

# *An Early Career Perspective on Risk Regulation*

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## **Abstract**

*I begin with two admissions. First, I am relatively new to risk regulation, and indeed academia in general, so this piece is based on still quite nascent views. Second, I fell into risk regulation scholarship almost by accident – therefore I hope this piece will provide an illustration of how strong the intellectual draw of the field is, having already captured my imagination at least!*

*In the following three sections I set out my risk regulation journey, and the understanding of the field I have developed so far. After summarising how I was drawn to risk regulation, I attempt to reflect philosophically on the purposes of risk regulation research, after which I outline the questions that I believe risk regulation scholars should be asking now and in future years, along with my corresponding research priorities.*

## I. BEGINNING A CAREER IN RISK REGULATION

My risk regulation story began when my future friend and colleague Professor Amandine Garde became my undergraduate dissertation supervisor (which, incidentally, examined the Turkish Association Agreement with the EU). I had previously decided to undertake a research Masters degree on EU internal market law, and I soon decided to continue studying with Professor Garde, investigating an appealing topic that combined classic internal market questions with novel and topical questions of public health and consumer protection – the regulation of alcohol advertising within the EU.

I was captivated by the complexity, topicality, and philosophical depth of the issues raised by corporations' attempts to promote the excessive consumption of alcohol, and governments' attempts to prevent it. They went to the heart of how the law does or does not promote justice and fairness within a society. I felt privileged to be thinking about these questions, and captivated by the potential for scholarly inquiry in this field to contribute to shaping public policy.

I had never intended to pursue research to PhD level and beyond, but I became increasingly enchanted with my topic, and indeed with research itself. At the time I was applying for training contracts with law firms, and I distinctly remember realising after one assessment centre that I had spent most of the day talking about my research, rather than the firm I wanted to hire me. At this point I realised that I wanted to pursue a research career in the risk regulation field.

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With Professor Garde's guidance as my future supervisor, I secured funding to write a PhD on addiction and the law. My PhD research was given the best possible start through an invitation to present the results of my Masters research at a conference organised by Professor Garde and Professor Alberto Alemanno at HEC Paris in September 2012.<sup>1</sup> This opportunity not only gave me the confidence to engage in risk regulation research, but the chance to meet numerous future friends and colleagues – not least Professor Alemanno and Cliff Wirajendi – who have provided invaluable advice and opportunities as I start my career in risk regulation research. Risk regulation story told, I now turn to reflect on the essence of risk regulation as I see it.

## II. A PHILOSOPHICAL TAKE ON RISK REGULATION SCHOLARSHIP

Risk regulation must mean many things to many people due to the sheer depth and breadth of the field, something that I am rapidly discovering in my new role as Case Commentary Editor for the *EJRR*. This makes risk regulation a truly rewarding field to research in, since there are innumerable ways in which risk regulation scholars coming from different perspectives can combine to create new knowledge.

One benefit of being at the start of my risk regulation journey is that I have very few preconceptions of what risk regulation should be. I therefore find this an ideal opportunity to reflect personally and philosophically upon what really lies at the heart of risk regulation. For me, risk regulation is an ongoing process of introspection, observation, debate, and evaluation, through which a society creates a set of rules and values that define what the society considers beneficial or harmful for its continued success. The purpose of the process, and of following the set of rules and values therein produced, is to promote beneficial developments and prevent harmful ones. Consequently, risk regulation research is about developing knowledge and understanding that will help societies to engage in the risk regulation process. There are two important strands to this understanding, in my opinion.

Firstly, risk regulation scholars should attempt to understand how relationships of power and control develop within a society, and how those relationships impact upon the society's definition of benefits and harms. As part of this, risk regulation scholars might reflect upon *who* should be responsible for deciding what will benefit the society and its various members and what will not.<sup>2</sup> In doing so, risk regulation scholars should build a more refined understanding of *how* those with the power to decide should decide what

<sup>1</sup> 2<sup>nd</sup> HEC Paris Workshop on Regulation, "Regulating Lifestyle Risks in Europe: The Case of Alcohol, Tobacco, Unhealthy Diets and gambling" (HEC Paris, 20–21 September 2012), conference programme available online at <<http://appli6.hec.fr/forms/risk-regulation-2012/>> (last accessed 29 November 2016). See also the edited collection that resulted from the conference: A Alemanno and A Gard (eds), *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* (Cambridge University Press 2015).

<sup>2</sup> This is a train of thought which I owe to generous and useful feedback by Professor Francis Snyder on a presentation that I gave at the 10<sup>th</sup> International Workshop for Young Scholars, 19–20 June, HEC Paris. The conference itself aimed to "identify new directions in EU and global risk regulation ... [and] nurture self-reflection among the [young] scholars about the future of their own discipline": see "Wish@10: International Young Scholars from Top International Law Schools gather at HEC Paris to discuss new regulatory trends" (hec.edu, Paris, 6 July 2015), available online at <<http://www.hec.edu/News-Room/News/WISH-10-International-Young-Scholars-from-Top-International-Law-Schools-gather-at-HEC-Paris-to-discuss-new-regulatory-trends>> (last accessed 29 November 2016). The opportunity was gratefully seized, and is advanced greatly by the chance to write this current piece.

constitutes a benefit or harm for society and its members, and which interests are at play in guiding decisions on how to achieve benefits and avoid harms. Furthermore, risk regulation scholars should investigate how those with decision-making power should balance specific competing and sometimes contradictory interests once they have been identified – principally interests in shaping the environment to secure opportunities for greater health and well-being, and interests in shaping the environment to build wealth.

