

EDITORIAL

Unhealthy, (Un)Lawful? A Multidimensional Study of Legal but Potentially Lethal Products and Services

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Products and services like mobile phones, tasty manufactured food and tobacco have enriched today's life and brought us happiness and prosperity. However, the moment these products were introduced to the market, we did not know or were not aware of the risks the new products and services embodied. We know now that mobile phones *may be* health-threatening, tasty manufactured food *under some circumstances is* health threatening and smoking *kills*. Those three products illustrate a serious global societal problem, which is the legitimate offer of products and services that are potentially lethal. On a yearly basis, legal but lethal products and services greatly damage society in various ways. Not only do the costs of healthcare rise as victims call on healthcare, it also causes a loss of social economic potential. Although offering the products and services on the market is legal, the role of the law remains important to take action to help to prevent avoidable harm and to facilitate a safe environment.

Keywords: Prevention; Unhealthy; Lethal products; Tobacco; Tort Law

1. Introduction

Products and services like mobile phones, tasty manufactured food and tobacco have enriched today's life and brought us happiness and prosperity. However, the moment these products were introduced to the market, we did not know or were not aware of the risks the new products and services embodied. We know now that mobile phones *may be* health-threatening,¹ tasty manufactured food *under some circumstances is* health threatening and smoking *kills*.² Those three products illustrate a serious global societal problem, which is the legitimate offer of products and services that are potentially lethal. On a yearly basis, legal but lethal products and services greatly damage society in various ways. Not only do the costs of healthcare rise as victims call on healthcare, it also causes a loss of social economic potential. Although offering the products and services on the market is legal, the role of the law remains important to take action to help to prevent avoidable harm and to facilitate a safe environment.

As a starting point, one could state that national governments have a responsibility for the well-being of their citizens. At the same time, however, the autonomy of each individual is a core value in today's modern society. In light of this, the question to what extent the government has to (further) intervene in order to protect public and individual health requires a difficult balancing act. On the one hand, there is the legal obligation of the government, arising from for instance fundamental rights, to promote public and individual health to the highest possible level. On the other hand, each individual is entitled to make his or her choice, even if that choice is potentially harmful. However, the balancing act is even more complicated when one realises that more actors are actually involved; that regulation is not confined to the national level,

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¹ See www.who.int/features/qa/30/en/ (last visited 25 September 2019).

² See www.who.int/news-room/fact-sheets/detail/tobacco (last visited 25 September 2019).

but does necessarily take place at local, European and international levels as well; and that various types of legal instruments are available to take action against potentially lethal products and services.

This being said, it should be noted that, in principle, precautionary measures are already taken to prevent the introduction of harmful products and services on the market. For example, new products need to be tested before they may be introduced and the use of specific substances is the subject of regulation. However, this is clearly not enough, when one realises that precautionary measures do not always suffice or may under certain circumstances be completely absent. The excessive consumption of age-old products that may only be harmful if consumed in certain amounts, like sugar, fat and alcohol, illustrates that precautionary measures do not always suffice.

In 2016, the Utrecht Centre for Accountability and Liability Law (Ucall) initiated a working group on the role of the law in respect of combating legal but potentially lethal products and services.³ In line with Ucall's philosophy, the working group consists of researchers with different academic backgrounds; both legal and non-legal. The multidisciplinary study conducted by the group aims to contribute to the question of what the legal approach towards legal but potentially lethal products and services is, could and should be. That question is not merely a question about law, but also about disciplines that are intrinsically linked to the legal discipline. As we regard the law as an instrument to influence one's behaviour, we are for instance also interested in the question of how the role of the law relates to what is known in the psychological discipline about conditions for influencing the individual's behaviour. At the *Ius Commune* Conference that took place at Utrecht University in November 2017, a liability and insurance workshop was dedicated to the question of where tort law comes in in this debate on lethal but legal products and services.⁴ In May 2018, Ucall organised an interdisciplinary conference on the legal battle against lawful products or services that are potentially threatening to human health⁵ and presented an impressive volume of 21 chapters from the perspectives of private law, public law, international law, human rights, public health, law and economics, philosophy, psychology and social sciences.⁶

This special issue of the *Utrecht Law Review* consists of contributions that, from different perspectives, contribute to the central question on the role of the law in combating legal but potential lethal products and services.⁷ In this editorial we aim to introduce the theme of this special issue and at the same time outline the various contributions via three dimensions that can be identified in the contributions. First, there are the *actors* that are involved with the problem. It will become clear that the state is involved in many different capacities, i.e. as a legislator, policy maker, judge and supervisor. Besides the state the contributors also shine light on the individual/consumer and the private actors that produce and/or offer the products and services. Second, there are the concrete *legal instruments*. The instruments that form part of a legal approach towards legal but potentially lethal products and services vary in many ways. Some instruments aim to inform consumers about potential risks that come with certain products, while others aim to compensate damage resulting from products. Some are rather vague, like fundamental rights, while others are much more specific, like the duty to place concrete warnings at the packaging. Third and last, there is the *multilevel legal order* that affects the central question on the role of the law. The multilevel legal order is relevant as the problem we address is a global problem in various ways.

