

TOBACCO, MARKET ECONOMY AND MARKET OF IDEAS NEWEST DEVELOPMENTS CONCERNING FREEDOM OF COMMERCIAL SPEECH

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Introduction

Freedom of speech and the market are not strangers. Interestingly, one of the most famous quotes on freedom of speech compares exchange of ideas with the interplay of market forces. In *Abrams v. United States* Justice Holmes stated in his dissenting opinion:

“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”¹

Although Justice Holmes referred to the free trade in ideas and the competition of the market, it is the notion of ‘marketplace of ideas’ that is commonly attributed to his dissenting opinion. It originates in John Milton’s concept of ‘agon’, the wrestling match in which the stronger truth will triumph.² Holmes replaced the concept of *agon* by ‘agora’ – marketplace of ideas.³ Of course one might say that freedom of speech is about individual development, democratic form of government, checks and balances and has nothing to do with what we buy, why and at what prices. There is some reluctance to let commercialism into the noble world of freedom of speech.⁴ However, market economy and market of ideas do interact. The link between the two fits into a broader context of relations between democracy and the market. At the core of those discussions are questions of whether democratic principles are applicable to market economy, and – *vice versa* – how market principles apply or contribute to the functioning of democracy, i.e. how democratic is our market economy or how market-oriented is our democracy?⁵ Economic processes may determine the organisation and the mode of exercise of freedom of expression. One example is competition rules that apply to media and ensure diversity of information sources. On the

* *European Commission, Directorate General for External Trade. Views presented are personal views of the author.*

¹ 250 U.S. 616, 630 (1919).

² D. Cole, ‘Agon at Agora: Creative Misreadings in the First Amendment Tradition’, *Yale Law Journal* (95) 1986, 886.

³ R. Shiner, *Freedom of Commercial Expression*, OUP 2003.

⁴ *Ibid.*

⁵ See A. Kiyindou (ed.), *Évolution de l’économie libérale et liberté d’expression*, Brussels 2007.

other hand, freedom of expression can impact the market and define the behaviour of market operators. This aspect is reflected in the development of the commercial speech doctrine. It demonstrates how freedom of speech impacts unfair competition law and defines the boundaries of commercial speech that directly or indirectly promotes the commercial activity of the speaker.⁶

This paper does not purport to cover the broad territory of freedom of commercial speech. Its focus is to highlight the link between market and freedom of expression with reference to the newest developments in the area of tobacco advertising in several legal systems. The aim is to present how courts assess the limits of free speech rights of commercial speakers, thereby changing the dynamics of the market. Tobacco restrictions influence demand and consumption levels, but also force development of new advertising techniques. Freedom of speech impacts the market indirectly as a signpost on which those restrictions are judged with regard to the commercial speaker's right to speak and the consumer's right to receive information.

I. Market of Ideas in the European Common Market

The European Union, EU, as defined by the Treaty of Lisbon, is a particularly interesting place to discuss the interplay of market and freedom of expression. Formally speaking, the EU, is not a human rights organisation. It is an organisation of economic co-operation fostering market integration between its Member States (MSs). Fundamental rights were not originally part of the project and found their place in the EU's legal order as a consequence of judicial activism of the European Court of Justice, ECJ. It is thus interesting to see how democratic principles (and among those fundamental rights in particular) were gradually considered to be an indispensable element of the common market.

The discussion on the status of fundamental rights in the EU's legal order is linked to the everlasting debate on the EU's place on the continuum between international organisation and federal state. The EU is neither of those but it holds characteristics of both. The debate has resurfaced with the constitutional debate, the details of which need not to be repeated here. Linked to all those issues is the principle of supremacy of EU law, and here many groundbreaking judgments did concern fundamental rights. *Solange*,⁷ for example, is commonly perceived as a showcase of power play between Karlsruhe and Luxembourg as to who has the final say on the compatibility of national and European law. But on a different level it is an explicit

⁶ E.g. commercial speech, in particular impact of freedom of speech on unfair competition law in Germany in J Krzeminska-Vamvaka, *Freedom of Commercial Speech in Europe*, Hamburg 2008.

⁷ BVerfGE (Bundesverfassungsgericht (German Federal Constitutional Court) 37, 271 – Solange I; BVerfGE 73, 339 – Solange II.

recognition of the need to have fundamental rights as part of the construction of the common market.

