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The Legality of Banning Fossil Advertising

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Introduction

It is hard to overlook the pervasive influence of advertising that encourages unsustainable behaviour and consumption. As we roam the streets of Amsterdam, every other billboard invites us to escape the drizzling, grey weather for a sunny weekend in Portugal or Spain. This same message infiltrates our many screens, coaxing us with the promise of a few days on the beach, only a few clicks and a low-cost flight away. It is a penetrating, pernicious message whose unmistakable purpose is to shape preferences, steer choices, and subtly create demands. Yet, its impact extends beyond influencing consumer behaviour. Advertising forges assumptions about what is normal and fosters an illusion of limitless possibilities, rendering everything else plain boring. Consequently, advertising hampers cooperative lifestyles that respect climate goals and planetary boundaries.

Two years ago, in December 2020, the Amsterdam municipal council voted to ban fossil advertising in public transport spaces, with some first effects. Several other municipalities in the Netherlands, as well as public entities elsewhere, have been swayed by the compelling evidence highlighting the adverse effects of fossil advertising. They have either adopted bans or are deliberating such measures. For example, the Advertising Standards Authority in the UK recently banned two Toyota ads that promoted the company's SUVs due to their disregard for the impact on nature and the environment, citing a lack of "responsibility to society".

The Netherlands is now contemplating a nationwide ban. A recent scientific report commissioned by the Ministry for Climate and Energy—*Een verbod op fossiele reclame (2023) (A Ban on Fossil Advertising)*—concluded that such a ban is necessary, albeit

insufficient on its own. As per the report's proposal, the ban would encompass advertising that encourages the purchase or use of high-carbon footprint goods and services (such as flying, fast fashion or meat consumption). Compared to regulating or prohibiting the underlying goods or services themselves, an advertising ban is a relatively minimal measure. Essentially, it restricts those profiting from fossil-intensive goods and services from manipulating consumer beliefs and preferences. In response to the report, Minister Jetten, the Dutch Minister for Climate and Energy, acknowledged the report's findings but expressed concerns about the ban's legality. Is there validity to these concerns?

Let's be clear from the outset: Contrary to Minister Jetten's concerns, a ban on fossil advertising is perfectly legal. Advertising restrictions are a common feature of public policy. In the EU, for example, tobacco advertising has been prohibited since 1989—a ban extended in 2010 to all forms of audio-visual communications, including product placement. Member States and public bodies like federal states or municipalities often impose various restrictions on, for example, pharmaceuticals, adult content, gambling, alcohol, weapons, among others. Despite occasional challenges to these policies due to conflicting commercial interests or questions of principle, their legality has predominantly stood unshaken. These bans have been upheld in context of legitimate public policy objectives such as the protection of health and public order. The discourse surrounding the banning of fossil advertising offers a prime opportunity to revisit the legality questions they entail.

1. EU Fundamental Freedoms

In his letter to Dutch parliament, Minister Jetten contends that an advertising ban violates EU internal market law, in particular the free movement of goods and the freedom to provide services. However, an analysis of EU internal market law reveals that an advertising ban can be justified on public interest grounds and is likely to withstand legal challenges. Additionally, a narrowly focused ban does not necessarily amount to a prohibited market restriction and might not require justification.

Moreover, the Netherlands possesses the regulatory competence to adopt such a ban: EU Member States can regulate the internal market for public interest purposes. Regulating the EU internal market is, after all, a *shared* competence. Given the absence of advertising restrictions at the EU level aimed at curbing climate change, Member States retain the liberty to enact their own regulations. Furthermore, such measures would contribute to the EU's climate goals, including the EU's international commitments to reach the goals of the Paris Agreement. Therefore, regulators *can* adopt the advertising ban, and they *should*.

Scope of the ban: restrictions on trade in goods, services or neither?

As a preliminary question, it is worth asking whether an advertising ban falls within the purview of internal market law at all. This hinges on its specific form and scope. Notably, transport services lie beyond the realm of EU internal market law (see Case C-434/14 *Elite Taxi* and Article 2(2)(d) of the Services Directive). Consequently, an advertising ban targeting specific transport services like cheap flights would be beyond the scope of EU internal market law.

