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Promoting the Apocalypse? The Legality of a Ban on Advertising for Fossil Fuels and Other Carbon-Intensive Products under European Law

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Abstract

Climate policy requires a steep and rapid reduction of greenhouse gas emissions, which are mainly caused by fossil fuels. Advertising that promotes fossil fuels and other carbon-intensive products undermines this objective. It normalises unsustainable consumption patterns and enables producers of harmful commodities to manipulate public discourse in order to delay or derail the energy transition – for example, by spreading misinformation, deflecting responsibility and promoting false solutions. For these reasons, there are increasing calls for a fossil fuel advertising ban along the lines of the tobacco advertising ban at both the European and the Member State level. This article evaluates the legality of such bans under European law, focusing on legislative competence, fundamental rights and internal market law. It finds that a fossil fuel advertising ban can be assumed to conform to the requirements of European law, especially if it is modelled after the tobacco advertising ban.

Keywords: climate change; freedom of speech; freedom to conduct a business; fossil fuel advertising; internal market law; tobacco advertising

I. Introduction

To limit global warming to 1.5–2.0°C, steep and immediate greenhouse gas (GHG) emission reductions are required.¹ However, currently implemented climate policies will not deliver these reductions,² and the window of opportunity is rapidly closing.³ Much-touted technological solutions such as CO₂ removal, hydrogen fuel and electric aviation are at early stages of development, and it is highly uncertain whether they will be deployable at the necessary scale and speed, or at all.⁴ Consequently, interventions

¹ IPCC, “Summary for Policymakers” in H Lee et al, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)* (Geneva, IPCC 2023) p 20.

² *ibid.*, 22.

³ *ibid.*, 24.

⁴ M Allen et al, “Technical Summary” in V Masson-Delmotte et al, *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Geneva, IPCC 2018) p 34; BA Adu-Gyamfi and C Good, “Electric Aviation: A Review of Concepts and Enabling Technologies” (2022) 9 *Transportation Engineering* 100134; M Yue et al, “Hydrogen Energy Systems: A Critical Review of Technologies, Applications, trends and Challenges” (2021) 146 *Renewable and Sustainable Energy Reviews* 111180.

to curb demand for fossil fuels and other carbon-intensive products are becoming increasingly central in climate policy.⁵ Demand-side strategies have a significant potential to reduce emissions, estimated at 40–70% by 2050.⁶ Moreover, they can be deployed immediately and can therefore support near-term reduction goals.⁷ They also entail significantly lower uncertainty and fewer environmental risks than new, untried technologies.⁸ Demand-side mitigation strategies comprise measures to *avoid* demand (eg reducing transportation by aircraft and cars), to *shift* demand (eg switching to plant-based diets) and to *improve* efficiency in existing technologies.⁹ Individual behavioural changes are central in these strategies, but they can only translate into aggregate emission reductions if they are embedded in a comprehensive societal transformation that encompasses the technological, the infrastructural, the political and the socio-cultural spheres.¹⁰

Advertising plays a considerable role in shaping social norms and lifestyle.¹¹ It can increase awareness of the climate crisis and challenge materialistic values.¹² Much more frequently, however, advertising promotes and normalises unsustainable, carbon-intensive consumption patterns.¹³ Moreover, the fossil fuel industry and other producers of carbon-intensive products use advertising to exert political influence, to manipulate media reporting, to deflect corporate responsibility and to spread misinformation about climate science, with the aim of derailing or delaying the energy transition.¹⁴ These practices are increasingly coming under criticism from a wide range of stakeholders, including public health professionals and environmental organisations.¹⁵ They have also become the target of a growing number of legal challenges. Multiple lawsuits in the USA maintain that major fossil fuel companies have deceived the public about the climate harm of their products by means of advertising.¹⁶ Court actions against Total in France and KLM in the Netherlands hold that the undertakings are misleading consumers with implausible marketing claims on their transition plans and by promoting false solutions to the climate crisis.¹⁷ Decisions by the Dutch advertising authority have established that Shell incorrectly promoted itself as a “driver of the energy transition” and misled consumers by maintaining that carbon offsets could neutralise the harm from driving with fossil fuels.¹⁸

⁵ IPCC, *supra*, note 1, 28; P Newell, M Twena and F Daley, “Scaling Behaviour Change for a 1.5-Degree World: Challenges and Opportunities” (2021) 4 *Global Sustainability* 1.

⁶ PR Shukla et al, *Climate Change 2022: Mitigation of Climate Change. Working Group III Contribution to the IPCC Sixth Assessment Report (AR6)* (Geneva, IPCC 2022) p 505.

⁷ *ibid*, 508.

⁸ *ibid*, 508; F Creutzig et al, “Towards Demand-Side Solutions for Mitigating Climate Change” (2018) 8 *Nature Climate Change* 260.

⁹ Shukla et al, *supra*, note 6, 508.

¹⁰ *ibid*, 505; Newell et al, *supra*, note 5, 2.

¹¹ Newell et al, *supra*, note 5, 7; Creutzig et al, *supra*, note 8, 261.

¹² Shukla et al, *supra*, note 6, 546–47, 572.

¹³ *ibid*, 264.

¹⁴ *ibid*, 121, 557–58, 1378; G Beattie, “Advertising and Media Capture: The Case of Climate Change” (2020) 188 *Journal of Public Economics* 104219.

¹⁵ Canadian Association of Physicians for the Environment, “Fossil Fuel Ads Make Us Sick” <<https://cape.ca/focus/fossil-fuel-ad-ban/>> (last accessed 1 March 2023).

¹⁶ For a comprehensive overview, see JA Wentz and B Franta, “Liability for Public Deception: Linking Fossil Fuel Disinformation to Climate Damages” (2022) 52 *Climate Law Reporter* 10995, 10997–98.

¹⁷ “Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France” (*Climate Case Chart*) <<http://climatecasechart.com/climate-change-litigation/non-us-case/greenpeace-france-and-others-v-totalenergies-se-and-totalenergies-electricite-et-gaz-france/>> (last accessed 2 May 2022); “FossilVrij NL v. KLM” (*Climate Case Chart*) <<http://climatecasechart.com/non-us-case/fossilvrij-nl-v-klm/>> (last accessed 1 March 2023).

¹⁸ Reclame Code Commissie, 2021/00576/A (*Shell - “driver of the energy transition”*); 2021/00190 (*Shell - “Drive CO2 neutral”*).

Research indicates that advertising restrictions can help reduce emissions.¹⁹ Moreover, they can act as a “social tipping intervention” (ie an intervention that triggers the rapid transition to a state of net zero emissions).²⁰ Municipalities such as Amsterdam and Sydney have already enacted local measures to ban advertising for fossil fuels and other carbon-intensive products from city-owned advertising spaces, most notably in public transport.²¹ There are also growing calls for a legislative ban, often inspired by the example of the ban on tobacco advertising. Between 2021 and 2022, a European Citizen Initiative (ECI) collected 280,000 signatures in support of such a ban, though the number fell short of the threshold that would require the European Commission to formally engage with the proposal.²² In 2022, France passed the first legislative ban on advertising for fossil fuel products.²³ National campaigns to enact bans are ongoing in various countries, such as the Netherlands.²⁴

Different design options for a ban exist. The French ban only covers the direct promotion of fossil fuels. It does not prohibit fossil fuel companies from engaging in image advertising or sponsorship, which significantly limits the effectiveness of the ban.²⁵ By contrast, the ECI sought a quasi-comprehensive ban that also included a prohibition of indirectly promoting fossil fuels (ie image- or advocacy-related advertising and sponsorship), as well as a ban on advertising for fossil fuel-powered products such as aviation and cars.

Advertising restrictions are a common regulatory tool to curb the effects of harmful products and communication practices. At the European Union (EU) level, multiple advertising bans are in place, ranging from the general prohibition of misleading advertising under the Unfair Commercial Practices Directive (UCPD) to various product-related restrictions. Among the most comprehensive advertising bans enacted by the EU is that for tobacco products. The tobacco advertising ban has been subject to numerous legal challenges under European law, ultimately weathering most of them. Building on this experience, the present article will evaluate the legality of a ban on advertising for fossil fuels and other carbon-intensive products (the “fossil fuel advertising ban”) under European law. It addresses, first, the legislative competence of the Member States and the EU to enact such a ban. Second, it analyses the effects of an advertising ban on the freedoms of commercial speech and to conduct a business. And third, it evaluates the effects of a national advertising ban on the free movement of goods and the freedom to provide and receive services, which are protected by internal market law. The article concludes that a fossil fuel advertising ban will likely conform to the requirements of European law, especially if it is modelled after the tobacco advertising ban.

¹⁹ Shukla et al, supra, note 6, 455; D Ivanova et al, “Quantifying the Potential for Climate Change Mitigation of Consumption Options” (2020) 15 Environmental Research Letters 093001, 15; see also G Paradies and R van den Brink, “Anders consumeren om klimaatdoelen te halen” (TNO, 2023) p 32 <<https://repository.tno.nl/islandora/object/uuid%3Ae3d7fcec-4cae-47a3-b0e9-c5fd02216d69>> (last accessed 27 April 2023).

²⁰ IM Otto et al, “Social Tipping Dynamics for Stabilizing Earth’s Climate by 2050” (2020) 117 Proceedings of the National Academy of Sciences of the United States of America 2354, 2358.

²¹ “Decision – Fossil Fuel Advertising in the City” (City of Sydney, 22 August 2022) <<https://meetings.cityofsydney.nsw.gov.au/ieDecisionDetails.aspx?AIId=13628>> (last accessed 1 March 2023); “Amsterdam to Become First City in the World to Ban This Type of Advert” (euronews, 20 May 2021) <<https://www.euronews.com/green/2021/05/20/amsterdam-becomes-first-city-in-the-world-to-ban-this-type-of-advert>> (last accessed 1 March 2023).

²² “Ban Fossil Fuel Advertising and Sponsorships” (europa.eu) <https://europa.eu/citizens-initiative/initiatives/details/2021/000004_en> (last accessed 1 March 2023).

²³ Art L229-61 Code de l’environnement.