II. Treaty of Lisbon and the EU Charter of Fundamental Rights

The Treaty of Lisbon went through a rough patch. The last country to delay its ratification was the Czech Republic. Vaclav Klaus ratified the Treaty after the Czech Constitutional Court's ruling that it conformed to the Czech constitution.⁸ With the Treaty of Lisbon the Charter will become a legally binding instrument. It should not however change much in terms of defining the scope of fundamental rights because the Charter's role is to confirm the existing judge-made catalogue of rights. The European Convention on Human Rights (ECHR) and the common constitutional traditions of MSs preserve their role in defining the EU fundamental rights. Article 11 of the EU Charter codifies the right to freedom of expression. It states that "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

III. Commercial Speech in the EU

Although there is not much discussion on the constitutional status of commercial speech in the EU, it is acknowledged. The recognition is principally based on the inclusion of commercial speech within the realm of Article 10 ECHR. The ECHR has served as a source of inspiration in fleshing out the general principles of Community law and the standards of protection developed under the ECHR will continue to be transposed to the Union's legal order. All speech, whatever its content, comes within the realm of Article 10 ECHR.⁹ The key question is the range of permissible restrictions scrutinised under Article 10(2) ECHR.¹⁰ Compared to core (political or artistic) speech, the necessity test is less strict with regard to commercial statements.¹¹ The states enjoy a wider margin of appreciation in commercial matters. This means that they may interfere with commercial speech to a greater extent than what would be allowed with regard to other kinds of expression (e.g. political speech). The EU Charter neither mentions commercial expression nor explicitly limits the protection to non-commercial (political, literary, artistic *etc.*) statements. The protection accorded to commercial speech in the Union's law will continue to be based on standards

⁸ For judgements of national courts concerning the Treaty of Lisbon see <http://caselawpedia.wikidot.com> (last accessed on 13 November 2009), an interactive database of European judgements of national courts.

⁹ *Müller v. Switzerland* (1988) 13 E.H.R.R. 212, para 27.

¹⁰ C.R. Munro, 'The Value of Commercial Speech', *Cambridge Law Journal* (3), 138 2003.

¹¹ *Markt Intern Verlag GmbH and Klaus Beermann v Germany* (1989) 12 E.H.R.R. 161; other cases include: *Barthold v Germany* (1985) 7 E.H.R.R. 383, *Casado Coca v Spain* (1994) 18 E.H.R.R. 1, *Demuth v Switzerland* (2004) 38 E.H.R.R. 20, *Hertel v Switzerland* (1998) 28 E.H.R.R. 534, *Jacobowski v Germany* (1994) 19 E.H.R.R. 64, *Stambuk v Germany* (2003) 37 E.H.R.R. 42.

developed under Article 10 ECHR. This is due to the fact that the right to freedom of expression has been construed (in terms of its wording) similarly to its concomitant in the ECHR. Moreover, according to Article 52 (3) of the Charter – in so far as it contains rights which correspond to those guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the Convention. This approach is reinforced in the light of the EU's accession to the ECHR (Article 6 TEU).

In the EU, three cases have been so far explicitly concerned with commercial speech: two challenges to Tobacco Advertising Directives (TED I¹² and TED II¹³) and the *Karner*¹⁴ case. In the first Tobacco Advertising (I) case,¹⁵ only the Advocate General (AG) mentioned commercial speech. The ECJ invalidated the directive holding that the legal basis for its adoption was inappropriate.

In the Tobacco Advertising I case the applicants submitted that “commercial speech such as advertising by which undertakings can give the public useful information about their products” comes within the realm of protection of Article 10 ECHR.¹⁶ The defendants on the other hand emphasised that freedom of expression is not absolute and Article 10(2) ECHR permits restrictions in the interest of public health.¹⁷ AG Fennely defined commercial speech as:

“the provision of information, expression of ideas or communication of images as part of the promotion of a commercial activity and the concomitant right to receive such communication”¹⁸

He then advocated that commercial speech should receive protection in the Community law:

“commercial expression should also be protected in Community law. Commercial expression does not contribute in the same way as political, journalistic, literary or artistic expression do, in a liberal democratic society, to the achievement of social goods such as, for example, the enhancement of democratic debate and accountability or

¹² 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 (OJ 1998 L 213, p. 9).

¹³ 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 (OJ 2003 L 152, p. 16).

¹⁴ Case C-71/02 *Herbert Karner Industrie Auktionen GmbH and Troostwijk GmbH* [2004] 2 CMLR 5.

¹⁵ Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419 (“Tobacco Advertising case I”).

¹⁶ *Idem*, para 54.

¹⁷ *Idem*, para 55.

¹⁸ Opinion of Advocate General Fennely, *Tobacco Advertising case I* (n 16 above), para 153.

the questioning of current orthodoxies with a view to furthering tolerance or change. However, in my view, personal rights are recognised as being fundamental in character, not merely because of their instrumental and social functions, but also because they are necessary for the autonomy, dignity and personal development of individuals. Thus, individuals' freedom to promote commercial activities derives not only from their right to engage in economic activities and the general commitment, in the Community context, to a market economy based upon free competition, but also from their inherent entitlement as human beings freely to express and receive views on *any* topic, including the merits of the goods or services which they market or purchase."¹⁹

According to this definition, commercial speech encompasses statements linked to the commercial promotion of products and services and is concerned with the achievement of price and sales-volume targets. This is one form of commercial speech, referred to as purely commercial speech. But commercial speech has different forms and variables. Another possible category is so-called mixed speech, which constitutes a blending of commercial self-interest and commentary on issues of public concern.²⁰

When scrutinising the proportionality of legislative choices made by the institutions in complex fields, the ECJ has to examine whether the exercise of discretion is not vitiated by a manifest error or a misuse of powers or whether the institutions have not exceeded the limits of their discretion.²¹ AG referred to the rules governing the imposition of restrictions on rights under the ECHR and distinguished between general rule and the specific case of commercial speech. As a matter of rule, restrictions imposed on rights have to be justified by a pressing social need.²² Commercial speech is a special case. The European Court of Human Rights (ECtHR) held that it could be restricted if competent authorities 'on reasonable grounds' considered that the restrictions were necessary.²³ Similarly, in the *RTL* case, the AG Jacobs referred to two judgments of the ECtHR in *Casado Coca*²⁴ and *VGT Verein Gegen Tierfabriken*.²⁵ He stated that the ECtHR was willing to accept considerable restrictions on commercial advertising and that a wider

¹⁹ *Idem*, para 154.

