

## Lifestyle Risks

*This section discusses the regulation of “lifestyle risks”, a term that can apply to both substances and behaviours. Lifestyle risks take place along the line of “abstinence – consumption – abuse – addiction”. This can concern substances such as food, alcohol or drugs, as well as behaviours such as gambling or sports. The section also addresses the question of the appropriate point of equilibrium between free choice and state intervention (regulation), as well as the question of when risks can be considered to be acceptable or tolerable. In line with the interdisciplinary scope of the journal, the section aims at updating readers on both the regulatory and the scientific developments in the field. It analyses legislative initiatives and judicial decisions and at the same time it provides insight into recent empirical studies on lifestyle risks.*

## Obesity Epidemics, the State, the Individual, and the Private in Public-Private Partnerships

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*The report aims to illustrate how weakening of the statehood is reflected in the way EU and its member-states manage obesity epidemics. Private interests and behavioural turn in policy mechanisms call for more state involvement and rigorous democratic deliberation not only of nudges coming from the state, but those coming from the industry as well. The potential of nudging does not lie in the behavioural interventions it is capable of producing, but rather in the discourse it kick-started, as behavioural law and economics are paving their way into policy-making.*

### I. Introduction

The aim of this conceptual article is to illustrate how New Governance<sup>1</sup> in managing public health, manifested as behavioural interventions and private-public partnerships (PPPs), undermines the role of the state in matters where strong statehood securing the public interest is needed. Nudging and PPPs, both based on neoliberal principles, indirectly and directly promote the notion that transnational corporations are capable of resolving behavioural market failures. The inherent characteristics of the corporations – directly responsible mainly to its shareholders – renders their responsibility to the stakeholders, society, and the environment democratically unscrutinised. Behavioural law and economics, nevertheless, provide policymakers with the same tools as the ones employed by commercial marketing. These very tools give decision makers and politicians an opportunity to be on par with the private sector choice architects operating on the market. Usage of behaviour-

al insights by transnational corporations in their products and services should become a part of democratic deliberation and behaviourally informed regulation, where needed. The libertarian taboo, rendering the activities of the corporations untouched by democratic institutions, ought to be reconsidered, as the prevailing democratic deficit and crisis of capitalism are in full swing.

Public health is increasingly becoming a global issue. The relative ability and authority of nation-states to both promote and protect domestic public health has declined, whilst non-state actors, including private companies, “gained relatively greater

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1 On the topic of New Governance, please, see: Adrienne Héritier and Martin Rhodes (eds.), *New modes of governance in Europe: Governing in the shadow of hierarchy* (New York: Palgrave Macmillan, 2011).

power and influence both formally and informally.”<sup>2</sup> In terms of socio-economic purviews on public health, the role of the state as delineated by Rayner and Lang, has fallen into two models: social-behavioural and techno-economic. In the former model, policies (these include nudging and social marketing interventions) manifest through the state acting as a patron, educator, and protector. In the latter, the state comes across as the facilitator of economic growth, legislation, and infrastructure (through private-public partnerships, Corporate Social Responsibility (CSR), and shared value).<sup>3</sup> These two models correspond well with the New Governance Paradigm within the European Union’s (EU) apparatus, which we critically evaluate from the vantage point of obesity-mitigating policies.

Obesity aetiology is no longer seen merely as a matter of individual choice, but as an outcome of different environments the affected individual finds herself in.<sup>4</sup> Despite this ecological understanding of adiposity, majority of the policies are still designed around informing and educating citizens downstream, enmeshed with the non-hierarchical governance structures, such as private-public partnerships. Whilst these might consider micro-, meso- and, to some extent, exo-systems the affected individuals find themselves in, such modes of governance nevertheless neglect the macro-structures.<sup>5</sup> Inviting the food industry to partner with the state, in addition to embedded notion of individualism

(manifested also in policy-based behavioural interventions nudging citizens), are preventing the state to mandate more effective means, such as regulatory policies.

Conflict of interests in these partnerships presents a problem of the weakening of the state’s role in mitigating societal issues which require deeper structural changes. Our aim is to elucidate two approaches towards public health: private-public partnerships and nudging.

Characteristics of the former call for a further reflection on the motivations of large industrial players to resolve the food crisis; and creative democratic innovations which are to recourse the effects of private corporations’ activities on the quality of life, particularly of children and adolescents. We understand the industry as large private corporations, mostly transnational in character, which are having proportionally large power, and are in terms of policy and legal category “of their own – neither public, nor private, but ‘corporate.’”<sup>6</sup>

The latter approach presents an opportunity for behavioural law and economics to lean their measuring stick not only against the behaviour of individuals, but also that of major players on the market.