2. The actors and their respective roles

How should the battle against harmful products and services be fought? The most radical option is to ban lethal products, such as tobacco, as is the case with asbestos. In this view, the government should prohibit the sale and marketing of lethal products that merely bring harm. Another option is to seek financial compensation for the harm inflicted. This leads to holding the involved industry liable and responsible for its portion of the human toll and clean-up costs. The publicly-funded healthcare is to be compensated by the polluter. Turning to criminal law might also be a route. It is, for example, argued that the tobacco industry should be prosecuted for attempted murder or manslaughter. In the Netherlands, the Dutch cancer fighting

³ See <ucall.rebo.uu.nl> (last visited 25 September 2019).

⁴ See for an introduction and overview of the contributions to his workshop: A.L.M. Keirse & R. Rijnhout, 'Lethal but legal, and where does tort law come in?', (2018) *TvC*, 1, pp. 53–41.

⁵ See <www.uu.nl/en/events/ucall-conference-2018> (last visited 25 September 2019).

⁶ The contributions are published in Dutch in A.L.M. Keirse et al, *Ongezonder (on)geoorloofd. Publiek- en privaatrecht & legal maar gezondheidsbedreigende producten en diensten* (2018).

⁷ *Ibid.*

association KWF and Benedicte Ficq have filed a criminal complaint against the tobacco industry for murder, attempted murder, manslaughter, assault, deliberately harming health and forgery.⁸

By contrast, it can be argued that it is not up to the law to tackle this issue. From this perspective, one could point to politics and to the autonomy and personal liberty of humankind. Or is the latter strategy in fact shelving responsibility? Is it not a matter of the deepest concern of law to translate the needs of society into a system of justice? After all, one wonders, if this is not up to the law; what is? When all is politics, nothing is law. It should be emphasised that only the doctrine of law is capable of enforcing its insights by means of law and rulings. Insights of other studies such as political science, philosophy or social studies have to be picked up and implemented by the government or by judges and have to be transformed into rules of law, before being able to really make a difference. Other sciences lack the means of enforcement that the law offers naturally.

In the search for a legal approach to combat legal but potentially lethal products, the first question that arises is what actors have a role to play and thus may have a responsibility to bear in this context. An initial relevant actor is the *producer* of the products at hand. In their contribution, Borucki, Samoy and Keirse concentrate on manufacturers of tobacco products as they pose the question of who can potentially be held liable for the damage caused by tobacco products. According to these authors, a successful claim is not evident. In their explanation a second relevant actor appears, that is the *individual* in his/her capacity as a consumer/active smoker or second-hand smoker. Since the adverse effects of smoking are commonplace today, Borucki, Samoy and Keirse state that the consumer also bears a responsibility in terms of non-contractual liability law. On the basis of the theory of assumption of risk it could well be that the consumer/active smoker or the person who enters a smoking area/second-hand smoker commits a fault him/herself.

The producer is also the central figure in the contributions by Bloks and Vytopil on trans fats in food products and sugar respectively. However, as Borucki, Samoy and Keirse focus on the responsibility of the producer for harm caused by cigarettes, Bloks and Vytopil explore the responsibilities of the respective producers in an earlier phase. Bloks concentrates on the producer who adds trans fats to his/her food products and analyses laws and regulations with regard to trans fat labelling, limiting trans fat levels and banning partially hydrogenated oils that contain trans fats. Bloks makes a comparison between European regulations and regulations in the US. The central question in Vytopil's contribution is whether laws and regulations may give rise to a duty to warn about the health risks associated with high-sugar products such as lemonade and candy. Vytopil draws a parallel with tobacco laws and regulations to see if the laws and regulations in the context of tobacco and sugar have the same characteristics. She concludes that the public could benefit from a clear strategy and vision when it comes to regulating unhealthy food. A clear and simple visual system could contribute to the education of consumers and assist them in making healthier choices.

Two other actors that potentially bear responsibilities in the context of battling against legal but potentially lethal products are the government and supervision agencies. Borucki explains the role of the government in guaranteeing the right to health from a European human rights perspective. On the basis of human rights law, states have to guarantee the health of their citizens. On the other side, however, individuals do not have to accept fundamental rights infringements in all cases, like interference in their private life, by a government that is carrying out its positive obligations. This being said, Borucki reflects on (European) fundamental rights law to find if lifestyle differentiation by states is allowed. As an example, Borucki mentions the interference in smoking behaviour by a government that is justified by the public interest. Whatever might be the margin of appreciation for the states to differentiate, the lower limit seems to be set by the fundamental principle that healthcare must be accessible to all.⁹

Lastly in this (non-exhaustive) overview of actors that potentially bear responsibilities, supervision agencies are discussed. Kasdorp and van Erp shed light on the responsibilities of supervision agencies that are confronted with new risks that are either associated with new products or with current products. Several intervention options, both legal and non-legal, are analysed for supervision agencies whose mandate does not suffice for an enforcement action to address the risks.