²⁰ See discussion in Krzeminska-Vamvaka (n 6 above).

²¹ Opinion of Advocate General Fennelly, *Tobacco Advertising case I* (n 16 above), para 157.

²² *Sunday Times v United Kingdom* (1979) 2 E.H.R.R. 245; *Observer and Guardian v United Kingdom*, (1992) 14 E.H.R.R. 153, para 70–1 (71. The adjective 'necessary' within the meaning of Article 10(2) of the Convention is not synonymous with 'indispensable' or as flexible as 'reasonable' or 'desirable', but it implies the existence of a pressing social need. 72. The notion of necessity implies that the interference of which complaint is made corresponds to this pressing social need, that it is proportionate to the legitimate aim pursued and that the reasons given by the national authorities to justify it are relevant and sufficient.); *Barthold* (n 12 above), para 55.

²³ Opinion of Advocate General Fennelly, *Tobacco Advertising case I* (n 16 above), para 158; *Markt Intern* (n 12 above), para 37; *Groppera Radio AG v Switzerland* (1990) 12 E.H.R.R. 321, para 55.

²⁴ *Casado Coca* (n. 12 above).

²⁵ *Vgt Verein Gegen Tierfabriken v Switzerland* (2002) 34 E.H.R.R. 4.

margin of appreciation for national authorities was important, particularly in an area as complex and fluctuating as that of advertising.²⁶

In the Tobacco Advertising I case, the AG justified different treatment of commercial and core speech by varying functions of different forms of expression and their interactions with more general public interest. He concluded that “political expression serves certain extremely important social interest (...) [whereas] commercial speech does not normally perform a wider social function of the same significance.”²⁷ Consequently, he advocated that the Community approach to commercial speech should be similar to that applied under the ECHR:

“where it is established that a Community measure restricts freedom of commercial expression, as the Advertising Directive clearly does, the Community legislator should also be obligated to satisfy the Court that it had reasonable grounds for adopting the measure in question in the public interest. In concrete terms, it should supply coherent evidence that the measure will be effective in achieving the public interest objective invoked – in these cases, a reduction in tobacco consumption relative to the level which would otherwise have obtained – and that less restrictive measures would not have been equally effective.”²⁸

In the *Karner* case the ECJ upheld the provisions of the Austrian Unfair Competition Law as reasonable in view of (1) the objectives pursued (consumer protection and fair trading) and (2) the commercial use of freedom of expression in a field as complex and fluctuating as that of advertising.²⁹

IV. Selling Arrangements and Freedom of Movement of Goods

Advertising restrictions have also been challenged as incompatible with the TEC rules on freedom of movement of goods. In *Familiapress*³⁰ the ECJ invalidated an Austrian rule prohibiting magazines from publishing prize competitions (a German publisher was prevented from distributing its magazines with crossword puzzles for which readers could receive prizes). The Court held that because the content of magazines would have to be changed, the rule impaired market access. In *De Agostini*³¹ a Swedish ban on TV advertising directed at children under 12 and a ban on commercials for skincare products was scrutinised. Under the *Keck*³² formula the ECJ looked

²⁶ Opinion of Advocate General Jacobs, Case C-245/01 *RTL Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk*, [2003] ECR I-12489, para 54.

²⁷ Opinion of Advocate General Fennelly, *Tobacco Advertising case I* (n 16 above), para 158.

²⁸ *Idem*, para 159.

²⁹ *Karner* (n. 15 above), para 51.

³⁰ Case C-368/95 *Vereinigte Familiapress Zeitungsverlag- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.

³¹ Case C-34-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska^o Forlag AB and TV-Shop i Sverige AB* [1997] ECR I-3843.

³² Cases C-267-268/91 *Keck and Mithourand* [1993] ECR I-6097.

at the question of whether (1) national measures applied to all traders operating within national territory and (2) whether they affected in the same manner, in law and fact, the marketing of domestic products and of those from other MSs. The ECJ noted, leaving it for the national courts to balance the conflicting interests in the framework of proportionality test, that De Agostini claimed that advertising was the only effective way of promotion. Another Swedish rule, prohibiting alcohol advertisements in magazines was challenged in *Gourmet*.³³ The ECJ noted that because consumption of alcohol depends on local habits and traditions, an advertising ban might have greater impact on products originating in other MSs and hence impair intra-Community trade.