Second, the work produced by risk regulation researchers should help societies to reflect on which values will lead to the promotion or avoidance of identified benefits and harms, and which rules will enshrine those values. Risk regulation researchers should investigate how those values and their associated rules constrain what actions the powerful (whether governors or the governed) can take to shape society in pursuit of their own interests. Specifically, risk regulation researchers should explore the legitimacy of governments' action that seeks to advance interests in protecting the health and wellbeing of those they govern, and whether other interests held by governments (such as securing economic prosperity for the society) compromise or complicate pursuit of their interest in a healthy population. By extension, risk regulation researchers might investigate how the system of values and rules defined by the risk regulation process might give members of the society a reason to expect protection from threats to their well-being, what form this protection might take, and when it will be offered.

As stated above, any account of the purposes of risk regulation must necessarily be personal, and the one offered above has of course been influenced by the particular risk regulation research that I have undertaken to date, which has mostly involved investigating how law can be a tool of non-communicable disease prevention,<sup>3</sup> how governments can shape the environment that drives the development of addictions,<sup>4</sup> how the existence of the human right to health can contribute to non-communicable disease prevention,<sup>5</sup> and how corporate vectors of non-communicable disease can be controlled.<sup>6</sup>

Following my account of what I believe the purpose of risk regulation research is, and what the general priorities of risk regulation researchers might be, the final section of this contribution outlines the specific priorities that I believe might drive risk regulation researchers in the future.

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<sup>3</sup> I owe a great deal of my thinking on this topic to the work of Amandine Garde and Alberto Alemanno, see for example: A Alemanno and A Garde, "The emergence of an EU lifestyle policy: The case of alcohol, tobacco and unhealthy diets" (2013) 50 *Common Market Law Review* 1745. I have also relied considerably on the work of Laurence Gostin, see for example: L Gostin, "Public health law in a new century: part I: law as a tool to advance the community's health" (2000) 283(21) *Journal of the American Medical Association* 2837.

<sup>4</sup> I developed this as the topic of my PhD in consultation with Professor Garde, and drew inspiration in the early stages from Planzer's thoughts on this topic: S Planzer, "Towards an EU addiction policy: rationale and competences" in A Alemanno and A Garde (eds), *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* (Cambridge University Press 2015). My understanding of addiction is built on the theory developed by Bruce Alexander in B Alexander, *The Globalisation of Addiction: A Study in Poverty of the Spirit* (Oxford University Press 2008).

<sup>5</sup> I have drawn on several authoritative works that address the right to health, for example: J Zuniga et al (eds), *Advancing the Human Right to Health* (Oxford University Press 2013).

<sup>6</sup> On corporate vectors of disease, I have drawn inspiration from, for example: A Gilmore et al, "Public health, corporations and the New Responsibility Deal: promoting partnerships with vectors of disease?" (2011) 33(1) *Journal of Public Health* 2; R Moodie et al, "Profits and pandemics: prevention of harmful effects of tobacco, alcohol and ultra-processed food and drink industries" (2013) 381(9867) *Lancet* 670.

### III. A RISK REGULATION RESEARCH AGENDA FOR THE INFORMATION AGE

As human society becomes increasingly concerned with promoting connectivity, technological advancement and economic prosperity, yet at the same time allows the human and natural relationships upon which these priorities must depend to be eroded,<sup>7</sup> there are perhaps two priorities that, building on the thoughts in the section above, should drive the risk regulation process and risk regulation research.

First, the risk regulation process should seek to ensure that the development of free market ideals, and the quest for technological enhancement and greater connectivity, does not result in powerful members of society being allowed to exploit more vulnerable members of society in order to increase their own share of society's wealth and resources. For example, multinational alcohol and food corporations exploit the vulnerability and future well-being of children in an effort to recruit future customers, with increasingly subtle and multi-platform advertising campaigns that are designed to be attractive to the young.<sup>8</sup> These corporations also exploit the vulnerability of individuals who have developed addictions: for example, tobacco manufacturers design and brand their products to create sustained attraction to the product and the image of "safer" cigarettes for the health-conscious nicotine addict.<sup>9</sup> Corporations even exploit cherished global symbols of human cooperation, endeavour and achievement, for example by sponsoring the Olympic Games, with the ultimate objective of normalising consumption of their products.<sup>10</sup> A priority for risk regulation research should, therefore, be to establish how and why decision makers might balance the interests of such powerful members of society with the interest of those who would seek to prevent the exploitation of the vulnerable in service of continued human flourishing.