²⁴ “Ban Fossil Fuel Advertising; a Dutch Citizens’ Initiative” (Reclame Fossilvrij) <<https://verbiedfossilereclame.nl/dutch-citizens-initiative-ban-fossil-fuel-advertising/>> (last accessed 1 March 2023).

²⁵ “La fausse fin des pubs sur les énergies fossiles” (Reporterre, 22 August 2022) <<https://reporterre.net/BV-Interdiction-pub-energies-fossiles>> (last accessed 1 March 2023).

The article is structured as follows: Section II discusses the objectives of a fossil fuel advertising ban. This helps determine the legislative competence of the Member States and the EU to enact such a ban, and it is also relevant in the context of the proportionality analysis. It will be shown that a fossil fuel advertising ban has multiple objectives, namely the protection of health, the environment, consumers and the democratic process. Section III provides an overview of existing advertising restrictions in the EU. Section IV examines parallels between tobacco and fossil fuel advertising. It will show that the two are comparable in important aspects. Section V provides an overview over the legal framework of tobacco advertising regulation. Section VI scrutinises the legality of a fossil fuel advertising ban under European law from different perspectives. Section VII concludes.

II. The objectives of a ban on fossil fuel advertising

A fossil fuel advertising ban pursues three central objectives.²⁶ First, it aims to reduce the consumption of fossil fuels and other carbon-intensive products, which cause major harm to health and the environment. Fossil fuel combustion is responsible for up to 10 million deaths globally per year as a result of air pollution.²⁷ In the EU, the number of deaths caused by air pollution is estimated at 660,000 per year.²⁸ More than half of these deaths could be avoided by eliminating emissions from fossil fuel combustion.²⁹ Furthermore, fossil fuels cause over two-thirds of total GHG emissions and are therefore the main drivers of climate change.³⁰ It is estimated that an average of 250,000 deaths per year will be caused by climate-sensitive diseases and conditions, such as malaria, heat, childhood undernutrition and diarrhoea, by 2050.³¹ Due to its severe health impacts, the climate crisis is increasingly being conceptualised as a public health crisis, with fossil fuels as its dominant cause.³² Moreover, GHG emissions already inflict enormous environmental harm, such as irreversible ecosystem loss and the widespread extinction of species.³³ An aggressive phase-out of fossil fuels will therefore have major health and environmental benefits.³⁴ Advertising normalises the continued use of fossil fuels and promotes the consumption of carbon-intensive products.³⁵ It reinforces existing behavioural patterns and undermines a sense of urgency in

²⁶ “Ban Fossil Fuel Advertising and Sponsorships”, supra, note 22; “Ban Fossil Fuel Advertising; a Dutch Citizens’ Initiative”, supra, note 24.

²⁷ K Vohra et al, “Global Mortality from Outdoor Fine Particle Pollution Generated by Fossil Fuel Combustion: Results from GEOS-Chem” (2021) 195 *Environmental Research* 110754.

²⁸ J Lelieveld et al, “Cardiovascular Disease Burden from Ambient Air Pollution in Europe Reassessed Using Novel Hazard Ratio Functions” (2019) 40 *European Heart Journal* 1590.

²⁹ *ibid*, 1595.

³⁰ Shukla et al, supra, note 6, 59.

³¹ WHO, “Climate change and health” <<https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>> (last accessed 26 June 2023).

³² M Romanello et al, “The 2022 Report of the Lancet Countdown on Health and Climate Change: Health at the Mercy of Fossil Fuels” (2022) 400 *The Lancet* 1619; see also “WHO Urges Accelerated Action to Protect Human Health and Combat the Climate Crisis at a Time of Heightened Conflict and Fragility” (WHO) <<https://www.who.int/news/2022/06-04-2022-who-urges-accelerated-action-to-protect-human-health-and-combat-the-climate-crisis-at-a-time-of-heightened-conflict-and-fragility>> (last accessed 1 March 2023).

³³ IPCC, supra, note 1, 5.

³⁴ D Shindell and CJ Smith, “Climate and Air-Quality Benefits of a Realistic Phase-Out of Fossil Fuels” (2019) 573 *Nature* 408.

³⁵ Shukla et al, supra, note 6, 170–71, 264; Newell et al, supra, note 5, 5; V Frick et al, “Do Online Environments Promote Sufficiency or Overconsumption? Online Advertisement and Social Media Effects on Clothing, Digital Devices, and Air Travel Consumption” (2021) 20 *Journal of Consumer Behaviour* 288; T Kasser, “Advertising’s Role in Climate and Ecological Degradation. What Does the Scientific Research Have to Say?” (*Badvertising*, 2020) <<https://static1.squarespace.com/static/5ebd008238e863d04911b51/t/5fbfcb1408845d09248d4e6e/1606404891491/Advertising%E2%80%99s+role+in+climate+and+ecological+degradation.pdf>> (last accessed 28 April 2023).

implementing behavioural changes, thereby contributing to the carbon lock-in.³⁶ Advertising regulation constitutes an important measure to reduce carbon-intensive consumption.³⁷ According to Otto et al, a fossil fuel advertising ban can contribute to the public recognition of the “immoral character of fossil fuels”.³⁸ This constitutes an important “social tipping intervention”, which describes a relatively small policy change that can trigger a systemic transformation.

Second, a fossil fuel advertising ban aims to protect consumers and ensure the effective functioning of markets in the context of the energy transition. Advertising misleads consumers about the adverse effects of fossil fuels and about the damaging role that fossil fuel companies play in the transition. As fossil fuel advertising normalises the continued consumption of fossil fuels despite the fact that an urgent phase-out is required, it is misleading by default.³⁹ Misleading marketing claims directly harm the interests of consumers, as correct and non-deceptive product information is necessary for informed and thus efficient consumer choice.⁴⁰ Indirectly, they also harm the interests of competitors, such as providers of genuinely sustainable energy.⁴¹ Fossil fuel advertising thereby contributes to market failure in the context of the energy transition.⁴² Deceptive fossil fuel advertising practices are increasingly targeted by lawsuits in both the USA and Europe. In the EU, misleading advertising is prohibited under the UCPD. However, the UCPD relies on ex-post, case-by-case enforcement, which is ineffective in the face of systematically deceptive advertising. A fossil fuel advertising ban can address the problem of systematic consumer deception in an effective manner and thereby contribute to the efficient functioning of markets in the context of the energy transition.⁴³

Third, a fossil fuel advertising ban seeks to protect public discourse and the democratic process from misinformation and corporate manipulation. Through advertising and other public relations (PR) instruments, the fossil fuel industry has systematically driven climate change misinformation and stoked widespread science scepticism.⁴⁴ It continually misrepresents its role in the climate crisis and promotes false solutions. Brulle et al state in this regard: “Sophisticated propaganda campaigns designed to manipulate public and elite perceptions of the major oil companies are a significant barrier to meaningful climate action.”⁴⁵ Fossil fuel advertising also manipulates media reporting. According to the latest Intergovernmental Panel on Climate Change (IPCC) report, “[f]ossil fuel industries have unique access to mainstream media via advertisements, shaping narratives of media reports, and exerting political influence”.⁴⁶ Research shows that fossil fuel advertising can significantly shape the editorial stance of media companies on energy issues.⁴⁷ It can also influence how readers perceive reporting on climate-related issues and thereby counteract

³⁶ KC Seto et al, “Carbon Lock-In: Types, Causes, and Policy Implications” (2016) 41 Annual Review of Environment and Resources 425, 441.

³⁷ Shukla et al, *supra*, note 6, 455, 1561.

³⁸ Otto et al, *supra*, note 20, 2356, 2358.

³⁹ C Kaupa, “Smoke Gets in Your Eyes: Misleading Fossil Fuel Advertisement in the Climate Crisis” (2021) 10(1) Journal of European Consumer and Market Law 21.

⁴⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22 (Unfair Commercial Practices Directive, UCPD), preamble, paras 6 and 14.

⁴¹ *ibid*, preamble, paras 6 and 8.

⁴² Seto et al, *supra*, note 36, 443.

⁴³ Kaupa, *supra*, note 39.

⁴⁴ RJ Brulle, M Aronczyk and J Carmichael, “Corporate Promotion and Climate Change: An Analysis of Key Variables Affecting Advertising Spending by Major Oil Corporations, 1986–2015” (2020) 159 Climatic Change 87, 88.

⁴⁵ *ibid*, 99.

⁴⁶ Shukla et al, *supra*, note 6, 1378.

⁴⁷ Brulle et al, *supra*, note 44, 92.

its effects.⁴⁸ Citizens who receive mixed messages about fossil fuels and other carbon-intensive products may react with disengagement.⁴⁹ Misinformation about the climate crisis and how to address it can thus significantly undermine public discourse at a time when crucial but difficult decisions on climate change mitigation are on the agenda.

By promoting products that significantly damage health and the environment, by systematically deceiving consumers and by undermining the democratic process, fossil fuel advertising violates central legal obligations and public policy objectives of the EU and the Member States. EU law prescribes a high level of protection of health, the environment and consumers and is based on the democratic principle.⁵⁰ Moreover, the EU has bound itself to an emission reduction target of at least 55% by 2030.⁵¹ Advertising that promotes and normalises the continued consumption of fossil fuels and other carbon-intensive products stands in direct conflict with this obligation. A failure to regulate fossil fuel advertising also violates other important legal requirements. Most notably, human rights law requires governments to take appropriate action in order to protect their citizens from the dangers of climate change.⁵² Governments are also under an obligation to protect its citizens from adverse health impacts, including those caused by corporations promoting harmful commodities.⁵³ A fossil fuel advertising ban prevents corporate activities that are manifestly in conflict with central objectives of the EU and the Member States.

Summing up, a fossil fuel advertising ban aims to achieve multiple objectives, namely the protection of health and the environment, consumers and the democratic process. Moreover, it seeks to ensure that fossil fuel advertising does not counteract important public policy objectives of the EU.