Advertising bans or restrictions as well as other selling arrangements can potentially be harmful for the internal market because they impair market access or market penetration of imported products. Local brands would normally be better known so it is all the more important for foreign brands to be able to reach out to would-be buyers. But much will depend on the circumstances of a particular sector. For some products local brands might indeed be better known (e.g. beer), but some others might be dominated by **European Commission, Directorate General for External Trade. Views presented are personal views of the author.* ‘international’ brands and thus the problem of different effects on local and foreign brands might not be prominent.

V. Where There is Smoke, There is Fire? New Tobacco Challenges

Following the successful challenge of TAD I, the Parliament and the Council adopted a new Tobacco Advertising Directive (TAD II), which has been again challenged by Germany.³⁴ This time around the ECJ remarked on the commercial use of freedom of speech.

The new TAD (II) was not expressly challenged as contravening the freedom of expression. Instead, the right to freedom of expression and Article 10 ECHR were introduced under the plea of breach of proportionality.³⁵ The applicant contended first that the prohibitions were overbroad as they covered purely local or regional situations and in the rare cases where they applied to cross-border situations, the trade in question did not encounter any obstacles liable to justify prohibitions. Consequently, the applicant claimed that the prohibitions should only be applied to advertising media circulating between the MSs. The second claim related to the impairment of the freedom of expression.

³³ Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECR I-1795.

³⁴ C-380/03 *Germany v European Parliament* [2006] ECR I-11573 (‘Tobacco Advertising case II’).

³⁵ *Idem*, para 129 *et seq.*

Interestingly, the applicant did not allege that advertising restrictions as such infringed upon the right to freedom of speech, but pointed to the fact that advertising was a source of revenue for the press and thus an important guarantee of the freedom of expression and of the press.³⁶ In that sense the EU challenge of tobacco advertising differs from its US or Canadian counterparts (see the discussion below) where advertising restrictions were scrutinised for conformity with the tobacco manufacturers' right to freedom of commercial expression.

The ECJ seems to, in principle, accept the loss of revenue argument as part of the freedom of speech analysis. A (standard) general statement about the importance of freedom of speech is followed by the presentation of the test applicable to core speech (limitations must be justified by public interest objectives, they have to be in accordance with the law, motivated by one or more of the legitimate aims under Article 10(2) ECHR and necessary in a democratic society, i.e. justified by a pressing social need and proportionate to the legitimate aim pursued).³⁷ Only after that, the specific test for advertising as form of 'commercial use of freedom of expression' is restated after *Karner*:

“the discretion enjoyed by the competent authorities in determining the balance to be struck between freedom of expression and the objectives in the public interest which are referred to in Article 10(2) of the ECHR varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When a certain amount of discretion is available, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression in a field as complex and fluctuating as advertising.”³⁸

The test for commercial speech differs from that applied to core (political, artistic) speech. It is first and foremost based on the scope of discretion enjoyed by the Community legislature, which – as the Court puts it – “must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic, and social choices on its part, and in which it is called upon to undertake complex assessments.”³⁹

Under the proportionality principle the Court has to assess whether means employed are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it.⁴⁰ In view of the objective pursued

³⁶ *Idem*, para 131.

³⁷ *Idem*, para 154, with reference to Case C-368/95 *Vereinigte Familienpress Zeitungs- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689, para 26; Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republic of Austria* [2003] ECR I-5659, para 79; and *Karner* (n 15 above), para 50.

³⁸ *Tobacco Advertising case II*, in *Idem*, para 155.

³⁹ *Idem*, para 145.

⁴⁰ *Idem*, para 144; see also Case 137/85 *Maizena and Others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM)* [1987] ECR 4587, para 15; Case C-339/02 *ADM Ölmühlen Others v*

(ensuring high level of human health), the ECJ held that challenged Articles 3 and 4 TAD II did withstand the proportionality test.

The Court expressly mentioned the fact that the prohibition of advertising in printed media did not extend to publications intended for professional tobacco traders or those published in third countries and not intended principally for the Community market.⁴¹ This statement suggests that the Court looks at the question of whether restrictions would leave open other channels of communication (or other opportunities for speech to take place). The argument was put forward by the Parliament and the Council, which claimed that they did not impose a total advertising ban.⁴² Further, the Court examined other alternatives, possibly less restrictive of the free speech rights, but concluded that the exemption for local or regional market would have destabilised the application of the prohibition (by making it uncertain and unsure) and would have thus endangered TAD's objectives.⁴³

VI. European *Central Hudson* Test?

The first case in which the US Supreme Court recognised the constitutional status of commercial speech was *Virginia Board*.⁴⁴ Four years later in *Central Hudson*⁴⁵ the Court established a four-part test to scrutinise the restrictions on commercial speech and to determine if the regulation of truthful and non-misleading advertising about lawful activity is justified. The test established an intermediate standard of scrutiny reminiscent of that applied to content-neutral time, place, and manner regulations of speech.⁴⁶ Under the rules established by the New York Public Service Commission the electrical utilities could not promote their services. The ban dated back to the times of severe fuel shortage and was meant to prevent electrical utilities from stimulating demand for electricity.⁴⁷ Justice Powell delivered the opinion of the Court and stated that:

“At the outset we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both enquires yield positive answers, we must determine whether the

Bundesanstalt für landwirtschaftliche Marktordnung (BALM) [1993] ECR I-6473, para 15; and Case C-210/00 *Käserei Champignon Hofmeister v Hauptzollamt Hamburg-Jonas* [2002] ECR I-6453, para 59.