## II. Nudging, Private-Public Partnerships and Obesity-mitigating Policy-driven Strategies at a Supranational Level

According to the 2013 World Health Organisation (WHO) report, in the European WHO region, over 50 % of people were overweight, out of which, staggering 20 % were obese.<sup>7</sup> European Union and its member states employed various measures in tackling the obesity epidemic, with promotion of healthy eating habits being at the forefront of policy-driven interventions. At the level of EU member-states, EATWELL research accounted for 121 different national-level policy interventions aiming at impacting eating habits, with 10 out of the total not targeting nutrition *per se*. Majority of these policies (82 in number) supported an informed choice and 39 were to modify market environment by: promoting the availability of those foodstuffs considered as healthy, or restricting the accessibility of unhealthy foods or nutrients, or by food taxation or subsidisation.<sup>8</sup> At the EU level, the EU Platform for Action on Diet, Physical Activity and Health (the EU Platform) has

2 Richard Dodgson, Kelley Lee, and Nick Drager, “Global Health Governance: A Conceptual Review”, in Frank J. Lechner and John Boli (eds.), *The Globalisation Reader*, 5th Edition (Chichester: Wiley Blackwell, 2015), pp. 296 *et seq.*, at p. 297.

3 As proposed by Geof Rayner and Tim Lang, *Ecological public health: Reshaping the conditions for good health* (Abingdon, Oxon: Routledge, 2012), at pp. 101–102.

4 For mapping of different perspectives on obesity aetiology see Tim Lang and Geoff Rayner, “Obesity: a growing issue for European policy?”, 15(4) *Journal of European Social Policy* (2005), pp. 301–327.

5 We borrow the systems terminology from Uri Bronfenbrenner, *The Ecology of Human Development* (Cambridge, MA: Harvard University Press, 1979).

6 David Ciepley, “Beyond Public and Private: Toward a Political Theory of the Corporation.”, 107(1) *American Political Science Review* (2013), pp. 139–158, at p. 140.

7 WHO, “Infographic – Over 50 % of people are overweight or obese”, July 2013, available on the Internet at: <[http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0011/256295/infographic-people-overweight-obese-Eng.pdf](http://www.euro.who.int/__data/assets/pdf_file/0011/256295/infographic-people-overweight-obese-Eng.pdf)> (last accessed on 12 March 2015).

8 W. Bruce Traill, Mario Mazzocchi, and Barbara Niedzwiedzka, *et al.*, “The EATWELL project: Recommendations for healthy eating policy interventions across Europe.” 38(3) *Nutrition Bulletin* (2013), pp. 352–357, at p. 353.

been launched in March 2005 by the European Commission (EC), aiming to

“seek close coordination with other initiatives, and will seek to enable successful endeavours in this field to be more promptly shared with potential partners and emulators across the European Union as a whole.”<sup>9</sup>

In the spirit of New Governance, partnerships with the private sphere in joint efforts at mitigating obesity have also been called for at the WHO European Ministerial Conference on Counteracting Obesity in 2006.<sup>10</sup> The Community Strategy on nutrition, overweight, and obesity-related health issues has been established by the EC in 2007, encompassing several EU policy areas<sup>11</sup> with Directorate-General for Health and Food Safety (DG SANCO) at the forefront. Combating childhood obesity, public-private partnerships that promote healthy lifestyle initiatives are to serve as a pillar for cross-EU fight against overweight; the two most notable examples being EPODE for the Promotion of Health Equity (EPHE), and the above mentioned, the EU Platform.<sup>12</sup> A multi-stakeholder approach is to ensure that each of the segments of public sector and civil society are to partake in devising effective strategies. The stance taken towards transnational corporations within these partnerships, however, remains contentious.

## 1. Private Interests and Motivations in Private-Public Partnerships

Within Lang and Rayner’s techno-economic model of public health the New Governance in the EU ap-

paratus resorted to a multi-stakeholder approach in tackling obesity, which is based on private-public partnerships. Such examples are the EU Platform<sup>13</sup> and the EPODE European Network (EEN), both relying heavily on the input of the industry. While this is a welcomed and needed approach, examining the quality of such relationship is due.