If the ban is broader, which it arguably should be, its evaluation would centre on free movement law. The European Court of Justice (ECJ) tends to analyse a measure either under the free movement of goods or freedom of services, depending on their predominant impact. In cases where this distinction is difficult or inconclusive, the ECJ may assess a national measure under both goods and services. This preliminary step in the legal analysis holds particular importance when it comes to advertising: if treated under goods, advertising measures may constitute 'selling arrangements', falling outside the scope of Article 34 TFEU, provided the conditions under *Keck* are satisfied. If the advertising ban predominantly restricts advertisements of goods (e.g., products like gasoline), Dutch authorities do not have to put forward a public interest justification at all if the conditions under *Keck* are satisfied. Under the *Keck* line of cases, the burden shifts to the industry to demonstrate that an advertising ban obstructs their market access or impedes it more than it does domestic products.

While the ECJ's case law on the *Keck* conditions and its discrimination test is conceptually fuzzy, it is far from evident that an advertising ban would unduly favour domestic products in the context of fossil fuels. For instance, it is difficult to see how an advertising ban on fossil fuels such as gasoline would lead to an advantage for Dutch products merely because consumers in the Netherlands are more familiar with locally produced gasoline. The advertising ban at issue does not appear comparable to an advertising ban on alcohol where in most Member States there is particular local production of beers or wines that may be more familiar to local consumers. For instance, in *Gourmet*, the Court worked on the assumption that an advertising ban for alcoholic products would favour domestically produced alcoholic beverages because consumers would be more familiar with them. The ban on fossil advertising does not appear to favour any domestic products over imported ones unless, of course, litigants can convincingly argue that gasoline from a UK-based multinational like Shell is akin to locally crafted beer. In any event, the burden rests on traders challenging the measure to present substantial evidence that an advertising ban indeed favours domestic fossil goods over those from other EU Member States.

Given the probable broad scope of the advertising ban, it may also encompass restrictions on the freedom to provide services. For example, the ban might cover advertisements for holiday packages that necessitate flying (e.g., all-inclusive trips to the Costa Brava), thereby limiting cross-border services. At least part of the measure therefore would have to comply with Article 16 of the Services Directive. However, even in this scenario (or where litigants can demonstrate that the *Keck* conditions have not been satisfied), the Dutch government could plausibly justify the measure under either the free movement of goods or freedom to provide services.

Justifying restrictions: suitability, necessity

Under both the free movement of goods provisions and the Services Directive, trade-restrictive measures may be justified on public policy grounds, *in casu* the protection of life, health and of the environment. It falls upon the Dutch government to demonstrate that an advertising ban is a proportionate measure for achieving a legitimate aim. This entails ensuring that the measure is *suitable*, not more trade-restrictive than *necessary*, and that it is *proportionate* in a strict sense, i.e., that pursuing the legitimate aim outweighs the restriction on the free movement of goods or services.

It is abundantly clear and recognized in case law that curbing climate change is either recognized as a legitimate aim in and of itself, or else contributes to the aims of protecting life, health and the environment. A wealth of scientific research and daily news highlight the drastic consequences of the current level of warming (about 1.2˚C), and of the temperature increase still to come: extreme weather events, prolonged droughts and flooding, related migration, malnutrition, ill-health, deaths and mass extinction. The IPCC unequivocally underscores the imperative for a 'deep, rapid, and sustained reductions in greenhouse gas emissions' to curb temperature increases, with fossil fuel combustion being the primary driver. The IPCC emphasizes changes in behaviour and consumption as one of the key conditions for a pathway towards sustainability, pointing to advertising regulation as one of the policy measures to support this shift—insufficient on its own, clearly, but part of a necessary minimum. Consequently, regulating advertising is a *suitable* means to pursue legitimate aims.

Assessing whether a measure is *necessary* depends on available alternatives. Socio-legal research has repeatedly demonstrated that alternatives such as mandatory warnings or labelling requirements are *less* effective and probably *in*effective compared to a ban on fossil advertising. These alternatives would just not yield equivalent contributions. The burden of proof, in any event, 'cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be

attained under the same conditions'. Simply put, the Netherlands must show that the measure contributes to protecting the environment and that reasonable less trade-restrictive alternatives have been explored.