⁴¹ *Tobacco Advertising case II*, in *Idem*, para 148.

⁴² *Idem*, para 140.

⁴³ *Idem*, para 149.

⁴⁴ *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

⁴⁵ *Central Hudson Gas and Electricity Corporation v Public Service Commission*, 447 U.S. 557 (1980).

⁴⁶ KM Sullivan and G Gunther, *First Amendment Law* (New York 2003), 191.

⁴⁷ *Central Hudson*, 447 U.S. 557, 558 (1980).

regulation directly advances the governmental interest asserted, and whether it is not more than is necessary to serve that interest.”⁴⁸

Under the *Central Hudson* test, four questions have to be answered:

- (1) Does the ban concern truthful and non-misleading speech about lawful activity (government can prohibit false and misleading communications or those related to illegal activity)?
- (2) What is the substantial interest to be achieved by restrictions imposed on commercial speech?
- (3) Do the restrictions directly advance the state interest involved (ineffective or remote support for the government’s purpose will not pass the test)?
- (4) Could the governmental interest have been served by less restrictive means?⁴⁹

In *Central Hudson* the Public Service Commission claimed that the suppression of advertising served the state’s interest in conserving energy. The ban failed on prongs 3 and 4. The US Supreme Court held that the Commission’s order prevented Central Hudson from promoting energy efficient services, which could contribute to the reduction of energy demand. Therefore, the ban was considered unconstitutional to the extent to which the Commission’s order suppressed speech that did not impair the state interest in energy conservation. Further, the Court noted that the Commission failed to demonstrate that its goal could not have been achieved by less restrictive means, for example by requiring the advertiser to include information about the efficiency of promoted services.

In *Board of Trustees*⁵⁰, the Court further defined the last prong of the *Central Hudson* test (regulation should be ‘no more than necessary’). It stated that:

“what our decisions require is a “‘fit’ between the legislature’s ends and the means chosen to accomplish those ends” — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is “in proportion to the interest served”; that employs not necessarily the least restrictive means but (...) a means narrowly tailored to achieve the desired objective.”⁵¹

The Supreme Court held that the government was not required to employ ‘least restrictive alternative’, but means that were reasonable and proportionate to the interest served.

⁴⁸ *Idem*, pp. 565–6.

⁴⁹ *Idem*, p.566.

⁵⁰ *Board of Trustees of the State University of New York v Fox*, 492 U.S. 469 (1989).

⁵¹ *Idem*, p.479.

VII. Tobacco Regulation in the US

On 22 June 2009, President Barack Obama signed the Family Smoking Prevention and Control Act (FSPCA).⁵² The new Act grants the Food and Drug Administration (FDA) powers to regulate tobacco products, bans companies from promoting products as lower-risk alternatives to traditional tobacco unless the FDA certifies that their sale is likely to improve public health (Section 101), and mandates larger, more varied and more prominent warning labels on tobacco products (Sections 201, 204). The FSPCA tackles the risks related to sales and marketing of so-called modified risk tobacco products (any tobacco product that is sold or distributed for use to reduce harm or the risk of tobacco related disease associated with commercially marketed tobacco products).⁵³ Restrictions on labelling and advertising will be the same for smokeless tobacco products. Limitations on the right to publicise the relative health risks of certain tobacco

⁵² Information on legislative history under <http://www.govtrack.us/congress/bill.xpd?bill=h111-1256> and the text of the act under http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1256enr.txt.pdf; http://www.npr.org/blogs/thetwo-way/2009/08/tobacco_makers_sue_over_new_fd.html; see also JH Adler, Philip Morris Gets Its Tobacco Bill, <http://article.nationalreview.com/?q=YWUwOTExZGNjNTlmNWM1OGZkOWNhY2Q5ZTY5ODA3NTc=&w=MA> (all accessed on 13 November 2009).

⁵³ Section 911 (g) MARKETING.—

(1) MODIFIED RISK PRODUCTS.— Except as provided in paragraph (2), the Secretary shall, with respect to an application submitted under this section, issue an order that a modified risk product may be commercially marketed only if the Secretary determines that the applicant has demonstrated that such product, as it is actually used by consumers, will—

(A) significantly reduce harm and the risk of tobacco related disease to individual tobacco users; and (B) benefit the health of the population as a whole taking into account both users of tobacco products and persons who do not currently use tobacco products.