Second, and relatedly, the risk regulation process should attempt to ensure that humanity does not become its own greatest existential threat. Human society has evolved to a point where very few physical threats are posed by our environment; unlike every other species on our planet, we have learnt how to tame natural phenomena, protect ourselves from disease, and even (for the most part) prevent violent conflict between competing groups, and have developed systems to preserve and communicate this knowledge. Despite all this, humanity now seems intent, having done all we can to ensure ultimate physical longevity, upon creating new environments that will destroy this hard-won longevity. Non-communicable diseases, mainly cardiovascular disease, cancer, chronic respiratory diseases and diabetes kill around 36 million people annually and are the leading cause of human mortality, causing 63% of all global deaths.<sup>11</sup>

<sup>7</sup> One finds it hard to escape this conclusion after reading the work of Alexander, who postulates that the growth of the free market society and free market ideals have led to increased and incessant competition between human beings for power and advantage that has ultimately started to destroy the psychosocial connections that the successful evolution of human beings is built upon. See Alexander, *supra* note 4.

<sup>8</sup> G Hastings, "They'll drink bucket loads of the stuff": An analysis of internal alcohol industry advertising documents" (The Alcohol Education and Research Council 2009).

<sup>9</sup> M Wakefield, "The cigarette pack as image: new evidence from tobacco industry documents" (2002) 11 *Tobacco Control* 173.

<sup>10</sup> A Garde and N Rigby, "Going for gold – should responsible governments raise the bar on sponsorship of the Olympic Games and other sporting events by food and beverage companies?" (2012) 17 *Communications Law* 42.

<sup>11</sup> *Global action plan for the prevention and control of noncommunicable diseases 2013–2020* (World Health Organization 2013).

This leading killer of humanity is not a natural phenomenon. It is linked to four primary risk factors: tobacco use, excessive alcohol consumption, excessive unhealthy food and beverage consumption and physical inactivity – all of which have been created by a human society that, in its quests for advancement, now promotes lifestyles that our bodies have not evolved to sustain or guard against.<sup>12</sup> Risk regulation scholars therefore have a role to play in identifying how governments should and can shape the environments that promote the development of non-communicable diseases, (including the activities of corporations as described above) to ensure that, having reached the limits of physical evolution by learning to eliminate the vast majority of natural existential threats, humans do not create new physical threats that we do not have the capacity to evolve to overcome.

It is my intention to pursue a research agenda that reflects the above beliefs about the future priorities of risk regulation, which, considering my background and interests within the field, will include the following projects. I intend to continue my work on addiction, law and regulation, and will aim to explore in greater depth why legal intervention is appropriate and necessary for controlling factors of the addictiogenic environment, as I term it in my doctoral thesis. Addiction is a complex social phenomenon that challenges and threatens both the health of populations and our ideas about exploitation, exclusion and incapacity, and how we prevent these from happening to vulnerable people. I therefore propose to dig deeper into how and why different societies have chosen to address the phenomenon of addiction, whether there are aspects of the problem and the solution that are common to all societies, and whether there are lessons for use of the law as a tool of environmental shaping and control that we can apply to similar societally-generated problems.

Furthermore, I intend to begin a new project on the role of courts and legal institutions in the public health policymaking process. Courts of law are important, perhaps the most important, forums where societies can publically debate and decide the legitimacy of certain courses of action by government that are purported to protect populations, or courses of action by other actors which are claimed to be harming populations.<sup>13</sup> Building on previous work on the application of the proportionality principle to minimum unit pricing interventions, I aim to explore what role courts of law should take in a society's process of deciding which powers governments should possess and what they should be used for in the public health field.

Finally, I also intend to build upon existing work that I have done on the ethics of legal intervention for public health purposes. I aim to explore the nature of government paternalism in more detail, drilling down into what it really means to be paternalistic in public health practice, particularly in the European context.<sup>14</sup> In particular, I seek to build an understanding of whether paternalism is a policymaking paradigm that will

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<sup>12</sup> R Beaglehole and D Yach, "Globalisation and the prevention and control of non-communicable disease: the neglected chronic diseases of adults" (2003) 362 *Lancet* 903.

<sup>13</sup> See, for example, the discussion of the role of courts in policymaking on obesity in the US: R Kersh and J Morone, "Obesity, Courts and the New Politics of Public Health" (2005) 30(5) *Journal of Health Politics, Policy and Law* 839, 854.

<sup>14</sup> A sizeable amount of high quality literature on public health paternalism has been produced in the North American context, but few explorations of paternalism in European legal contexts have been produced by comparison.

contribute to sustaining healthy societies, and whether there *is* a limit to how far societies should prioritise health protection over other interests, some of which may contribute to a sustainable society in other ways.

#### IV. CONCLUDING THOUGHTS

This is an exciting time at which to be beginning a career in risk regulation. I am grateful for the journey that I have come on, and to the people that have helped me along the way. Perhaps the above thoughts come over as naïve or unrefined, however I hope that they will be seen as the reflections of a risk regulation researcher who is just starting to make sense of the field, and his place in it. It is my belief that preventing the powerful from exploiting the vulnerable and preventing humanity from becoming its own and only predator should become central concerns of risk regulation, whose objective ultimately is to ensure that societies develop in a sustainable way. I look forward to exploring these ideas, and to developing my understanding of a fascinating and captivating field of scholarly enquiry.