⁸ See <www.kwf.nl/voorkomen/aangifte-tabaksindustrie/Pages/hoe_staat_het_er_voor.aspx>. See also R.S.B. Kool, 'Op (te) smalle leest? De betekenis van het strafrecht voor de bestrijding van legale gezondheidsbedreigende risico's', in: A.L.M. Keirse, R.S.B. Kool & R. Ortlep (eds.), *Ongezond en (on)geoorloofd – publiek- en privaatrecht & legale maar gezondheidsbedreigende producten en diensten* (2018), pp. 313–337.

⁹ See the contribution of Borucki to this issue, with reference to UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, available at <www.refworld.org/docid/4538838d0.html>.

3. The instruments

A second dimension that is relevant in light of our central question is the concrete *legal instruments* that form part of the legal approach to combat legal but potentially lethal products. First, in his fundamental contribution on the (potential) role of the law, De Vries argues that we need to reflect on 'the law as a whole' and 'the normative foundations of modern contemporary society'. De Vries takes as a starting point a social-theoretical framework that is 'the risk society', in which wealth and consumption are the rationale. Following this line and understanding law as 'an instrument that qualifies what we find important', De Vries reaches the (preliminary) conclusion that the law as it stands today falls short. According to De Vries, current law 'translates our moral responsibility under the harm principle and reduces it into legal responsibility in terms of liability in private law or public law (in particular criminal law)'. In the fight against legal but potentially lethal products, it is problematic that the key criterion under current (tort) law is an individual's behaviour instead of damage, notwithstanding that the latter is a criterion for liability. Making current law effective in terms of being part of our legal approach would result in so-called coerced paternalism, or, more concretely, 'imposing a particular life style considered to be "good", i.e. "healthy", regardless of whether you can afford it or not'. Another complexity is that the risks that exist in today's society cannot easily be related to a single cause of action for which one concrete individual bears responsibility. After ample consideration that goes beyond the above issues, De Vries concludes that 'the current legal toolkit' falls short and suggests to reconsider the normative framework on which our society is built and to reflect on the law as a whole. This means a fundamental reflection on basic concepts in the law, like the distinction between private and public law and 'our notion of liability'.

The concerns that are raised in De Vries' contribution seem to be confirmed in a way in at least two contributions on tort law in this special issue. First, Gillaerts expresses his concerns about today's trend towards instrumentalisation of tort law and contends that tort law be used to fulfil its primary compensation function. Instrumentalisation of tort law is for example to be considered as using tort law in pursuing public goals. Gillaerts states that the compensatory function of tort law prescribes the boundaries of tort law as an instrument to also be used for other purposes, like prevention, enforcement and legal protection. The aforementioned contribution of Borucki, Samoy and Keirse on the role of tort law in the battle against damage resulting from smoking behaviour illustrates the problems that are identified by De Vries, like difficulties that exist with regard to the causality criterion.

Tort law is an instrument that comes to the fore when the damage has already occurred. At the other end of the spectrum, there are also instruments that aim to prevent harm. These instruments include concrete information duties for producers, like the duty to inform on trans fats in food (Blocs) or product warnings (Vytopil, Verheyen). Verheyen evaluates European product liability law against the arguments in academic literature for a 'more nuanced approach to warnings and instructions' in product liability law.

Finally, Borucki studies human rights. European human rights law in his contribution serves as an instrument for balancing the legal obligations of the state and the margin of discretion with regard to health issues on the one hand and the interests of individuals (respect for one's individual choice) on the other.

4. The multilevel legal order

The actors that were mentioned in section 2 move across borders easily, which requires cooperation between lawmakers on different levels. This necessity is reflected in the instruments that were presented in section 3. It is clear that the instruments were created at the international, European and national level. The multilevel legal order that results from this is the last dimension to address here. Our search for a legal approach towards legal but potentially lethal products and services leads to the conclusion that the approach cannot but be composed of legal instruments created on different levels that impose responsibilities on the various actors that play a role in the context of legal but potentially lethal products and services.

Competing Interests

The authors have no competing interests to declare.

How to cite this article: Anne Keirse and Jessy Emaus, 'Unhealthy, (Un)Lawful? A Multidimensional Study of Legal but Potentially Lethal Products and Services' (2019) 15(3) Utrecht Law Review pp. 1–5. DOI: <https://doi.org/10.36633/ulr.537>

Published: 13 December 2019

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