III. Advertising restrictions in the EU and the Member States

Advertising restrictions are a common regulatory tool to curb the harmful impact of products and communication practices. At the EU level, multiple advertising bans are in place. The EU Community code relating to medicinal products for human use prohibits advertising of prescription medicine⁵⁴ and also authorises Member States to ban advertising for medicinal products if they are reimbursed.⁵⁵ The Audiovisual Media Services Directive (AVMSD) restricts advertising for alcohol on television.⁵⁶ It also bans commercial communications that “prejudice respect for human dignity”, “include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation” or encourage behaviour “prejudicial to health

⁴⁸ A Engels et al, “Hamburg Climate Futures Outlook: The Plausibility of a 1.5°C Limit to Global Warming – Social Drivers and Physical Processes” (*Universität Hamburg*, 2023) pp 131, 133.

⁴⁹ Newell et al, supra, note 5, 5; M Stubenvoll and A Neureiter, “Fight or Flight: How Advertising for Air Travel Triggers Moral Disengagement” (2021) 15 *Environmental Communication* 765.

⁵⁰ Art 114(3) TFEU (health, environmental and consumer protection); Arts 9 and 168(1) TFEU and Art 35 FRC (health); Art 191(2) TFEU and Art 37 FRC (environmental protection); Arts 12 and 169(1) TFEU and Art 38 FRC (consumer protection); Arts 2 and 10 TEU (democracy).

⁵¹ Art 4(1) Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality [2021] OJ L 243/1 (European Climate Law).

⁵² Principle 1, UN Guiding Principles on Business and Human Rights.

⁵³ Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 14: The right to the highest attainable Standard of Health (Art 12), para 51.

⁵⁴ Art 88(1)(a) Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L 311/67 (Community code).

⁵⁵ Art 88(3) Community code.

⁵⁶ Arts 9(1)(e) and 22 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L 95/1 (Audiovisual Media Services Directive, AVMSD).

or safety” or “grossly prejudicial to the protection of the environment”.⁵⁷ The Food Information Regulation bans misleading food information in advertising,⁵⁸ and so does the Regulation on nutrition and health claims made on foods.⁵⁹ Finally, the UCPD prohibits advertising that misleads consumers. The UCPD is not limited to any specific products and instead applies to all marketing claims that are false or otherwise deceptive and are liable to influence consumer behaviour.⁶⁰ At the Member State level, advertising restrictions exist, inter alia, for products such as alcohol, gambling and betting.⁶¹

For the purposes of this article, the most important advertising restriction is that for tobacco products. Its relevance is twofold: first, it is often cited as a model for a fossil fuel advertising ban, and therefore it provides an idea of how a future legislative proposal for a fossil fuel advertising ban might look. Second, the tobacco advertising ban has been subject to numerous legal challenges. The case law helps us to evaluate the legality of a fossil fuel advertising ban, in particular if it is modelled after the tobacco advertising ban.

IV. Comparing tobacco and fossil fuel advertising

This section assesses the parallels between tobacco and fossil fuel advertising. They can be compared on at least three levels: the harm caused by the promoted products, the multifactorial mechanisms that cause this harm to be so widespread and the role that advertising plays in them.

First, tobacco and fossil fuels can be compared in terms of the harm caused. Both commodities have significant negative effects on public health. Smoking is responsible for 8 million deaths globally per year, of which 1.2 million deaths are from second-hand smoke.⁶² As discussed, the health impact of fossil fuels is of a similar or greater magnitude. Moreover, both tobacco and fossil fuels have major adverse environmental effects.⁶³ Finally, fossil fuels and tobacco are also highly damaging in economic terms. The yearly economic loss caused by tobacco is estimated to be 1.8% of global gross domestic product.⁶⁴ Climate change will cause major economic losses, with 35–132 million people pushed into extreme poverty by 2030.⁶⁵

⁵⁷ Art 9(1)(c) AVMSD.

⁵⁸ Art 7(4)(a) Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers [2011] OJ L 304/18 (Food Information Regulation).

⁵⁹ Art 3(a) Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods [2006] OJ L 404/9.

⁶⁰ Arts 6–7 UCPD.

⁶¹ For national restrictions on alcohol advertising, see WHO, “Alcohol Marketing in the WHO European Region” (2020) pp 8–11 <https://www.euro.who.int/_data/assets/pdf_file/0010/450856/Alcohol-marketing-report-on-the-evidence-and-recommended-policy-actions-eng.pdf> (last accessed 7 March 2023); for national restrictions on gambling and betting, see A Kerr, J O’Brennan and L Vazquez Mendoza, “Gambling Trends, Harms and Responses: Ireland in an International Context” (Maynooth University, 2021) pp 40–43 <<https://mural.maynoothuniversity.ie/14258/1/MGRG%20Gambling%20in%20Ireland%20report%20final.pdf>> (last accessed 7 March 2023).

⁶² MB Reitsma et al, “Spatial, Temporal, and Demographic Patterns in Prevalence of Smoking Tobacco Use and Attributable Disease Burden in 204 Countries and Territories, 1990–2019: A Systematic Analysis from the Global Burden of Disease Study 2019” (2021) 397 *The Lancet* 2337; G Carreras et al, “Burden of Disease Attributable to Second-Hand Smoke Exposure: A Systematic Review” (2019) 129 *Preventive Medicine* 105833.

⁶³ A 2022 WHO report highlights the significant environmental harm that tobacco causes throughout its lifecycle. See World Health Organization, “Tobacco: Poisoning Our Planet” (2022); M Zafeiridou, NS Hopkinson and N Voulvoulis, “Cigarette Smoking: An Assessment of Tobacco’s Global Environmental Footprint Across Its Entire Supply Chain” (2018) 52 *Environmental Science & Technology* 8087.

⁶⁴ M Goodchild, N Nargis and ET d’Espaignet, “Global Economic Cost of Smoking-Attributable Diseases” (2018) 27 *Tobacco Control* 58.

⁶⁵ Shukla et al, supra, note 6, 85; BA Jafino et al, *Revised Estimates of the Impact of Climate Change on Extreme Poverty by 2030* (Washington, DC, World Bank 2020).

A second point of comparison concerns the mechanisms by which tobacco and fossil fuels cause such widespread harm. The global tobacco epidemic has been found to have multiple causes and contributing factors. At its basis lies smoking addiction, which has a pharmacokinetic and a behavioural dimension.⁶⁶ The former refers to the way nicotine is processed by the body. It is intentionally exploited by the tobacco industry through the design of cigarettes, which have been described as “a very efficient and highly engineered drug-delivery system”.⁶⁷ The behavioural dimension of smoking addiction concerns cues associated with pleasurable effects, which are also intentionally exploited.⁶⁸ Social, political and economic factors further contribute to the smoking epidemic. Social factors concern the acceptability and desirability of smoking, which are influenced by marketing. Political factors include issues such as smoking policies and legislation, as well as public support for the industry – for example, in the form of subsidies for tobacco farming or government support for trade deregulation.⁶⁹ Finally, economic considerations drive the tobacco industry to intentionally expand existing and develop new markets for their products.⁷⁰ The tobacco industry has also used its economic power to lobby and litigate vigorously against regulation and to deceive the public about the harm caused by its products.⁷¹

The global overconsumption of fossil fuels also has multiple causes and contributing factors. At its core lies the role of fossil fuels as the dominant source of energy production. Energy demand is a function of social practices,⁷² which are increasingly conceptualised in analogy to substance dependence.⁷³ For example, the compulsive overuse of electronic devices, which is the result of intentional design choices, is described as “digital addiction”.⁷⁴ Digital services, in turn, are a significant driver of growth in global energy demand.⁷⁵ Technological, social, institutional and economic factors contribute to the overconsumption of fossil fuels, creating and stabilising the “carbon lock-in”.⁷⁶ Technological lock-in is caused by historical design choices, such as the development of highway networks or the deterioration of railroads, which complicate the adoption of efficient, low-carbon solutions such as public transport. Social institutions and customs create a social lock-in, reinforcing carbon-intensive consumption patterns.⁷⁷ Political institutions contribute to an institutional lock-in – for example, by subsidising carbon-intensive industries. Finally, an economic lock-in is created by undertakings continuing to operate in their carbon-intensive business models. Highly polluting industries such as the fossil fuel, car and aviation industries put considerable financial means into lobbying,

⁶⁶ National Institute on Drug Abuse, “Tobacco, Nicotine, and E-Cigarettes – Research Report” (2022) pp 3–6 <<https://nida.nih.gov/download/1344/tobacco-nicotine-e-cigarettes-research-report.pdf?v=4b566e8f4994f24caa650ee93b59ec41>> (last accessed 24 January 2023).

⁶⁷ *ibid.*, 4.

⁶⁸ *ibid.*, 5–6.

⁶⁹ R Roemer, *Legislative Action to Combat the World Tobacco Epidemic* (Geneva, World Health Organization 1993) pp 71–78.

⁷⁰ A Brandt, *The Cigarette Century* (New York, Basic Books 2007) pp 69–101.

⁷¹ *ibid.*, 159–207, 241–77.

⁷² E Shove, M Watson and N Spurling, “Conceptualizing Connections: Energy Demand, Infrastructures and Social Practices” (2015) 18 *European Journal of Social Theory* 274.

⁷³ J Spencer, “The Energy Dependence Syndrome” (1990) 9 *Drug and Alcohol Review* 273.

⁷⁴ H Allcott, M Gentzkow and L Song, “Digital Addiction” (2022) 112 *American Economic Review* 2424; P Berthon, L Pitt and C Campbell, “Addictive De-Vices: A Public Policy Analysis of Sources and Solutions to Digital Addiction” (2019) 38 *Journal of Public Policy & Marketing* 451.

⁷⁵ S Lange, J Pohl and T Santarius, “Digitalization and Energy Consumption. Does ICT Reduce Energy Demand?” (2020) 176 *Ecological Economics* 106760.

⁷⁶ GC Unruh, “Understanding Carbon Lock-In” (2000) 28 *Energy Policy* 817, 818–19; Seto et al, *supra*, note 36.

