly includes these measures among those that states may adopt in order to prevent and control unhealthy diets. Yet, as demonstrated by our analysis, the road towards the adoption of fat taxes is not without difficulties. One question is whether these product-specific taxes are really addressing the obesity problem by penalising certain ‘unhealthy’ products or if they are just new instruments to generate fiscal revenues (or maybe, even, to protect certain domestic constituencies), in particular in view of the public deficit problems that many EU Member States are currently facing in the context of the economic crisis. In addition, it is not clear whether the imposition of such taxes reduces obesity or whether governments would get

\(^{30}\) Para 43.

\(^{31}\) Para 43, let. (g).
better results from education campaigns, for instance. Another issue, which remains largely unexplored, is whether anti-obesity measures, such as fat taxes, may breach ‘fat rights’, i.e. “logics of personhood that link together identity, personal traits, moral responsibility, government response, and legal protections”\textsuperscript{32}. Finally, there is no consensus in the scientific community on which foods to target. Therefore, before committing to the introduction of a fat tax, policy-makers need to consider their objective, the effect of the tax in combination with other measures, and the impact on businesses. In view of the discrimination among specific food categories, the hope is that, in Europe, the adage that ‘there are no bad foods, only bad diets’ will not become ‘there are no bad health policies, only bad trade-related measures’.