(2) SPECIAL RULE FOR CERTAIN PRODUCTS.—

(A) IN GENERAL.—The Secretary may issue an order that a tobacco product may be introduced or delivered for introduction into interstate commerce, pursuant to an application under this section, with respect to a tobacco product that may not be commercially marketed under paragraph (1) if the Secretary makes the findings required under this paragraph and determines that the applicant has demonstrated that—“(i) such order would be appropriate to promote the public health; “(ii) any aspect of the label, labelling, and advertising for such product that would cause the tobacco product to be a modified risk tobacco product under subsection (b) is limited to an explicit or implicit representation that such tobacco product or its smoke does not contain or is free of a substance or contains a reduced level of a substance, or presents a reduced exposure to a substance in tobacco smoke; “(iii) scientific evidence is not available and, using the best available scientific methods, cannot be made available without conducting long-term epidemiological studies for an application to meet the standards set forth in paragraph (1); and “(iv) the scientific evidence that is available without conducting long-term epidemiological studies demonstrates that a measurable and substantial reduction in morbidity or mortality among individual tobacco users is reasonably likely in subsequent studies.

products have become particularly controversial and were particularly criticised by tobacco manufacturers.⁵⁴

FSPCA has been challenged this summer. The challenge might prove controversial and interesting at the same time. In their press statement Reynolds clarified that the suit did not challenge the decision to give FDA powers over tobacco products, but aimed at those provisions that “severely restrict the few remaining channels we have to communicate with adult tobacco consumers and, in our opinion, cannot be justified on any basis consistent with the demands of the First Amendment”.⁵⁵ The most interesting part of the challenge will probably be the one concerning – as it seems – mixed speech, similar to that challenged in *Kasky v Nike*.⁵⁶ In the same statement we read that:

“The law also contains provisions that chill our ability to participate in the broader public policy dialogue over the future of tobacco products in this country. Reynolds believes that governments, public health officials, tobacco manufacturers and others can and should play a role in providing adult tobacco consumers with accurate information about the various health risks and comparative risks associated with the use of different tobacco and nicotine products. This suit seeks to confirm that Reynolds’ ability to participate in that important dialogue has not been shut down.”⁵⁷

It is not clear which provisions of the new Act impose – in the plaintiff’s view – such far-reaching restrictions on tobacco companies’ freedom to participate in a public debate on risks associated with various tobacco products.

VIII. In Search of Authorities...

Among authorities that could govern current litigation, the one that comes to mind first is the successful challenge of the provisions of Federal Cigarette Labelling and Advertising Act⁵⁸ (FCLAA) in *Lorillard Tobacco*.⁵⁹ The US Supreme Court scrutinised regulation banning advertisements of cigarettes,

⁵⁴ http://online.wsj.com/article/SB125174788118073575.html?mod=googlenews_wsj (last accessed on 13 November 2009).

⁵⁵ http://files.shareholder.com/downloads/RAI/714752953x0x315691/1ad6e56f-4b90-4662-89ba-3e33de4e9882/2009-06_RJRT_Co_other_tobacco_manufacturers_retailer_file_suit_challenging_provisions_of_FDA_Tobacco_Act.pdf (last accessed on 13 November 2009).

⁵⁶ *Nike v. Kasky*, 539 U.S. 654 (2003); *Marv Kasky v. Nike, Inc., et al.*, 27 Cal. 4th 939.

⁵⁷ *Ibid.*

⁵⁸ <http://uscode.house.gov/pdf/2007/2007usc15.pdf> (last accessed on 13 November 2009).

⁵⁹ *Lorillard Tobacco Co. v Reilly*, 533 U.S. 525 (2001); other cases that could also be considered are *Posadas de Puerto Rico Associates, dba Condado Holiday Inn v Tourism Company of Puerto Rico et al.* (478 U.S. 328), concerning gambling advertising, or *44 Liquormart, Inc. v Rhode Island*, 517 U.S. 484 (1996), concerning alcohol advertising.

smokeless tobacco and cigars within 1,000 feet of a school or a playground and requiring the indoor advertising to be placed at least five feet from the floor. Only the case of smokeless tobacco and cigars was considered, because of the FCLAA pre-emption clause, according to which cigarettes whose packages bore certain labels were not to be subject to any further requirements as regarded advertising or promotion. Regulations were struck down because – under the Supreme Court’s interpretation⁶⁰ – the pre-emption clause prevented states and localities from imposing any further restrictions based on smoking and health. The new challenge of FSPCA will be seemingly different from *Lorillard* because it is federal law imposing further restrictions on advertising. Obviously, some of the arguments related to smokeless tobacco and cigars might be used in the analysis of new restrictions.

On more general questions concerning commercial speech doctrine in the US the Justices divided over the question of whether *Central Hudson* test or strict scrutiny should be applied to truthful and non-misleading information (strict scrutiny requires compelling state interest and least restrictive means).