Coherence and Appreciation

A specific concern within the Dutch Ministry revolves around the policy's coherence and consistency, particularly in delineating which goods and services' advertising will be prohibited *vel non* and whether an objective policy rationale—the fossil intensity of the good or service being advertised—can be articulated and implemented objectively. Achieving coherence in this regard may be a political aspiration. However, the ECJ, while often critical of seemingly incoherent or inconsistent regulations, does not mandate coherence and consistency as legal requirements *per se*. The regulation of tobacco advertising, for example, is legally justified by its contribution to public health, irrespective of whether the advertising of other unhealthy products is similarly restricted.

This aspect is evident in the case-law of the Court. For instance, in the *Loi Evin* case, a French law that partially banned advertising of alcoholic beverages was challenged by the Commission on grounds of inconsistency. The French law prohibited only advertising of certain beverages (those with more than 1.2% alcohol), applied only to television advertising, did not apply to tobacco, and banned advertising visible in sports events but not in films. Nevertheless, the Court upheld the measure, dismissing the Commission's arguments that the ban was inconsistent. The Court referred to the discretion of Member State authorities to set the level of protection.

In the absence of harmonized EU legislation on this matter, the Dutch government has the prerogative to choose the level of protection it wants to achieve. As a result, the Member State in question enjoys a margin of appreciation in determining the most suitable approach to achieve this level of protection. Moreover, since curbing climate change is a goal of the EU itself, the Court tends to scrutinize Member States' measures less intensly when they pursue objectives that are also pursued by the EU itself (as famously seen in Case C-379/98 *PreussenElektra*).

2. The Freedom of Expression

Minister Jetten contends that both the freedom of expression and the protection of property appear incompatible with a prohibition of fossil advertising. Such a view is surprising, especially considering the widespread and uncontroversial array of advertising

prohibitions (such as those regarding tobacco). Article 7 of the Dutch Constitution safeguards the freedom of expression but explicitly excludes commercial advertising in Paragraph 4: 'The preceding paragraphs do not apply to commercial advertising.' Article 10 of the European Convention on Human Rights (ECHR), which likewise protects freedom of expression, does not have such a specific carve-out and the protected freedom indeed also extends to 'commercial expression', of which commercial advertising is the prime example. According to the European Court of Human Rights (ECtHR), Article 10 'guarantees freedom of expression to "everyone", with no distinction being made according to whether the type of aim pursued is profit-making or not' (ECHR, *Casado Coca v. Spain*, 1994, para 35). Therefore, a ban on fossil advertising imposed by a public body, whether at national, sub-national or supranational levels, would amount to an interference with the right to freedom of expression protected in Article 10 of the ECHR.

However, it is equally clear that the right to freedom of expression can be subject to restrictions if the conditions outlined in Article 10(2) ECHR are fulfilled:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

For an interference to be justified under Article 10(2), it must have a legal basis—an uncontroversial requirement. The legal foundation must meet certain conditions: the law must be accessible and allow for foreseeability. It must clearly identify the advertisements covered, and the language must not be too vague, to prevent the state from having excessive discretion to make arbitrary decisions. Many advertising regulations meet these conditions, and it is ultimately unproblematic in the case of fossil advertising too. While it may still be possible to formulate a prohibition that relates to the fossil fuel intensity of the product or service that is being advertised, a clearer and legally sounder option will likely involve specifying the kind of products and service whose advertising is prohibition (such as meat and/or flights), enhancing legal clarity.

A measure infringing on the right to freedom of expression must also be *proportionate*, which implies a test of the measure's *necessity* as well as its *appropriateness* (or its proportionality in a strict sense). In its application, the ECtHR has often referred to the 'existence of a pressing social need' to inform its assessment of whether a measure meets these conditions. Policies aimed at reducing greenhouse gas emissions respond to a

pressing social need, aligning with positive legal obligations to limit global warming to 'well below 2°C above pre-industrial levels', and to 'pursue efforts to limit the temperature increase to 1.5°C'. The *Urgenda* Climate Case notably reaffirmed and specified these obligations for the Netherlands, supported by the positive obligation to protect 'everyone's right to life' (Art. 2 ECHR) and the right to respect for private and family life, home and correspondence (Art. 8 ECHR).