⁷⁷ Unruh, *supra*, note 76, 828.

marketing and litigation to protect and expand their markets. The fossil fuel industry in particular has actively resisted the energy transition for decades.⁷⁸

While the pharmacokinetic dimension of nicotine addiction is an important element fuelling the tobacco epidemic that is not of relevance in the context of fossil fuels, the multifactorial processes that magnify the harm caused by the two commodities are similar in important respects. This parallel has long been highlighted, most notably by the public health community.⁷⁹ For example, the 2022 Lancet Report on Health and Climate Change speaks of “fossil fuel dependence”,⁸⁰ and World Health Organization (WHO) Director Tedros Ghebreyesus called for “transformative solutions to wean the world off its addiction to fossil fuels”.⁸¹ Along similar lines, United Nations (UN) Secretary-General António Guterres demanded an “end our global addiction to fossil fuels”.⁸²

A third point of comparison is the role that advertising plays in the process of magnifying the harm caused by the two commodities. Advertising has long been held to be a central driver of the tobacco epidemic.⁸³ Tobacco advertising aims to create positive cues for cigarettes⁸⁴ and to maintain the social acceptability of smoking.⁸⁵ Tobacco advertising also influences political processes, as well as media reporting. Finally, tobacco advertising plays a key role in deceiving the public about the harms of smoking.⁸⁶ Advertising by the fossil fuel and other carbon-intensive industries similarly seeks to create positive cues for their products, thereby stimulating demand and normalising their consumption. The fossil fuel industry also uses advertising to spread misinformation about climate science, to mislead about the harm caused by their products and its role in the energy transition and to influence media and political processes. Research shows that the PR strategies employed by the fossil fuel industry mirror those of the tobacco industry in important respects.⁸⁷ For example, both the tobacco and the fossil fuel industries have been found to systematically target children and education.⁸⁸ The role that advertising plays in amplifying the harm caused by the two commodities is therefore largely comparable.

The preceding overview shows that important parallels between tobacco and fossil fuel advertising can be identified. This suggests that the tobacco advertising ban may serve as a plausible model for a fossil fuel advertising ban and also that the case law on the former is relevant for evaluating the legality of the latter. It is sometimes pointed out that the two commodities also differ in important respects.⁸⁹ Most importantly, tobacco use serves no

⁷⁸ Shukla et al, *supra*, note 6, 557–58, 1378.

⁷⁹ See already Spencer, *supra*, note 73.

⁸⁰ Romanello et al, *supra*, note 32, 1620.

⁸¹ “WHO Urges Accelerated Action to Protect Human Health and Combat the Climate Crisis at a Time of Heightened Conflict and Fragility”, *supra*, note 32.

⁸² “Guterres: “Global Addiction to Fossil Fuels’ Must End and a ‘Renewables Revolution’ Jumpstarted” (UN, 18 September 2022) <<https://news.un.org/en/story/2022/09/1126931>> (last accessed 3 March 2023); see already S Suranovic, “Fossil Fuel Addiction and the Implications for Climate Change Policy” (2013) 23 *Global Environmental Change* 598.

⁸³ Roemer, *supra*, note 69, 31.

⁸⁴ S Vollstädt-Klein et al, “Severity of Dependence Modulates Smokers’ Neuronal Cue Reactivity and Cigarette Craving Elicited by Tobacco Advertisement” (2011) 16 *Addiction Biology* 166; C Schooler, MD Basil and DG Altman, “Alcohol and Cigarette Advertising on Billboards: Targeting With Social Cues” (1996) 8 *Health Communication* 109.

⁸⁵ Roemer, *supra*, note 69, 25.

⁸⁶ Brandt, *supra*, note 70, 159–207.

⁸⁷ G Reed et al, “The Disinformation Playbook: How Industry Manipulates the Science-Policy Process – And How to Restore Scientific Integrity” (2021) 42 *Journal of Public Health Policy* 622.

⁸⁸ Brandt, *supra*, note 70, 665–74; EM Eaton and NA Day, “Petro-Pedagogy: Fossil Fuel Interests and the Obstruction of Climate Justice in Public Education” (2020) 26 *Environmental Education Research* 457; see also “Shell grote speler in fossiel lesmateriaal” (*Fossielvrij Onderwijs*, 29 April 2019) <<https://fossielvrijonderwijs.nl/2019/04/29/shell-in-het-basisonderwijs-middelbare-school/>> (last accessed 26 April 2023).

⁸⁹ For an overview see Suranovic, *supra*, note 82.

socially justifiable need, whereas fossil fuels are important energy sources.⁹⁰ However, a ban on advertising for fossil fuels and other carbon-intensive products does not prevent their sale. Consequently, the difference is not of significance for the purposes of this article.

V. The legal framework of tobacco advertising regulation

I. WHO Framework Convention on Tobacco Control

At the international level, a tobacco advertising ban is prescribed by the WHO Framework Convention on Tobacco Control (FCTC), which was adopted in 2003.⁹¹ The objective of the FCTC is “to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke” and thereby to “protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke”.⁹²

The FCTC takes a comprehensive approach to the regulation of tobacco, encompassing measures to reduce both supply and demand. Supply-related measures concern the illicit trade in tobacco products, sales to and by minors and the provision of support for economically viable alternative activities for tobacco farmers.⁹³ Demand measures include price and tax measures, the protection from exposure to tobacco smoke, the regulation of the contents of tobacco products and of tobacco product disclosures, the packaging and labelling of tobacco products, education, communication, training and public awareness and demand reduction measures concerning tobacco dependence and cessation. The FCTC explicitly states that tobacco control policy must be protected from the influence of the tobacco industry. The Preamble identifies “the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts”.⁹⁴

The regulation of advertising, promotion and sponsorship plays an important role in the comprehensive approach to tobacco control taken by the FCTC. It is considered a demand-oriented measure, though it is sometimes also viewed as a supply-side instrument, as it concerns actions of the tobacco industry.⁹⁵ Article 13(2) FCTC holds that “[e]ach Party shall . . . undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship”. The requirement is developed in more detail in implementation guidelines.⁹⁶ They specify that an effective, comprehensive ban should cover all tobacco advertising, promotion and sponsorship and all forms of communications or contributions that have the aim, effect or likely effect to directly or indirectly promote tobacco use.⁹⁷ It should “address all persons or entities involved in the production, placement and/or dissemination of tobacco advertising, promotion and sponsorship”.⁹⁸ The guidelines emphasise that “contemporary marketing communication involves an integrated approach” that covers all forms of advertising and promotion. Consequently, a limited advertising ban will easily be circumvented, as “the tobacco industry inevitably

⁹⁰ L Sanchez, I Gerasimchuck and J Beagley, “Burning Problems, Inspiring Solutions: Sharing Lessons on Action against Tobacco and Fossil Fuels” (*International Institute for Sustainable Development*, 2019) p 12 <https://ncdalliance.org/sites/default/files/resource_files/BurningProblemsInspiringSolutions_WEB_0.pdf> (last accessed 26 January 2023).

⁹¹ WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166 (FCTC) 2003.

⁹² Art 3 FCTC.

⁹³ Art 4(4) FCTC.

⁹⁴ FCTC, Preamble.

⁹⁵ Roemer, *supra*, note 69, 20–21.

⁹⁶ Guidelines for implementation of Article 13 of the WHO Framework Convention on Tobacco Control (Tobacco advertising, promotion and sponsorship), decision FCTC/COP3(12), 2008.

⁹⁷ *ibid*, para 3.

⁹⁸ *ibid*, para 3.

shifts its expenditure”.⁹⁹ The ban should cover “advertising and promotion of tobacco brand names and all corporate promotion” (ie corporate image advertising even if it does not seem to promote a specific product). The ban should also include “brand stretching”, which “occurs when a tobacco brand name, emblem, trademark, logo or trade insignia or any other distinctive feature . . . is connected with a non-tobacco product or service in such a way that the tobacco product and the non-tobacco product or service are likely to be associated”.¹⁰⁰ The guidelines emphasise that the harmful effect of tobacco advertising goes beyond the direct promotion of tobacco products. Instead, its harm lies in “giving the impression that tobacco use is socially acceptable”.¹⁰¹

The guidelines also recommend that governments “should ban contributions from tobacco companies to any other entity for ‘socially responsible causes’, as this is a form of sponsorship”.¹⁰² It further explains: “It is increasingly common for tobacco companies to seek to portray themselves as good corporate citizens by making contributions to deserving causes or by otherwise promoting ‘socially responsible’ elements of their business practices.”¹⁰³ And: “Tobacco companies may also seek to engage in ‘socially responsible’ business practices (such as good employee–employer relations or environmental stewardship), which do not involve contributions to other parties. Promotion to the public of such otherwise commendable activities should be prohibited, as their aim, effect or likely effect is to promote a tobacco product or tobacco use either directly or indirectly.”¹⁰⁴

2. The tobacco advertising ban in the EU and in the Member States

Tobacco advertising has been subject to restrictions in Europe for more than half a century. Italy passed the first tobacco advertising ban in 1962.¹⁰⁵ Comprehensive bans were first enacted in the early 1970s by Finland, Iceland and Norway.¹⁰⁶ From the 1980s onwards, European countries adopted increasingly stringent restrictions, though with significant differences between them.¹⁰⁷ The first EU-wide ban on tobacco advertising and sponsorship, limited to television, was enacted by the Television without Frontiers Directive (1989).¹⁰⁸ It was complemented a decade later by the Tobacco Advertising Directive I, which established a comprehensive ban for all remaining forms of such advertising, ranging from print media, radio and the Internet to billboards and tobacco brand logos on ashtrays and parasols.¹⁰⁹ However, the Directive was successfully challenged by the German government, under the influence of the tobacco industry.¹¹⁰ In the judgment *Tobacco Advertising I* (2000), the Court of Justice of the European Union (CJEU) ruled that a ban extending to advertising with no cross-border effects exceeded the EU’s

⁹⁹ *ibid*, para 5.

¹⁰⁰ *ibid*, para 22.

¹⁰¹ *ibid*, para 12.

¹⁰² *ibid*, paras 25–28.

¹⁰³ *ibid*, para 25.

¹⁰⁴ *ibid*, para 27.

¹⁰⁵ Roemer, *supra*, note 69, 17.

¹⁰⁶ *ibid*, 32.

¹⁰⁷ *ibid*, 32–39.

¹⁰⁸ Art 13 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L 298/23 (Television without Frontiers Directive).