### a. The EU Platform

Bartlett and Garde question the commitments made by private firms and the outcomes of the partnerships within the EU Platform, and view the industry’s motivation for joining private-public partnerships as an attempt at public-image building, portraying the companies as willing to cooperate so as to stave off more stringent regulation.<sup>14</sup> On this note, we argue, commercial marketing research to be added to the rationale for private corporations to participate in PPPs. To illustrate, Danone is a member of the Confederation of the Food and Drink Industries of the EU<sup>15</sup> (now FoodDrinkEurope), an organisation of various companies representing the interests of the food industry – and also a partner in the EU Platform.<sup>16</sup> Although not a public-private partnership, in 2006 Danone partnered with Muhammad Yunus creating Grameen Danone social business, set to ameliorate the occurrence of malnutrition in Bangladesh. As noble as the aim is, mere altruism was not all that motivated the company to embark on creating social business with the Nobel laureate Professor Muhammad Yunus. Murphy, Perrot, and Rivera-Santos describe (*italics added*):

“As a result, according to Danone Communities’ General Manager, the alliance with Grameen pro-

9 European Commission Directorate-General for Health and Food Safety, “Diet, physical activity and health - a European platform for action”, 15 March 2005, at p. 2, available on the Internet at: <[http://ec.europa.eu/health/archive/ph\\_determinants/life\\_style/nutrition/platform/docs/platform\\_charter.pdf](http://ec.europa.eu/health/archive/ph_determinants/life_style/nutrition/platform/docs/platform_charter.pdf)> (last accessed on 12 March 2015).

10 See World Health Organization, *WHO European ministerial conference on counteracting obesity: Conference report*, (Copenhagen, Denmark: WHO Regional Office for Europe, 2007).

11 European Commission Directorate-General for Health and Food Safety, “Strategy on nutrition, overweight and obesity-related health issues”, n.d., available on the Internet at: <[http://ec.europa.eu/health/nutrition\\_physical\\_activity/policy/strategy\\_en.htm](http://ec.europa.eu/health/nutrition_physical_activity/policy/strategy_en.htm)> (last accessed on 13 March 2015).

12 Vivica I. Kraak and Mary Story, “A Public Health Perspective on Healthy Lifestyles and Public-Private Partnerships for Global Childhood Obesity Prevention.” 110(2) *Journal of the American Dietetic Association* (2010), pp. 192–200, at p. 194.

13 For an in-depth analysis and critical perspective of the EU Platform see Oliver Bartlett and Amandine Garde, “The EU Platform and the EU Forum: new modes of governance or a smokescreen for the promotion of conflicts of interest?” in Alberto Alemanno and Amandine Garde (eds.), *Regulating lifestyle risks: The EU, alcohol, tobacco and unhealthy diets* (Cambridge: Cambridge University Press, 2015), pp. 283–308.

14 Bartlett and Garde, “The EU Platform and the EU Forum: new modes of governance or a smokescreen for the promotion of conflicts of interest?” *supra* note 13, at p. 302.

15 FoodDrinkEurope, “Members - Companies”, n.d., available on the Internet at: <<http://www.fooddrinkeurope.eu/about-us/members/>> (last accessed on 13 March 2015).

16 European Commission Directorate-General for Health and Food Safety, “EU Platform members (13/01/2015)”, 13 January 2015, available on the Internet at: <[http://ec.europa.eu/health/nutrition\\_physical\\_activity/docs/140728\\_platform\\_members.pdf](http://ec.europa.eu/health/nutrition_physical_activity/docs/140728_platform_members.pdf)> (last accessed on 13 March 2015).

vides the company 'a proven learning experience' leading to numerous product and process innovations. Consequently, the participation of R&D staff assigned to work on Danone's social projects has increased from a few hours of spare time to the dedication of a team of 15 staff supported by the part-time commitment of a further 60 employees. The team not only innovates for the purpose of social initiatives, but uses information gained from these projects for entering emerging markets such as India.<sup>17</sup>

Evaluating the workings of Grameen Danone is beside the point for this particular discussion. Our aim is to merely illustrate an old rule – that no lunch is free in the neoliberal marketplace. Albeit Grameen Danone endeavour is not a public-private partnership *per se*, it does provide insight into the reasoning behind why a transnational corporation would wish to join a socially-oriented project.

#### b. EPODE European Network

The case of EPODE (“Ensemble, prévenons l’obésité des enfants”) is a similar pan-European project aiming at counteracting obesity epidemics. It is centred around designing and implementing community-based behavioural interventions incorporating “all relevant local stakeholders in an integrated and concrete prevention program in order to facilitate the adoption of healthier lifestyles in the everyday life.”<sup>18</sup> It focuses on education of children and adolescents from families of low socio-economic status.<sup>19</sup> EPODE had been endorsed by the EC, when DG SANCO es-

tablished EPODE European Network in 2007.<sup>20</sup> EC invited the business sector to fund and cooperate in the project, which some have seen as controversial.<sup>21</sup> Its follow-up programme EPHE, is also supported by several of the FoodDrinkEurope members (Ferrero, Mars, and Danone) – in addition to the public partners, such as the EC, WHO, and DG SANCO.<sup>22</sup> Private-public partnerships are, as per Borys *et al.*, an integral part of the project’s approach.<sup>23</sup>