What matters for the proportionality analysis is the significance of the public aim being pursued and the measure's contribution in that regard. The protection of human (and planetary) life and health from anthropogenic increases in global temperatures constitutes a legitimate aim of utmost importance. Once again, in the words of the IPCC: 'Climate change is a threat to human well-being and planetary health (*very high confidence*). There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*).' Research into human behaviour has also revealed advertising's contribution to fostering or changing unsustainable consumption. Consequently, an advertising ban is deemed suitable, necessary, and in a strict sense proportionate to pursue the public policy objectives of protecting life, health, and the environment.

The infringement of a prohibition of fossil advertising on the freedom of expression is, conversely, a comparatively light one. While this right generally enjoys strong protection for the essential contribution it makes in a democratic society, commercial speech is granted *less* protection compared to other forms of speech, such as political or artistic speech (distinguished i.a. in *Animal Defenders – UK*). Similar reasons have led the ECtHR to find that the public health considerations underpinning tobacco advertising prevail over economic imperatives as well as the fundamental right to freedom of expression (*Societe´ de conception de presse et d'eédition and Ponson v. France*, §56).

Moreover, akin to the ECJ discussed above, the ECtHR recognizes countries' discretion in determining a pressing social need and their 'margin of appreciation' in choosing levels of protection and measures. It has emphasized the importance of this discretion and margin, especially in the context of advertising (*Casado Coca – Spain*, §50). Notably, that ECtHR increasingly adopts a procedural approach examining whether a measure was adopted based on scientific evidence and a careful assessment and balancing of interests (*Mouvement raëlien suisse v. Switzerland*, § 48).

3. The Protection of Property

Minister Jetten also invokes the right to the protection of property alongside the freedom of expression. This protection is not explicitly included in the ECHR itself but resides in its Protocol 1, where Art. 1 states:

> 1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> 2. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The general rule of the peaceful enjoyment of property is not absolute and is frequently subject to limitations that, in turn, must meet certain conditions. This raises a fundamental question: While it was apparent that a ban on advertising qualifies as protected commercial expression under Art. 10 ECHR, it is challenging to identify the protected property that might potentially be affected—effected in a manner constituting an infringement of Art. 1 of Protocol 1 in the first place. According to the ECtHR, the article '[applies only to a person's existing possessions]'. In the Court's jurisprudence, individuals can seek protection of their possession if they had a '[legitimate expectation]', that is, if they had an assertable right that amounts to a proprietary interest. Notably, a decrease in economic value or general disadvantageous economic consequences of a measure are per se *not* covered by Art. 1.

We do not see how a ban of fossil fuels could possibly be challenged under Art. 1 of Protocol 1. The only scenario we can envision is if a commercial party holds a contractual right relating to the use of publicly or privately owned advertising space. However, the use of that right is already conditioned by existing advertising regulations. Changes in those regulations might impact the value of the contractual right, but this appears to be the extent. In practical terms, contracts concerning the use of advertising space tend to have relatively short durations of a few years and can be adjusted or discontinued in response to regulatory changes. Given that a ban on fossil advertising does not appear to infringe upon the protection of property, we do not delve into how such an infringement could be justified by the protection of a 'general interest'.

4. Conclusions

Regulations governing advertising, including their total or partial ban, are a staple of public policy. Tobacco advertising is just one example that has been extensively scrutinised in relation to both the internal market—shaped by the fundamental freedoms of EU law—and the protection of fundamental rights—guaranteed by the ECHR in combination with domestic constitutional law. Should the EU eventually take action in this domain, it would also related to the Charter of Fundamental Rights. The main takeaway from the case-law is that the regulation of advertising is not only common but also lawful. It either does not amount to an infringement at all, or if it does, it can be justified on public policy grounds.

Given this understanding, we find ourselves pondering why the notion circulates within the ministry that an advertising ban would be illegal. Could it stem from a form of 'regulatory chill' and an internalised aversion to risk? Is it possible that civil servants are so concerned about the (as we have demonstrated, misperceived) risk of violating internal market laws, thus impeding genuine regulatory actions? Or is it a classic case of savvy industry lobbying? We do not know. However, what we do know is that a fossil ban is a necessary, albeit insufficient, measure in the urgent quest to curb climate change—and importantly, it is perfectly legal. Stronger still, the ban pursues positive legal commitments upheld by both the EU and the Netherlands.