¹⁰⁹ Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ 213/9 (Tobacco Advertising Directive I).

¹¹⁰ M Neuman, A Bitton and S Glantz, “Tobacco Industry Strategies for Influencing European Community Tobacco Advertising Legislation” (2002) 359 *The Lancet* 1323, 1326.

legislative competence under Article 114 TFEU.¹¹¹ That provision, which will be discussed in more detail in a later section, allows for the harmonisation of national laws, but only to the extent that this is necessary for the functioning of the internal market. As a consequence, the more limited Tobacco Advertising Directive II was enacted in 2003.¹¹² A further legal challenge against this measure failed (*Tobacco Advertising II*, 2006).¹¹³

Today, the three central instruments of tobacco advertising regulation at the EU level are the Tobacco Advertising Directive II, the Audiovisual Media Services Directive (AVMSD) and the Tobacco Products Directive. The AVMSD lays down a comprehensive ban on tobacco advertising on television, prohibiting “all forms of audiovisual commercial communications for cigarettes and other tobacco products”.¹¹⁴ According to its preamble, this includes indirect advertising that does not directly mention a tobacco product but contains brand names and symbols “of tobacco products or of undertakings whose known or main activities include the production or sale of such products”.¹¹⁵ Consequently, corporate image advertising is also included in the ban. The AVMSD also bans sponsorship “by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products”.¹¹⁶

The Tobacco Advertising Directive II covers advertising in print media, on the radio and online.¹¹⁷ As a consequence of the *Tobacco Advertising I* judgment, advertising without a significant cross-border relevance is not covered. This includes advertising on billboards and in cinemas. The Directive lays down a near-comprehensive ban on tobacco advertising, exempting only advertising in tobacco trade journals, as well as print media from third countries not intended for the Union market.¹¹⁸ The term “advertising” describes “any form of commercial communications with the aim or direct or indirect effect of promoting a tobacco product”,¹¹⁹ and therefore it also covers corporate image advertising. The Directive also prohibits sponsorship of events that take place in multiple Member States or that have a cross-border effect, such as international sporting or cultural events. Finally, the Tobacco Products Directive lays down a near-comprehensive advertising ban for electronic cigarettes, following the approach of the Tobacco Advertising Directive II and the AVMSD.¹²⁰

The Member States retain discretion to regulate advertising in the areas not covered by the EU measures. This essentially concerns forms of advertising with no significant cross-border effect, such as billboards. Most Member States have also enacted comprehensive advertising bans in these areas, as required by the FCTC.¹²¹

¹¹¹ Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising I)* [2000] ECLI:EU:C:2000:544.

¹¹² Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L 152/16 (*Tobacco Advertising Directive II*).

¹¹³ Case C-380/03, *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising II)* [2006] ECLI:EU:C:2006:772.

¹¹⁴ Art 9(1)(d) AVMSD.

¹¹⁵ *ibid*, preamble, para 88.

¹¹⁶ Art 9(2) *ibid*.

¹¹⁷ Art 1 Tobacco Advertising Directive II.

¹¹⁸ Art 3(1) *ibid*.

¹¹⁹ Art 2(b) *ibid*.

¹²⁰ Art 20(5) Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014] OJ L 127/1 (*Tobacco Products Directive*).

¹²¹ WHO, “Indicator Report ‘C271 – Comprehensive Ban on All Tobacco Advertising, Promotion and Sponsorship’” <<https://untobaccocontrol.org/impldb/indicator-report/?wpdvar=3.2.7.1>> (last accessed 6 April 2023).

Summing up, it has been shown that advertising restrictions form an integral part of the system of tobacco control established by the FCTC. The convention is adamant that the influence of the tobacco industry on policymaking and public discourse must be contained as much as possible. Consequently, tobacco advertising restrictions are comprehensive in their scope, prohibiting both direct promotion of tobacco products as well as indirect advertising, including image and advocacy advertising and sponsorship.

VI. The legality of a fossil fuel advertising ban

This section evaluates the legality of a fossil fuel advertising ban under European law from different perspectives. It first examines the competence of the EU and the Member States to enact such a ban. It then analyses the effects of an advertising ban on the freedoms of commercial speech and to conduct a business. Finally, it evaluates the effects of a national advertising ban on the free movement of goods and the freedom to provide and receive services that are protected under internal market law.

1. The legislative competence of the EU and the Member States to enact a fossil fuel advertising ban

Depending on the subject area, the competence to enact legislation is either held exclusively by the EU or the Member States or is shared between them.¹²² As discussed earlier, a fossil fuel advertising ban aims at the protection of health, the environment, consumers and the democratic process. The competence to legislate in the fields of environmental and consumer protection is shared between the EU and the Member States.¹²³ This means that both the EU and the Member States can enact legislation in these fields, though the latter can do so only to the extent that the matter has not been comprehensively regulated at the European level.¹²⁴ By contrast, the competence to legislate in the field of health lies with the Member States.¹²⁵ However, national health regulation can be harmonised at the EU level if necessary for the functioning of the internal market, as will be discussed further below. Finally, the protection of the democratic process is a procedural objective that both the EU and the Member States must pursue within their respective areas of competence.

As mentioned earlier, the EU has already enacted a significant number of advertising restrictions. Most of them are based on Article 114 TFEU.¹²⁶ The provision authorises the European legislators to harmonise national norms if the European measure has as its “object the establishment and functioning of the internal market”. The CJEU has interpreted the requirement in *Tobacco Advertising I* as meaning that the measure must contribute to the elimination of obstacles to the exercise of the economic freedoms guaranteed by the EU’s internal market rules or remove appreciable distortions of competition in the internal market.¹²⁷ Article 114 TFEU is not restricted to a specific subject area. Instead, it authorises harmonising measures in any regulatory field, as long

¹²² Arts 2–6 TFEU; Art 5(2) TEU.

¹²³ Art 4(2) TFEU.

¹²⁴ Art 2(2) TFEU.

¹²⁵ Arts 6 and 168(5) TFEU.

¹²⁶ The only exception is the AVMSD, which is based on Arts 62 and 53 TFEU, authorising legislation to harmonise national rules on the taking-up and pursuit of activities as self-employed persons.

¹²⁷ *Tobacco Advertising I*, supra, note 111, paras 95 and 106; Case C-547/14, *Philip Morris Brands SARL and Others v Secretary of State for Health* [2016] ECLI:EU:C:2016:325, para 58.

as the European measure creates or improves the internal market. This includes measures in the fields of health, environmental protection and consumer law.¹²⁸

In evaluating whether a measure meets the requirements of Article 114 TFEU, the CJEU usually grants a broad scope of discretion to the European legislator.¹²⁹ It authorises the use of Article 114 TFEU not only in situations where differences between national measures already obstruct the internal market, but also for “preventive harmonization”¹³⁰ (ie to prevent the future emergence of obstacles, provided that this is a likely prospect¹³¹). At the same time, the scope of Article 114 TFEU is not limitless, as the CJEU emphasised in *Tobacco Advertising I*. The European legislator must provide a plausible justification of how an advertising restriction serves the objective of Article 114 TFEU. This is illustrated by the reasons given by the European legislator for the bans contained in the Tobacco Advertising Directive II. According to its preamble, the ban on advertising in print media is justified on the ground that it ensures the cross-border circulation of these media products.¹³² The ban on sponsorship with cross-border relevance serves to eliminate distortions of competition.¹³³ Finally, the ban on tobacco advertising on the radio and online is justified on the ground that “[t]obacco advertising by both these media has, by its very nature, a cross-border character, and should be regulated at Community level”.¹³⁴ The CJEU confirmed in *Tobacco Advertising II* that these reasons are valid.¹³⁵

Importantly, European legislation must conform to the principle of proportionality.¹³⁶ It requires that the measure is appropriate for attaining the objectives pursued by the legislation and does not exceed the limits of what is necessary.¹³⁷ When there is a choice between several appropriate measures, the least onerous must be chosen, and the disadvantages caused must not be disproportionate to the aims pursued. When evaluating the proportionality of European legislation, attention must be paid to the fact that European law requires a high level of protection in the areas of health, environment and consumer rights.¹³⁸ Moreover, the precautionary principle authorises the European legislator to take action if there is a likelihood of real harm to health and the environment, even though the scientific evidence does not allow for determining this risk with certainty.¹³⁹ In the presence of scientific evidence indicating the existence of potential risks, the European legislator may be required to act to ensure a high level of protection.¹⁴⁰ In the light of these requirements, the CJEU typically grants a broad scope of discretion to

¹²⁸ Art 114(3) TFEU; for critical voices on the broad scope of Art 114 TFEU, see V Delhomme, “Between Market Integration and Public Health: The Paradoxical EU Competence to Regulate Tobacco Consumption” (College of Europe, Department of European Legal Studies, Research Papers in Law 1/2018); G Davies, “Democracy and Legitimacy in the Shadow of Purposive Competence” (2015) 21 *European Law Journal* 2; S Weatherill, “The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law Has Become a Drafting Guide” (2011) 12 *German Law Journal* 827.

¹²⁹ Weatherill, *supra*, note 128.

¹³⁰ *ibid.*, 832.

¹³¹ *Tobacco Advertising I*, *supra*, note 111, para 86; see also *Philip Morris Brands SARL*, *supra*, note 127, para 59; Case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECLI:EU:C:2002:741, para 67.

¹³² Tobacco Advertising Directive II, preamble, para 4.

¹³³ *ibid.*, preamble, para 5.

¹³⁴ *ibid.*, preamble, para 6.

¹³⁵ *Tobacco Advertising II*, *supra*, note 113, para 88.

¹³⁶ Art 5(1) and (4) TEU.

¹³⁷ Case C-358/14, *Republic of Poland v European Parliament and Council of the European Union (Menthol Cigarettes)* [2016] ECLI:EU:C:2016:323, para 78.

¹³⁸ See *supra*, note 51; see also Case C-157/14, *Société Neptune Distribution v Ministre de l’Économie et des Finances* [2015] ECLI:EU:C:2015:823, para 73.

¹³⁹ Case C-477/14, *Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for Health* [2016] ECLI:EU:C:2016:324, para 55; *Société Neptune Distribution*, *supra*, note 138, para 82.