As far as smokeless tobacco and cigars were concerned, the Court applied the *Central Hudson* test. It recognised the asserted state interest of prevention of underage use of smokeless tobacco and cigars. The regulation failed, however on the fourth of the *Central Hudson* prongs. The Court found that the ban was not sufficiently narrowly tailored to meet the objective set. It was noted that the geographical range in certain areas would lead to a complete ban of advertising. The five feet requirement imposed on indoor advertisements failed on the 3rd and 4th prong. The Court noted that children could simply look up and see the advertisements. It then emphasised the interest of adults in receiving truthful information about lawful activity and stated that

“[t]he uniformly broad sweep of the geographical limitation and the range of communications restricted demonstrate a lack of tailoring. The governmental interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products is a legal activity. A speech regulation cannot unduly impinge on the speaker’s ability to propose a commercial transaction and the adult listener’s opportunity to obtain information about products”.⁶¹

The Court also referred to another case – *Reno v. American Civil Liberties*⁶² – concerning indecent speech on Internet and pointed out that the

⁶⁰ For opposite view see opinion of Justice Stevens, *Lorillard*, 533 U.S. 525, 592 et seq (2001).

⁶¹ *Lorillard*, 533 U.S. 525, 528 (2001).

⁶² *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

government's protection of children "does not justify an unnecessarily broad suppression of speech addressed to adults".⁶³

In the European analysis there is not much explicit discussion as to whether restrictions do not disproportionately inhibit adult speech in order to protect youth. This is due to the fact that the legislation is not exclusively focused on curbing or preventing youth smoking. The bans are imposed to protect public health and address public health problems. But the test applied when scrutinising the restrictions does incorporate the question of whether alternative channels of communication are left open. The same is true for Canada (see below).

IX. The Irish Controversy – Point-of-Sale Display Ban

As of July 2009, Ireland introduced a point-of-sale display ban on tobacco products. Similar bans have been introduced in Australia, Iceland, and some provinces of Canada.⁶⁴ The Irish ban – the first European ban of this kind – has been introduced by a 2004 amendment of the 2002 Public Health (Tobacco) Act.⁶⁵ Section 33 of the 2002 Act as amended in 2004 prohibits advertising of tobacco products. As prescribed by the EU Tobacco Advertising Directive II there are two exceptions to this rule, covering publications that are (1) printed or published, and primarily intended for sale or distribution in a state other than a Member State of the European Communities, or (2) directed solely at persons who carry on, in whole or in part, the business of selling or distributing tobacco products (Section 35 of 2002 Act as amended in 2004).⁶⁶ The point-of-sale display ban is regulated in Section 43 of the 2002 Act as amended in 2004. It requires vendors to keep cigarettes in a closed container or dispenser not visible or accessible to the customers.

X.1 Will the UK Follow?

A display ban has also been considered in the UK.⁶⁷ The Health Bill 2009 currently goes through the legislative process.⁶⁸ The arguments put forward

⁶³ *Idem*, p. 848.

⁶⁴ <http://www.productdisplayban.com/Pages/Section1> (last accessed on 13 November 2009).

⁶⁵ See <http://www.irishstatutebook.ie/2002/en/act/pub/0006/print.html> and <http://www.irishstatutebook.ie/2004/en/act/pub/0006/print.html>; many details and further links can be found on an extremely informative webpage of Dr. Eoin O'Dell (<http://www.cearta.ie/>): <http://www.cearta.ie/2009/10/smoke-gets-in-your-eyes-tobacco-advertising-challenges/> (all websites last accessed on 13 November 2009).

⁶⁶ <http://www.irishstatutebook.ie/2002/en/act/pub/0006/print.html> and <http://www.irishstatutebook.ie/2004/en/act/pub/0006/print.html> (last accessed on 13 November 2009).

⁶⁷ <http://services.parliament.uk/bills/2008-09/health.html>;
<http://www.guardian.co.uk/politics/2009/oct/11/labour-rebellion-tobacco-shops-bill>;
<http://news.bbc.co.uk/2/hi/health/7771210.stm> (all accessed in October 2009).

by the opponents are similar to those raised in Ireland (see below). It has been pointed out that the ban would put small retail shops (convenience stores and newsagents) at a disadvantage as compared to dominant supermarkets.⁶⁹

X.2 The Irish Ban Challenged

Philip Morris Limited and an independent retailer have recently challenged the Irish display ban. Plaintiffs claim that it severely restricts their ability to provide trade and services thus violating Irish constitutional and EU law.⁷⁰ In particular they claim the ban to be anti-competitive “because it favours those manufacturers who already have a large market share through the sale of cheaper brands. (...) [I]f retailers are unable to display cigarettes, smokers are more likely to stick with the brands they currently buy.”⁷¹ Analysis is of course difficult at this stage because the text of the claims is available only from short press articles but a few points do come to mind.

Unlike an advertising ban, a display ban does not target speech as such. At first sight it appears to be more a sales practice regulation. A ban on self-service displays has been upheld in *Lorillard*. The US Supreme Court noted that ban on self-service sales required on the one hand that tobacco retailers placed tobacco products behind the counters and that customers had to have contact with salesperson before they were able to handle a tobacco product.⁷² Although the Court recognised that tobacco manufacturers had cognisable speech interest in a particular means of displaying their product, it held that the self-service ban withstood First Amendment scrutiny.⁷³ The Court noted that analysed provisions “regulate conduct that might have a communicative component, but Massachusetts seeks to regulate the placement of tobacco products for reasons unrelated to the communication of ideas.”⁷⁴ As a means of preventing unattended access to tobacco products without age verification, the self-service ban was held constitutional because the regulations “left open ample channels of communication” and thus did not constitute a significant impairment of adults’ access to tobacco products.⁷⁵ However, one example of open communication channels given by the Court

⁶⁸<http://www.guardian.co.uk/politics/2009/oct/11/labour-rebellion-tobacco-shops-bill>; http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Actsandbills/DH_093280 (both accessed in October 2009).