In order to preserve the public health goal and prevent potential conflicts of interest, these private sector partners are urged to sign a charter, where they pledge not to intervene with the content of the programme, restrained from associating EPODE with any promotion of their product brand, address the relationship with EPODE only as a part of corporate social responsibility commitment, and agree on not displaying any company logos in EPODE materials distributed in schools or local surroundings.<sup>24</sup> Question arises, just how have multinational corporations, such as Ferrero, Mars, Nestlé, Orangina-Schweppes Group (all partners of EPODE<sup>25</sup>), contributed to the amelioration of a global issue which they are inextricably part of?

Galea and McKee offer five tests that governments and international agencies could employ so as to assess whether a private corporation is a viable partner for health promotion. The first test examines just what kind of an effect do the potential partner’s services and products have on health?<sup>26</sup> EPODE’s partners from the food industry, one could argue, fail the first test.

One can indeed welcome a multi-stakeholder approach, as advocated by the French-born childhood

17 Matthew Murphy, Francois Perrot and Miguel Rivera-Santos, “New perspectives on learning and innovation in cross-sector collaborations.”, 65 *Journal of Business Research* (2012), pp. 1700–1709, at p. 1706.

18 Frances Hillier, Claire L. Pedley and Carolyn Summerbell, “Evidence base for primary prevention of obesity in children and adolescents.”, 54(3) *Bundesgesundheitsblatt - Gesundheitsforschung - Gesundheitsschutz* (2011), pp. 259–264, at p. 260.

19 European Commission Directorate-General for Health and Food Safety, “Flash Report Diet, Physical Activity and Health - a European Platform for Action of 6 February 2014 Conclusions of the Chair”, 6 February 2014, available on the Internet at: <[http://ec.europa.eu/health/nutrition\\_physical\\_activity/docs/ev\\_20140206\\_mi\\_en.pdf](http://ec.europa.eu/health/nutrition_physical_activity/docs/ev_20140206_mi_en.pdf)> (last accessed on 13 March 2015).

20 Rory Watson, “Steps to a leaner Europe”, 335(7632) *British Medical Journal* (2007), p. 1238.

21 Watson, “Steps to a leaner Europe”, *supra* note 20; Hillier, Pedley and Summerbell, “Evidence base for primary prevention of obesity

in children and adolescents.”, *supra* note 18; and Rayner and Lang, *supra* note 3, at p. 270.

22 EPHE Project, “Public-Private Partnership”, 2012, available on the Internet at: <[http://www.epheproject.com/?page\\_id=206](http://www.epheproject.com/?page_id=206)> (last accessed on 15 March 2015).

23 Jean-Michel Borys, Yann Le Bodo, Stefaan De Henauw *et al.*, *Preventing childhood obesity: EPODE European network recommendations*. (Cachan: Lavoisier, 2011).

24 Jean-Michel Borys, Yann Le Bodo, Susan A. Jebb *et al.*, “EPODE approach for childhood obesity prevention: methods, progress and international development”, 13 *Obesity Reviews* (2012), pp. 299–315, at p. 303.

25 Borys, Le Bodo, De Henauw, *et al.*, *Preventing childhood obesity: EPODE European network recommendations*, *supra* note 23, at pp. 257–265.

26 Gauden Galea and Martin McKee, “Public-private partnerships with large corporations: setting the ground rules for better health.” 115 *Health Policy* (2014), pp. 138–140, at p. 139.

obesity prevention project, and the EU and WHO. Following questions, however, remain: Do these transnational corporations see this partnership merely as a well-thought-of CSR campaign, integral part of marketing management and market intelligence accumulation; or do they actually re-evaluate their own activities? Do they consider the cumulative ecological consequences of their practices on the society – beyond the CSR commitments showcased on their websites? Their logos might not be displayed next to that of the project; gaining insight into local forces shaping the environments under which individuals make their food choices, however, provides enough benefits for the company to make a business case for entering a public-private partnership.

The *ecological* in this particular case, seems to be exempting the food industry from the macro structures which shape the food preferences of the very audiences EEN's interventions are targeted at.