¹⁴⁰ *Pillbox 38*, *supra*, note 139, para 116.

the European legislator when evaluating the proportionality of a measure.¹⁴¹ It usually limits itself to scrutinising whether the measure does not manifestly exceed the limits of what is necessary in order to achieve the objective pursued by the measure in question.¹⁴² In judgments such as *Société Neptune Distribution*, *Deutsches Weintor* and *Pillbox 38*, the CJEU found that restrictions on labelling and advertising were justifiable on grounds of protecting public health and proportional to the objective.¹⁴³ In the latter case, the CJEU found the advertising ban on electronic cigarettes laid down in the Tobacco Products Directive to be proportionate, reasoning that an advertising ban “means that consumers ... are confronted with fewer commercial inducements to purchase and consume electronic cigarettes with the result that they are less exposed to the identified or potential risks to human health to which those products could give rise”.¹⁴⁴

A fossil fuel advertising ban can be based on Article 114 TFEU if it is necessary for the functioning of the internal market as defined in the CJEU’s case law. This can plausibly be argued: differences in the regulation of fossil fuel advertising between the Member States already exist, since France has enacted a ban in 2022. The adoption of further restrictions by the Member States is likely, especially given that demand-reduction strategies are increasingly playing a central role in climate policy. In determining whether a fossil fuel advertising ban is proportional to the pursued objectives, it must be considered that existing mitigation measures are insufficient in the light of the Paris objectives. It therefore cannot be assumed that an advertising ban exceeds what is necessary, especially given the EU’s obligation to achieve a high level of protection of health, the environment and consumers. An advertising ban can also be considered as a less restrictive alternative to a sales ban on fossil fuels or other carbon-intensive products. Finally, the experience of tobacco control shows that an advertising ban must be comprehensive, as otherwise it is easy to circumvent. Consequently, a merely partial ban cannot be assumed to be a less restrictive alternative to a full ban.

Within the scope of shared competences, Member States remain competent to legislate in areas that have not been comprehensively harmonised by the EU. For example, various Member States have enacted advertising restrictions on products such as alcohol, gambling and betting.¹⁴⁵ As the EU has not yet harmonised rules on fossil fuel advertising, Member States remain competent to legislate in that area. National advertising bans must be designed in a way that does not unduly restrict the economic freedoms guaranteed by EU internal market law. This issue will be discussed in more detail further below.

Summing up, both the EU and the Member States are competent to enact a fossil fuel advertising ban. Article 114 TFEU provides a viable legal basis for such a ban at the EU level.

2. Freedom of commercial speech

The freedom of expression is protected under Article 10 European Convention on Human Rights (ECHR) and Article 11 Fundamental Rights Charter (FRC).

The ECHR binds the institutions of the Member States, all of which are parties to the Convention. According to the case law of the European Court of Human Rights (ECtHR), the protection of the freedom of speech under Article 10 ECHR extends to commercial speech,

¹⁴¹ Case C-151/17, *Swedish Match AB v Secretary of State for Health* [2018] ECLI:EU:C:2018:938, para 37; *Menthol Cigarettes*, supra, note 137, paras 150–51; *Société Neptune Distribution*, supra, note 138, 76.

¹⁴² *Pillbox 38*, supra, note 139, 115.

¹⁴³ *Société Neptune Distribution*, supra, note 138, paras 76–82; Case C-544/10, *Deutsches Weintor eG v Land Rheinland-Pfalz* [2012] ECLI:EU:C:2012:526, paras 42–59.

¹⁴⁴ *Pillbox 38*, supra, note 139, para 113.

¹⁴⁵ For national restrictions on alcohol advertising, see WHO, supra, note 61, 8–11; for national restrictions on gambling and betting, see Kerr et al, supra, note 61, 40–43.

including advertising.¹⁴⁶ Advertising restrictions can therefore violate Article 10 ECHR. However, the protection of the freedom of speech is not absolute. According to Article 10(2) ECHR, freedom of speech can be restricted if three conditions are met. First, the restriction must be prescribed by law. Second, the restriction must pursue a legitimate aim. Policy objectives that can justify restrictions of the freedom of expression are listed exhaustively in Article 10(2) ECHR, and they include the protection of health and of the rights of others. Third, the restriction must be “necessary in a democratic society”. According to the ECtHR, this implies the existence of a “pressing social need”¹⁴⁷ and the proportionality of the measure to the aim pursued. National authorities must give “relevant and sufficient” reasons to justify the restriction.¹⁴⁸ When evaluating the proportionality of a general measure, the ECtHR primarily assesses the underlying legislative choices.¹⁴⁹ According to the Court, the “quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation”.¹⁵⁰ And: “[T]he more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case.”¹⁵¹ The central question to be answered is not whether less restrictive measures are available to the legislator. Instead, “the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it”.¹⁵²

The ECtHR affords a significantly lower level of protection to commercial speech than to political speech.¹⁵³ National authorities have a broad margin of discretion in enacting restrictions to commercial speech, as the judgment *markt intern Verlag GmbH and Klaus Beermann* (1989) illustrates.¹⁵⁴ It dealt with the case of a trade journal that had published negative and unproven information about a company and had been convicted of dishonest trade practices under the German Unfair Competition Act. The ECtHR ruled that the judgment did not violate Article 10 ECHR. The ECtHR accepted that the national rule could be justified as a measure protecting the reputation and the rights of others, which is one of the grounds listed in Article 10(2) ECHR.¹⁵⁵ Concerning the necessity of the measure, the Court held that national authorities have to weigh the competing interests at stake.¹⁵⁶ It emphasised that the national authorities have a significant margin of appreciation in conducting this balancing exercise: “Such a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition.”¹⁵⁷

The broad margin of appreciation extends to advertising restrictions. This is illustrated by the judgment *Casado Coca v Spain* (1994), which dealt with rules of the Spanish bar association prohibiting advertising by lawyers and which were found not to violate Article 10 ECHR.¹⁵⁸ The ECtHR accepted that the restrictions were “designed to protect the interests of the public while ensuring respect for members of the Bar” and therefore

¹⁴⁶ *markt intern Verlag GmbH and Klaus Beermann* [1989] ECtHR 10572/83, para 26; *Casado Coca v Spain* [1994] ECtHR 15450/89, paras 35–36.

¹⁴⁷ *Sekmadienis Ltd v Lithuania* [2018] ECtHR 69317/14, para 71.

¹⁴⁸ *Mouvement raïlien suisse v Switzerland* [2012] ECtHR 16354/06, para 69.

¹⁴⁹ *Animal Defenders International v the United Kingdom* [2013] ECtHR 48876/08, para 108.

¹⁵⁰ *ibid*, para 108.

¹⁵¹ *ibid*, para 109.

¹⁵² *ibid*, para 109.

¹⁵³ *Sekmadienis Ltd. v. Lithuania* (n 147), para 73; See MH Randall, “Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?” (2006) 6 Human Rights Law Review 53.

¹⁵⁴ *markt intern Verlag GmbH and Klaus Beermann*, supra, note 146.

¹⁵⁵ *ibid*, para 31.

¹⁵⁶ *ibid*, para 34.

¹⁵⁷ *ibid*, para 33.

¹⁵⁸ *Casado Coca v Spain*, supra, note 146.

justifiable under Article 10(2) ECHR.¹⁵⁹ Regarding the necessity of the restrictions, the Court emphasised the broad margin of appreciation left to national authorities.¹⁶⁰ While advertising may benefit citizens “a means of discovering the characteristics of services and goods offered”, it “may sometimes be restricted, especially to prevent unfair competition and untruthful or misleading advertising”.¹⁶¹ Moreover, “[i]n some contexts, the publication of even objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions”.¹⁶² Given that there is no European consensus on the matter, the margin of appreciation is particularly broad.¹⁶³

Restrictions on advertising can violate Article 10 ECHR if the national authorities fail to strike a fair balance between the affected interests. This is illustrated by the case *Sekmadienis Ltd. v. Lithuania* (2018), which dealt with a decision prohibiting advertising of a clothing company referring to religious figures as contrary to public morals.¹⁶⁴ According to the ECtHR, the national authorities had granted absolute primacy to protecting the feelings of religious people, without adequately taking the advertiser’s freedom of expression into account.¹⁶⁵

The ECtHR had to deal with national restrictions on tobacco advertising in the cases *Société de conception de presse et d’édition et Ponson v. France* and *Hachette Filipacchi Presse Automobile et Dupuy c. France* (2009).¹⁶⁶ Two magazines had published photographs of race car driver Michael Schumacher. In the photographs the logo of his sponsor, Marlboro, a tobacco brand, was visible. One photograph caption also referred to the driver’s wealth. The magazines were fined for violating the French Loi Evin, which prohibits the promotion of tobacco products. The ECtHR noted that tobacco advertising restrictions formed an essential part of the broader tobacco control strategy and highlighted the importance of protecting public health “from the scourge of smoking”.¹⁶⁷ The Court held that the impact of promoting tobacco in the context of sport and success, particularly on young people, must be taken into account.¹⁶⁸ The Court also noted that the magazines could have easily avoided a fine by blurring the logo on the photographs.¹⁶⁹ The ECtHR concluded that the measures responded to a pressing social need and were not disproportionate to the legitimate aim pursued.¹⁷⁰ They could be considered “necessary in a democratic society” and therefore did not violate Article 10 ECHR. It is interesting to note that, according to the ECtHR, it is not necessary to determine the actual impact of advertising on consumption when evaluating the proportionality of the advertising restriction. The fact that the communications were likely to incite people and especially the young to smoke was considered a “relevant and sufficient” reason to justify the restriction.¹⁷¹

The FRC applies to the acts of EU institutions, including legislative acts. Moreover, it applies to Member States “when they are implementing Union law”.¹⁷² The latter

¹⁵⁹ *ibid.*, para 46.

¹⁶⁰ *ibid.*, para 50.

¹⁶¹ *ibid.*, para 51.

¹⁶² *ibid.*, para 51.

¹⁶³ *ibid.*, para 55.

¹⁶⁴ *Sekmadienis Ltd. v. Lithuania*, *supra*, note 147.

¹⁶⁵ *ibid.*, para 83.

¹⁶⁶ *Société de conception de presse et d’édition et Ponson v France* [2009] ECtHR 26935/05; *Hachette Filipacchi Presse Automobile et Dupuy c France* [2009] ECtHR 13353/05; see K Dzehtsiarou and A Garde, “Freedom of Commercial Expression and Public Health Protection at the European Court of Human Rights” (2022) 50 *Journal of Law, Medicine & Ethics* 250.

¹⁶⁷ *Société de conception de presse et d’édition et Ponson v France*, *supra*, note 166, para 56.

¹⁶⁸ *ibid.*, para 60.

¹⁶⁹ *ibid.*, para 59.

¹⁷⁰ *ibid.*, para 63.

¹⁷¹ *ibid.*, para 58.

¹⁷² Art 51(1) FRC.

requirement has been interpreted expansively by the CJEU. Whenever a national measure is challenged as a restriction of the economic freedoms protected under internal market law and the Member State seeks to justify it on overriding reasons in the public interest, the measure is considered to implement Union law.¹⁷³ Given that the scope of internal market law itself is broad, this means that most if not all national measures regulating advertising will fall under Article 11 FRC. Article 11 FRC corresponds to Article 10 ECHR, having the same meaning and scope.¹⁷⁴ Like Article 10 ECHR, the freedom of expression protected by Article 11 FRC can be limited. Restrictions must be provided for by law and protect the essence of the freedom of expression.¹⁷⁵ Moreover, they are subject to the requirement of proportionality, which means that they must be necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

According to the CJEU's case law, the essence of the freedom of expression is not affected by labelling and advertising restrictions if it is limited to a clearly defined area and does not make communications about product information impossible.¹⁷⁶ In evaluating whether a restriction is proportional, the Court scrutinises whether a "fair balance" has been struck between the various fundamental rights affected and the legitimate general interest objectives that the measure seeks to advance.¹⁷⁷ Both European and national legislators enjoy a margin of discretion in determining whether there is a pressing social need that may justify a restriction on the freedom of expression.¹⁷⁸ In *Société Neptune Distribution*, which dealt with food labelling restrictions, the CJEU held that the goal of ensuring that consumers have the most accurate and transparent information is closely related to the protection of health and can consequently justify limitations on the freedom of expression.¹⁷⁹ In *Philip Morris Brands SARL* (2016), the CJEU had to evaluate whether labelling restrictions under the Tobacco Products Directive violated Article 11 FRC. The Directive bans a significant list of elements from cigarette packets, including features that promote a tobacco product by creating an erroneous impression about its characteristics or health effects, suggest that the product has various benefits or refer to flavourings.¹⁸⁰ According to the CJEU, the freedom of the undertaking to disseminate information in pursuit of its commercial interests is outweighed by the objective of ensuring a high level of protection of health. The presence of mandatory health warnings on the packet does not negate the necessity to enact further measures. In fact, marketing claims that suggest some benefits of tobacco products can undermine consumer awareness of the risks associated with smoking.¹⁸¹

A fossil fuel advertising ban restricts the freedom of commercial speech. However, the restriction can be justified on grounds of the protection of health, the environment, consumers and the democratic process, all of which form important objectives of the EU. The example of tobacco advertising regulation shows that even a near-comprehensive advertising ban can be considered proportional in the light of important public interests.

¹⁷³ Case C-555/19, *Fussl Modestraße Mayr GmbH v SevenOne Media GmbH and Others* [2021] ECLI:EU:C:2021:89, para 80; Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalis kai Koinonikis Allilengyis* [2016] ECLI:EU:C:2016:972, para 64.

¹⁷⁴ Art 52(3) FRC; *Fussl Modestraße*, supra, note 173, para 82; see also Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECLI:EU:C:2004:181, paras 48–52.

¹⁷⁵ Art 52(1) FRC.

¹⁷⁶ *Philip Morris Brands SARL*, supra, note 127, para 151.

¹⁷⁷ *ibid*, para 154; *Fussl Modestraße*, supra, note 173, para 92; *Deutsches Weintor*, supra, note 143, para 47.

¹⁷⁸ *Fussl Modestraße*, supra, note 173, para 91; *Philip Morris Brands SARL*, supra, note 127, para 155.

¹⁷⁹ *Société Neptune Distribution*, supra, note 138, para 74.

¹⁸⁰ Art 13(1) Tobacco Products Directive.

¹⁸¹ *Philip Morris Brands SARL*, supra, note 127, para 159.

Given that tobacco and fossil fuel advertising are comparable in important aspects, the same considerations apply for a fossil fuel advertising ban.

3. Freedom to conduct a business

Article 16 FRC recognises the “freedom to conduct a business in accordance with Union law and national laws and practices”. It covers the freedom to exercise an economic or commercial activity, freedom of contract and free competition.¹⁸² Moreover, it includes the right to freely use the economic, technical and financial resources available to the undertaking.¹⁸³ Like all Charter freedoms, Article 16 FRC can be restricted if the limitation is provided for by law, is justified on grounds of general interest, is proportional and respects the essence of the freedom. The CJEU held in this regard: “[T]he freedom to conduct a business does not constitute an unfettered prerogative, but must be examined in the light of its function in society. The freedom to conduct a business may thus be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.”¹⁸⁴

Labelling requirements and advertising restrictions constrain the freedom to conduct a business.¹⁸⁵ According to the CJEU, this is because such requirements restrict the free use of the undertaking’s resources at their disposal, as the requirement may represent a significant cost and may have a considerable impact on the business.¹⁸⁶ However, they can be justified on important policy grounds, such as the protection of health and of consumers.¹⁸⁷ The CJEU repeatedly held that labelling and advertising requirements do not affect the essence of the right to conduct a business because they do not limit the production or sale of products.¹⁸⁸ The proportionality analysis conducted under Article 16 FRC is the same as that under Article 11 FRC.¹⁸⁹ In essence, the Court investigates whether the legislator has sought to strike a fair balance between the various affected fundamental rights.¹⁹⁰ In *Deutsches Weintor*, the CJEU found the prohibition of health claims on alcoholic beverages to be justified on grounds of health protection and proportional. The case concerned the promotion of wine as “easily digestible”. According to the Court, consumers are influenced by such claims, which therefore can lead to increased consumption.¹⁹¹ The Court held that “[i]t is essential that all claims in relation to [alcoholic] beverages are entirely unambiguous, so that consumers are in a position to regulate their consumption while taking into account all the inherent dangers associated with such consumption, and in so doing to protect their health effectively”.¹⁹² It notes that the advertising claim in question is silent as to the fact that, regardless of sound digestion, the dangers inherent in the consumption of alcoholic beverages are not in any way removed, or even limited.”¹⁹³ The CJEU concluded that the European legislators were justified in banning health claims on alcoholic beverages.

¹⁸² Case C-134/15, *Lidl GmbH & Co KG v Freistaat Sachsen* [2016] ECLI:EU:C:2016:498, para 28.

¹⁸³ Case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] ECLI:EU:C:2014:192, para 49.

¹⁸⁴ *Pillbox* 38, *supra*, note 139, paras 157–58; see also *Société Neptune Distribution*, *supra*, note 138, para 66; *Deutsches Weintor*, *supra*, note 143, para 54.

¹⁸⁵ *Lidl*, *supra*, note 182, para 29.

¹⁸⁶ *ibid*, para 29.

¹⁸⁷ *ibid*, para 32; *Société Neptune Distribution*, *supra*, note 138, para 72.

¹⁸⁸ *Société Neptune Distribution*, *supra*, note 138, paras 70–71; *Deutsches Weintor*, *supra*, note 143, paras 57–58.

¹⁸⁹ *Société Neptune Distribution*, *supra*, note 138, paras 67–85.

¹⁹⁰ *Deutsches Weintor*, *supra*, note 143, para 59.

¹⁹¹ *ibid*, para 37.

¹⁹² *ibid*, para 50.

¹⁹³ *ibid*, para 51.

An illustrative example of the application of Article 16 FRC to advertising restrictions is *Pillbox 38* (2016). In this case, the CJEU had to evaluate, inter alia, the validity of the near-comprehensive advertising ban on electronic cigarettes laid down by the Tobacco Products Directive. The CJEU established that the ban does not affect the essence of Article 16 FRC, as it does not prevent economic operators from manufacturing and selling electronic cigarettes.¹⁹⁴ The ban also does not exceed the limits of what is appropriate and necessary to achieve the legitimate objectives pursued by the Tobacco Products Directive, namely to harmonise national rules that hinder free movement and are liable to distort competition, while ensuring a high level of protection of public health.¹⁹⁵ The advertising ban therefore meets the conditions of Article 52(1) FRC and is thus consistent with Article 16 FRC.

Similar considerations will apply to a fossil fuel advertising ban. Given that it does not restrict sales, it does not affect the essence of the right to conduct a business. The proportionality of the measure in the light of its regulatory objectives has already been discussed earlier. A fossil fuel advertising ban, particularly if it follows the example of the tobacco advertising ban, is thus likely to be compatible with the freedom to conduct a business under Article 16 FRC.

4. A national fossil fuel advertising ban in the light of EU internal market law

EU internal market law guarantees the right to freely move goods across borders and to provide and receive services in a cross-border context. These rights are enshrined in Articles 34 and 56 TFEU. Article 34 TFEU is relevant for advertising restrictions on goods, such as fossil fuels or petrol-powered cars, whereas Article 56 TFEU is relevant for advertising restrictions on services, such as air travel. The provisions can be invoked directly by individuals and corporations in national courts against national legislation and administrative action that restrict these freedoms.¹⁹⁶ The analysis of restrictions under internal market law is essentially identical to that conducted under Article 16 FRC.¹⁹⁷

Article 34 TFEU prohibits quantitative restrictions on imports of goods, as well as measures having an equivalent effect. The prohibition extends to any national measure that is liable to directly or indirectly, actually or potentially restrict the free movement of goods, as the CJEU ruled in *Dassonville* (1974).¹⁹⁸ Exempt from this broad scope are measures that do not require alterations of the goods and merely affect the conditions of how they are sold, the so-called “selling arrangements” (*Keck*, 1993).¹⁹⁹ The exemption applies as long as the national measure affects domestic and non-domestic products alike, in both law and fact. National measures that do not benefit from the *Keck* exemption may nonetheless be justified on overriding grounds of public interest. Article 36 TFEU provides an illustrative list of justifications: “grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property”. Additional justifications recognised by the CJEU include environmental and consumer protection.²⁰⁰

¹⁹⁴ *Pillbox 38*, supra, note 139, para 161.