## 2. Behavioural Interventions and Reasserting Individualism

Thaler and Sunstein's Nudge<sup>27</sup> – a public-sector application of behavioural and cognitive sciences to resolving societal issues – has found its proponents amongst policymakers in majority of western countries.<sup>28</sup> The debate about the usage of cognitive and behavioural sciences in policy-making has been oscillating around the question of appropriate degrees of paternalism<sup>29</sup>, and who or what is to be subject to state intervention.<sup>30</sup> The case for its effectiveness, however, is still open.<sup>31</sup> Industry has long known how to harness reasoned but irrational and automatic behaviours for economic profits, both in children and adults alike. It is argued that a government should employ the same knowledge and nudge people into eating healthy.<sup>32</sup> Nudging has been mainly criticised for its top-down approach, which, at least in the context of obesity epidemics, does not suffice. The behavioural turn in soft policies directly governing the citizens and the dubious contributions of the private players in the new model of governance led us to agree that “soft law” translated into a shift from regulation into a dependence on private ordering.<sup>33</sup> In the context of the EU Platform the interest of the food industry lies predominantly in creating the discourse in which the individual, once more, is entirely re-

sponsible for consumption of their products whilst any potential deliberation on restriction of the food-stuff the industry produces, is omitted.<sup>34</sup> This makes sense for the private corporation, since more involvement of the state, or the EU for that matter, in the form of regulation might result in the industry having to reconstruct the core of their business.

## 3. Individualism as the Underlying Policy Paradigm

Neoliberal ideology and its commitment to individualism is a powerful driver for political actors to resort to behavioural solutions on the crusade against overweight – despite the vast body of evidence making a clear case for policies that change the conditions in which individuals make unhealthy decisions.<sup>35</sup> What is more, interventions focused on education, individual agency, and self-improvement, end up weakening the emphasis on structural and environmental

27 Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving decisions about health, wealth, and happiness* (New Haven: Yale University Press, 2008).

28 For an overview see Pete Lunn, *Regulatory policy and Behavioural Economics* (OECD Publishing, 2014).

29 See for example Thaler and Sunstein *Nudge: Improving decisions about health, wealth, and happiness*, *supra* note 27, at pp. 4–14. See also: Jayson L. Lusk, “Are you smart enough to know what to eat? A critique of behavioural economics as justification for regulation.” 41(3) *European Review of Agricultural Economics* (2014), pp. 355–373; and Frank Mols, S. Alexander Haslam, Jolanda Jetten and Niklas K. Steffens, “Why a nudge is not enough: A social identity critique of governance by stealth”, 54(1) *European Journal of Political Research* (2015), pp. 81–98.

30 Jens-Uwe Franck and Kai Purnhagen, “Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis”, in Klaus Mathis (ed.), *Law and Economics in Europe: Foundations and Applications*, Economic Analysis of Law in European Legal Scholarship 1 (Dordrecht: Springer Netherlands, 2014), pp. 329–365.

31 See e.g. Thomas S. Ulen, “European and American Perspectives on Behavioural Law and Economics”, in Klaus Mathis (ed.), *European Perspectives on Behavioural Law and Economics*, Economic Analysis of Law in European Legal Scholarship 2 (Switzerland: Springer International Publishing, 2015), pp. 3–16, at p. 3.

32 W. Bruce Traill, “Economic Perspectives on Nutrition Policy Evaluation”, 63(3) *Journal of Agricultural Economics* (2012), pp. 505–527, at p. 511.

33 On Amir and Orly Lobel, “Liberalism and Lifestyle: Informing Regulatory Governance with Behavioural Research”, 1 *European Journal of Risk Regulation* (2012), pp. 17–25, at p. 18 *et seq.*

34 Bartlett and Garde, “The EU Platform and the EU Forum: new modes of governance or a smokescreen for the promotion of conflicts of interest?”, *supra* note 13, at p. 291 *et seq.*

35 Fran Baum and Matthew Fisher, “Why behavioural health promotion endures despite its failure to reduce health inequities”, 36(2) *Sociology of Health & Illness* (2014), pp. 213–225, at p. 220.



changes.<sup>36</sup> Behavioural interventions aiming at *sustainable* behaviour and societal change hence need to be accompanied with upstream strategies which demand a culture change within the governments,<sup>37</sup> so as to ensure a pro-societal change of cultural, social, political, and economic structures. Changing these, notably, requires reconsideration of the individualistic view on the causes of majority of societal issues, since individuals are embedded not only in the local ecologies, but the global ones, just as much.