¹⁹⁵ *ibid*, paras 111–12.

¹⁹⁶ The internal market requirements also apply to EU institutions; see Case C-210/03, *The Queen, on the application of: Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* [2004] ECLI:EU:C:2004:802, para 59.

¹⁹⁷ Joined Cases C-407/19 and C-471/19, *Katoen Natie Bulk Terminals NV and General Services Antwerp NV v Belgische Staat and Middlegate Europe NV v Ministerraad* [2021] ECLI:EU:C:2021:107, para 56.

¹⁹⁸ Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECLI:EU:C:1974:82, para 5.

¹⁹⁹ Joined cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECLI:EU:C:1993:905, para 16.

²⁰⁰ Case 302/86, *Commission v. Denmark (beer bottles)* [1988] ECLI:EU:C:1988:421, para 9; Case C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECLI:EU:C:1979:42, para 8.

Article 56 TFEU prohibits restrictions on the freedom to provide and receive services. The CJEU interprets the scope of the ban expansively, covering all national measures that make the provision of services with a cross-border component less attractive than in a comparable domestic situation.²⁰¹ Restrictive measures can be justified on overriding grounds of public interest. These include, but are not limited to, the grounds listed in Article 52 TFEU, namely “public policy, public security or public health”.

Justifiable restrictions on economic freedoms must also meet the proportionality requirement, which has two aspects.²⁰² First, the national measure must be suitable to achieve the stated policy objective, which excludes measures that are wildly inconsistent or that use the public policy objective as a mere pretext to disfavour the cross-border provisions of goods or services. Second, the restrictive effect must not go beyond what is necessary to achieve the objective. In the absence of harmonised rules, Member States have the right to determine the level of protection they wish to afford to their citizens.²⁰³ This also implies a considerable degree of discretion in choosing the regulatory means to achieve that objective. In doing so, however, they need to pay attention to potential adverse transnational effects of their choices and prevent them to the extent possible.

The CJEU dealt with advertising restrictions in a number of judgments.²⁰⁴ The case *Aragonesa de Publicidad Exterior* (1991) concerned a Catalan ban on the promotion of alcoholic drinks of more than twenty-three degrees (ca. 13%) alcohol content in mass media, on streets and highways, in cinemas and on public transport.²⁰⁵ The Court found the measure not to be precluded by internal market law.²⁰⁶ According to the CJEU, the ban was a suitable means to protect public health, arguing that “advertising acts as an encouragement to consumption and the existence of rules restricting the advertising of alcoholic beverages in order to combat alcoholism reflects public health concerns”.²⁰⁷ Regarding the necessity of the measure, the Court pointed out that the freedom of trade is restricted only to a limited extent, and it held that a prohibition of promoting strong alcoholic drinks “does not appear to be manifestly unreasonable as part of a campaign against alcoholism”.²⁰⁸ The case *De Agostini* (1997) concerned a Swedish ban on television advertising targeting children under twelve years of age.²⁰⁹ While the ban applied without distinction to domestic and foreign service providers alike, the Court held that an advertising ban might affect imported goods more severely than domestic ones, as the latter may benefit from greater familiarity among consumers. Consequently, the *Keck* exemption did not apply. However, the advertising ban was held to be justifiable on overriding grounds in the public interest, such as the protection of vulnerable consumers,

²⁰¹ Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECLI:EU:C:2007:809, para 99.

²⁰² F Weiss and C Kaupa, *European Union Internal Market Law* (Cambridge, Cambridge University Press 2014) pp 34–35.

²⁰³ Joined cases C-1/90 and C-176/90, *Aragonesa de Publicidad Exterior SA and Publivia SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [1991] ECLI:EU:C:1991:327, para 16; see also Case C-141/07, *Commission of the European Communities v Federal Republic of Germany (pharmacies)* [2008] ECLI:EU:C:2008:492, para 51.

²⁰⁴ See in particular Case C-339/15, *Criminal proceedings against Luc Vanderborght* [2017] ECLI:EU:C:2017:335; *Kostas Konstantinides* [2013] ECJ Case C-475/11, ECLI:EU:C:2013:542; Case C-500/06, *Corporación Dermoestética SA v To Me Group Advertising Media* [2008] ECLI:EU:C:2008:421; Case C-429/02, *Bacardi France SAS, formerly Bacardi-Martini SAS v Télévision française 1 SA (TF1), Groupe Jean-Claude Darmon SA and Giro Sport SARL* [2004] ECLI:EU:C:2004:432; Case C-405/98, *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECJ ECLI:EU:C:2001:135; Joined cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB* [1997] ECJ ECLI:EU:C:1997:344; *Aragonesa de Publicidad Exterior*, supra, note 203.

²⁰⁵ *Aragonesa de Publicidad Exterior*, supra, note 203.

²⁰⁶ *ibid*, para 26.

²⁰⁷ *ibid*, para 15.

²⁰⁸ *ibid*, para 17.

²⁰⁹ *De Agostini*, supra, note 204.

if implemented in a proportional manner.²¹⁰ The case *Gourmet International Products* dealt with a Swedish ban on advertising for alcoholic beverages containing more than 2.25% of alcohol by volume. The CJEU noted that this ban effectively prohibited producers and importers from advertising to consumers, with very few exceptions.²¹¹ This makes the ban liable to impede market access for imported products more than for domestic products, with which consumers are more familiar. The *Keck* exemption was therefore inapplicable. However, the Court found that the measure could be justified on grounds of the protection of public health against the harmful effects of alcohol, unless it is apparent that the same objective could be achieved with measures that are less restrictive to cross-border trade.²¹² In *Bacardi France v TF1* (2004), which concerned restrictions on advertising for alcoholic beverages at sports events, the CJEU emphasised that Member States have a considerable margin of discretion in deciding on the level of protection that they wish to afford to public health and on the means by which that protection is to be achieved.²¹³

In the judgment *Philip Morris Norway* (2011), the European Free Trade Association (EFTA) Court had to deal with advertising restrictions on tobacco.²¹⁴ The EFTA Agreement protects economic rights that are equivalent to the internal market freedoms. The case concerned a Norwegian law that extended the advertising prohibition to the visible display of tobacco products, except in dedicated tobacco stores. The Court noted that a ban may have a restrictive effect on the marketing of tobacco products.²¹⁵ If it affects domestic and imported goods alike, the ban benefits from the *Keck* exemption.²¹⁶ If that is not the case, the ban may be justifiable as a measure protecting public health, if it meets the requirement of proportionality.²¹⁷ According to the Court, the measure “by its nature seems likely to limit, at least in the long run, the consumption of tobacco” and is therefore suitable to achieve the objective of protecting public health.²¹⁸ Unless there is a less restrictive means available to achieve the goal, the ban cannot be considered to violate the prohibition of quantitative restrictions on the import of goods and measures of equivalent effect.²¹⁹ The Court emphasised in this context that it is sufficient for the government to demonstrate that “it was reasonable to assume that the measure would be able to contribute to the protection of human health”, even in the presence of some scientific uncertainty.²²⁰

To summarise, EU internal market law does not prohibit national advertising restrictions that serve an objective of public interest. A national fossil fuel advertising ban can therefore be in conformity with internal market law. The preceding overview shows that internal market law is very sensitive to national restrictions that undermine market access of goods and service providers from other Member States. Advertising restrictions can make it more difficult for new competitors to enter a national market and may therefore benefit domestic goods and service providers. A national advertising ban must be designed in a way to minimise this risk.

²¹⁰ *Gourmet International Products*, supra, note 204, para 47.

²¹¹ *ibid*, para 20.

²¹² *ibid*, para 46.

²¹³ *Bacardi France*, supra, note 204, para 40.

²¹⁴ *Philip Morris Norway AS and The Norwegian State* [2011] EFTA Court Case E-16/10.

²¹⁵ *ibid*, para 42.

²¹⁶ *ibid*, paras 44–51.

²¹⁷ *ibid*, paras 77–79.

²¹⁸ *ibid*, para 84.

²¹⁹ *ibid*, para 88.

²²⁰ *ibid*, para 83.

VII. Conclusion

The article analysed the legality of a fossil fuel advertising ban under European law. It arrived at the following findings. First, advertising for tobacco and for fossil fuels and other high-carbon products are comparable in important respects. In both cases, advertising plays a significant role in exacerbating the harm caused by the two commodities. Consequently, the regulation of tobacco advertising is a plausible model for the design of a fossil fuel advertising ban, and the case law on the regulation of tobacco advertising is of relevance in evaluating its legality. Second, a fossil fuel advertising ban pursues multiple regulatory objectives, namely the protection of health, the environment, consumers and the democratic process. Third, the experience of tobacco regulation shows that advertising bans must be as comprehensive as possible, as otherwise they are easy to circumvent. Fourth, both the EU and the Member States are competent to enact a fossil fuel advertising ban. At the EU level, Article 114 TFEU provides a plausible legal basis if it can be shown that a Europe-wide ban contributes to functioning of the internal market. This is the case when diverging national rules on fossil fuel advertising are emerging. Fifth, a fossil fuel advertising ban is liable to restrict the freedom of commercial speech, the freedom to conduct a business and internal market freedoms. However, these restrictions can be justified on the grounds of the objectives pursued by the ban, particularly because the Treaties require a high level of protection of health, the environment and consumers. Sixth, to justify its restrictive effects, a fossil fuel advertising ban must be proportional. It must strike a fair balance between the affected interests, be designed in a consistent manner and be based on the best available scientific evidence. If the ban is modelled after the example of the tobacco advertising ban, it can be expected to conform to the requirements of European law.

Competing interests. The author declares none.