### III. Deconstructing Choice *landscapes* and the Decreasing Role of the State

Choice architectures are everywhere and private sector is thoroughly skilled in employing them so as to ease the psychological pain of our decision-making.<sup>38</sup> Private sector understands that the ecological approach leads to behavioural change and is applying it rigorously to its marketing and sales operations.<sup>39</sup> What can our expectations in ameliorating obesity epidemic of this innovation called *the nudge* be, if it stands against firmly built choice *landscapes* taking private sector unimaginable amounts of financial resources – and decades, if not centuries – to build? Private-public partnerships, where private companies cloak their business-as-usual under the veil of shared value do not offer a sustainable answer, nei-

ther. Behavioural interventions and PPPs seem to be myopic for the overarching structures and institutions in the socio-economic life, which made them necessary in the first place. Bourdieu might call this *doxa*; rendering both social-behavioural and techno-economic models of public health to be interpreted something in the lines of:

“(...) political instruments which contribute to the reproduction of the social world by producing immediate adherence to the world, seen as self-evident and undisputed, of which they are the product and of which they reproduce the structures in a transformed form.”<sup>40</sup>

In other words, both models of public health see the individual behaviour as the core problem. Neither of the two approaches, however, sustainably addresses obesity, as both grapple with the consequence and not the cause of the epidemic. The sheer fact that obesity is indeed a fully-fledged *global epidemic* ought serve as a proof strong enough, that the core reason for it is not coming strictly *from* the behaviour of millions of affected women, men, and children – but the grips of the invisible hand(s) governing their lives, too.

If we are having such a vivacious debate on the appropriateness of using behavioural and cognitive sciences for greater good, then, perhaps we could apply the same discourse to deliberate whether industry's nudges are acceptable, moral, and ethical. In part, this has been done in the discourse over advertising unhealthy foods to children and adolescents. Research on commercial advertising of foods high in calories and poor on nutrients, for example, suggests that cumulative effect of advertising via different media channels are having an effect on the food choices and eating behaviours of adolescents.<sup>41</sup> Despite such evidence, restrictions on marketing to children in Europe have shown to be “widespread but mostly voluntary.”<sup>42</sup> Leaving it to the market gives little hope for private companies to self-regulate and to correct the (behavioural) market failure. Should the state refuse to apply some level of protectionist principles, dietary choices will remain in the hands of the marketplace dominated by strong players with enormous marketing budgets.<sup>43</sup> Choice architectures are omnipresent, and nudging *citizens* seems more like a battle between David and Goliath; however one wishes to morally or ethically evaluate the concepts of both libertarian paternalism and the nanny state.

36 Paul Crawshaw, “Public health policy and the behavioural turn: The case of social marketing.”, 33(4) *Critical Social Policy* (2013), pp. 616-637, at p. 620.

37 Alice Moseley and Gerry Stoker, “Nudging citizens? Prospects and pitfalls confronting a new heuristic.”, 79 *Resources, Conservation and Recycling* (2013), pp. 4–10, at p. 9.

38 Thaler and Sunstein, *Nudge: Improving decisions about health, wealth, and happiness*, *supra* note 27, at p. 96.

39 Alberto Alemanno, “Nudging healthier lifestyles: informing the non-communicable diseases agenda with behavioural insights”, in Alberto Alemanno and Amandine Garde (eds.) *Regulating lifestyle risks: The EU, alcohol, tobacco and unhealthy diets* (Cambridge: Cambridge University Press, 2015), pp. 309-331, at p. 326.

40 Pierre Bourdieu, *Outline of a theory of practice*, 28th printing 2013, (Cambridge: Cambridge University Press, 1977), at p. 164.

41 Maree Scully, Melanie Wakefield, Philippa Niven, *et al.*, “Association between food marketing exposure and adolescents' food choices and eating behaviors.” 58 *Appetite* (2012), pp. 1–5.

42 Ffion Lloyd-Williams, Helen Bromley, Lois Orton, *et al.*, “Smorgasbord or symphony? Assessing public health nutrition policies across 30 European countries using a novel framework.”, 14 *BMC Public Health* (2014), pp. 1-20, at p. 1.

43 Tim Lang and Geof Rayner, “Overcoming policy cacophony on obesity: an ecological public health framework for policymakers”, 8 *Obesity Reviews* (2007), pp. 165–81, at p. 171.

One needs to consider that:

“Obesity has taken decades to create. Decades of car-based planning have made it harder for people to build their lives around daily exercise. There are long distances between home, work, school and shops. The goal of building exercise and good food into daily life and culture have been systematically, not haphazardly, made hard. Cultural signals celebrate cheap, fatty, sugary foods. These are ubiquitous in their offer. Prices are low (historically) because cheap food policies have been pursued. Advertising and marketing bombard consumers with the messages ‘Eat me, enjoy, now.’ In short, obesity is a symptom of and coexistent with various transitions (...) Energy, Nutrition, Culture and Economic Transitions.”<sup>44</sup>

Culture produces a constructed social world that moulds, ushers, and also impels individual’s actions at three distinct levels: “by the affordances of objects, the embodied mental representations of the subjects, and the coercive power of institutions.”<sup>45</sup> These *installations* were and are co-created by, among others, the private sector. Behavioural interventions are a mere drop in the ocean of preconfigured architectures – choice landscapes, if you will. Undoing them would require the state to take a step back and democratically evaluate the usage of behavioural insights not merely by the state itself, but more importantly – by the private sector. Moreover, these interventions are not as powerful so as to make a profound, lasting, and sustainable difference; hence, as argued by Alemanno, behaviourally informed interventions are insufficient without incorporating the insights into “more traditional forms of intervention” as it is difficult to “offset the potent effects of unhealthy nudges in existing environments shaped largely by industry.”<sup>46</sup> In the case of obesity epidemics, the need, therefore, is not to tackle mere “manifestations of obesity” but “the forces that shape it.”<sup>47</sup>

Mandatory reformulation of foodstuff is more effective than voluntary, and information strategies much less effective than regulation and fiscal interventions – but also “politically more challenging,” as explained by the experts.<sup>48</sup> Changing the market environment is seen as more cost-effective and can have a significant impact on dietary choices – and yet tends to be the less popular strategy of the policymakers.<sup>49</sup> Moreover, some of the most positive shifts in public health were due to policy change rather than individ-

ual behaviour (e.g. smoking prohibition, seat belt legislation, water fluoridation).<sup>50</sup> If we resort back to the ecological understanding of obesity, regulation is, therefore, a crucial environmental factor, impacting the affected subject.<sup>51</sup> This leads once more to the question of just how much state? Libertarian purview is not a value-neutral view, since it builds strongly on the individualistic premises, argued Planzer and Alemanno;<sup>52</sup> their question on how to draw a line between private and public sphere therefore *still* remains.

## IV. Discussion

The relationship between the state and increasingly powerful private corporations is becoming problematic in trying to prevent and reverse a complex social and health issue as obesity. The effect is all the more perverse, as in our public discourses we seem to be forgetting that the private power of corporations stems from their previous public status. A fact which ought always remind us that capitalist economics remains in its core, a political economy.<sup>53</sup> Governments, opposite to private corporations, are held accountable by democratic procedures, the rule of law, and may be subject to sanctions should they abuse their moral and legal authority to go after private self-in-

44 Rayner and Lang, 2012 book, *supra* at p. 318.

45 Saadi Lahlou, “How can we capture the subject’s perspective? An evidence-based approach for the social scientist”, 50 *Social Science Information* (2011), pp. 607-655, at p. 614.

46 Alemanno, “Nudging healthier lifestyles: informing the non-communicable diseases agenda with behavioural insights”, *supra* note 39, at p. 330.

47 Tim Lang and Geof Rayner, “Overcoming policy cacophony on obesity: an ecological public health framework for policymakers”, 8 *Obesity Reviews* (2007), pp. 165–81, at p. 178.

48 Lloyd-Williams, Bromley, Orton, *et al.*, “Smorgasbord or symphony? Assessing public health nutrition policies across 30 European countries using a novel framework.”, *supra* note 42, *ibid.*

49 Traill, Mazzocchi, and Niedźwiedzka, *et al.*, “The EATWELL project: Recommendations for healthy eating policy interventions across Europe.”, *supra* note 8, at p. 356.

50 Gerard Hastings and Laura McDermott, “Putting Social Marketing Into Practice”, 332 *BMJ* (2006), pp. 1210-1212, at p. 1212.

51 Simon Planzer and Alberto Alemanno, “Lifestyle Risks: Conceptualizing an Emerging Category of Research”, 4 *European Journal of Risk Regulation* (2011), pp. 337 *et seq.*, at p. 338.

52 Planzer and Alemanno, “Lifestyle Risks: Conceptualizing an Emerging Category of Research”, *supra* note 51, *ibid.*

53 Mauro Calise and Theodore J. Lowi, *Hyperpolitics: an interactive dictionary of political science concepts*, (Chicago: University of Chicago Press, 2010), at p. 96.

terest.<sup>54</sup> If public and private are interlocked in such a complex way, as in the case of PPPs, and reasserted under the individualistic purview of behavioural interventions, current democratic processes will never entirely engulf the forces shaping societal systems. And yet some of these forces need an evidence-based, democratic scrutiny because they are neither private nor democratically accountable. In such an interlocked complex relationship, democratic elections will always prove insufficient mechanisms to ensure the accountability of all the forces incorporated in the “governing” process.<sup>55</sup> In the case of transnational PPPs – and the strong role of corporations within them – this hybrid governance extends the political authority to the non-state actors, who are thus directly involved in political activity, and co-govern with the state actors.<sup>56</sup> This “hybridisation” of governance, requires new institutional mechanisms for ensuring appropriate accountability, transparency, and representation.<sup>57</sup>

As demonstrated already in the volume edited by Alemanno and Garde, the international trade regime and its propensity towards the liberalisation of trade may be considered as the barrier to prevention and

control of non-communicable diseases in the EU and beyond.<sup>58</sup> Politics is indeed being divorced from power, as power is global, whilst the politics remain local.<sup>59</sup> How, then, is the state going to mitigate the negative effects corporations’ business activities have on our health, if it takes a superficial stance and holding the individual solely responsible for her actions? As we attempted to corroborate, non-invasive approaches render private self-regulation rather dim, whilst the pursuit of private interest is left to its own devices. The role of corporations would not be problematic if it were not for a blind spot in the public discourse – despite the evidence presented by the scholars regarding the sometimes ill-effects of the industry’s actions. As Garde and Friant-Perrot eloquently put: “Evidence will never replace political will.”<sup>60</sup>

## V. Conclusion

Pierre Bourdieu argued strongly against economism coming from both left and right, and called for a re-assertion of the role of the state:

“(…) against the two forms of submission to the necessity of economic laws that flow from these two forms of economism, we need the state to be armed with an understanding of demographic, economic and cultural laws, so it can work to correct their effects by policies that use the resources (legal, taxation, financial, etc.) that the state has at its disposal. Ethical and political justice on the one hand, and technical correctness on the other, are certainly less antithetical than a short-term calculation of narrowly economic profit and loss leads one to believe. Far from calling for the ‘withering away of the state’, we have to demand that it exercise a regulatory action able to counteract the ‘fatality’ of economic and social mechanisms that are immanent to the social order.”<sup>61</sup>

Both behavioural interventions and public-private partnerships feed the same problem they are seemingly attempting to get rid of. The weakened statehood in specific areas inevitably raises the question of relative power i.e. who – the state or the private actors – impacts the public health more? Statehood does not belong into “the dustbin of history,”<sup>62</sup> but the asymmetry in power between the society and private corporations receives far too little attention. What is more, questioning private sector’s ways of

54 Tanja A. Börzel and Thomas Risse, “Governance without a state: Can it work?”, 4(2) *Regulation & Governance* (2010), pp. 113–134, at p. 129.

55 David Held, *Models of democracy*, 3rd ed. (Cambridge: Polity Press, 2006), at p. 210.

56 Marco Schäferhoff, Sabine Campe, and Christopher Kaan, “Transnational Public-Private Partnerships in International Relations: Making Sense of Concepts, Research Frameworks, and Results.”, 11(3) *International Studies Review* (2009) pp. 451–474, at p. 453.

57 Dodgson, Lee, and Drager, “Global Health Governance: A Conceptual Review”, *supra* note 2, at p. 297.

58 Alberto Alemanno and Amandine Garde, “Conclusion” in Alberto Alemanno and Amandine Garde (eds.), *Regulating lifestyle risks: The EU, alcohol, tobacco and unhealthy diets* (Cambridge: Cambridge University Press, 2015), pp. 355–359, at p. 358.

59 Zygmunt Bauman argues that there has been a divorce between politics and power; power is global, whilst politics stays local. For further elucidation, please, see: Zygmunt Bauman, “Times of interregnum”, 5(1) *Ethics & Global Politics* (2012), pp. 49–56, at p. 52.

60 Amandine Garde and Marine Friant-Perrot, “The regulation of marketing practices for tobacco, alcoholic beverages and foods high in fat, sugar and salt – a highly fragmented landscape” in Alberto Alemanno and Amandine Garde (eds.), *Regulating lifestyle risks: The EU, alcohol, tobacco and unhealthy diets* (Cambridge: Cambridge University Press, 2015), pp. 68–93, at p. 93.

61 Pierre Bourdieu, Franck Poupeau, Thierry Discepolo and David Fernbach, *Political interventions: Social science and political action*, (London: Verso, 2008), at p. 194.

62 Börzel and Risse, “Governance without a state: Can it work?”, *supra* note 54, at p. 128.



doing business, under the libertarian paradigm, is almost taboo. Behavioural economists indeed should be given honour for making their knowledge available outside the private sector,<sup>63</sup> but their insights could primarily be used as tools informing democratically elected decision makers about the outcomes of the industry's operations. As Berg deduced, the advancements of behavioural economics in the hands of the governments can serve as either the ability to

nudge citizens to optimal decisions or prohibiting known manipulative choice architectures in commercial marketing.<sup>64</sup> Public health governance would benefit more from the latter than the former.

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63 Lisbet Berg, "Who benefits from behavioural economics?", 44(2) *Economic Analysis and Policy* (2014), pp. 221–232, at p. 231.

64 Berg, "Who benefits from behavioural economics?", *supra* note 63, at p. 231.