⁶⁹http://business.timesonline.co.uk/tol/business/industry_sectors/retailing/article6870260.ece (accessed in October 2009).

⁷⁰<http://www.philipmorrisinternational.com/PMINTL/pages/eng/press/pressreleaseTemplate.asp?ID=1338177> (accessed October 2009).

⁷¹http://business.timesonline.co.uk/tol/business/industry_sectors/consumer_goods/article6860013.ece, see also <http://www.cearta.ie/2009/10/smoke-gets-in-your-eyes-tobacco-advertising-challenges/> (both accessed in October 2009).

⁷² *Lorillard*, 533 U.S. 525, 568 (2001).

⁷³ *Idem*, p. 528, 568 (2001) (with reference to *Cincinnati v Discovery Network, Inc.*, 507 U.S. 410).

⁷⁴ *Idem*, p. 569.

⁷⁵ *Idem*, p. 569.

was that the retailers could place on display empty tobacco packages or display those in areas accessible only to sales personnel.⁷⁶ Unlike the recent Irish ban, the Massachusetts self-service ban was not a total display ban.

A total display ban is particularly restrictive because it virtually precludes communication through display of products. Possible analysis here might include questions of availability of alternative avenues of communication. Two points are important in that regard.

The Irish ban is not a total advertising ban. On this point the Irish courts may refer to the Tobacco Advertising II judgment of the ECJ, where the Court analysed whether there were other opportunities for speech to take place. One of the elements due to which the EU tobacco-advertising ban withstood the proportionality test was that the TAD II allowed advertising to professional tobacco traders or in publications intended for countries outside of the EU. Possibilities to advertise other than by display of products could be considered as sufficient, i.e. leaving open alternative channels of communication.

Further, according to section 43(5) of 2002 Act as amended in 2004, the salesperson can show to the customer either (1) one packet of each tobacco product sold by them or a reproduction thereof, or (2) a pictorial list consisting of visual images of packets of the tobacco products.⁷⁷ Cigarette menus in shops with pictures of cigarette boxes and prices could be viewed as sufficient in terms of other communication avenues. Section 43(4)(b) prohibits displays indicating that tobacco products are sold at particular premises, but Section 43(4)(c)(ii) orders that a sign informing the public that tobacco products may be sold at particular premises to the persons who have attained the age of 18 years. Through this sign would-be customers can be informed that tobacco products are sold at a particular shop. Details are to be determined in administrative provisions. Relevant advertising messages can still be placed on packages.

All will depend on how Irish courts will balance the objective pursued by the legislator and the means employed to achieve it. Keeping in mind that under EU law the reasonableness test applies, one possibility here would be to prove (e.g. by studies) the impact of displays on (youth?) choices to start smoking.

XI. Canada

⁷⁶ *Idem*, p. 570.

⁷⁷ <http://www.irishstatutebook.ie/2002/en/act/pub/0006/print.html> and <http://www.irishstatutebook.ie/2004/en/act/pub/0006/print.html> (last accessed on 13 November 2009); there are some restrictions concerning those images: (I) each such image is not greater in size than the size of the packet concerned, (II) the list does not contain more than one image of the same product, and (III) the list or each such image contains a warning in such form and of such a type as may be prescribed by those regulations.

Tobacco advertising restrictions were also subject to constitutional review in Canada. In 1995, in the prominent *RJR-MacDonald*⁷⁸ case, the Supreme Court of Canada invalidated the provisions of the Tobacco Products Control Act.⁷⁹ The Act imposed prohibition of advertising and promotion of tobacco products and required warning labels on packaging. It did not withstand constitutional review because of the government's failure to properly justify the restrictions on freedom of speech (e.g. failure to demonstrate that less intrusive measures were available). The government lost the case because it did not provide sufficient evidence to support its claim. Although the Court held that the legislator did not have to present scientifically precise proof in order to justify restrictions "the absence of virtually any proof was fatal to the government's case".⁸⁰ Following *RJR-MacDonald* a new Tobacco Act⁸¹ was passed and again challenged in *JTI-Macdonald*.⁸² But in the new case the government presented an abundance of detailed evidence in order to justify the limits on the right to free expression.⁸³ The Court noted that the legislator demonstrated "increased understanding of the means by which tobacco manufacturers seek to advertise and promote their products and by scientific insights into the nature of tobacco addiction and its consequences".⁸⁴

An interesting aspect related to the evidence presented by the government in the new case was the references to the sophistication and subtlety of tobacco advertising. Especially with regard to lifestyle advertising (the petitioners claimed that the prohibition of lifestyle advertising was too vague and overbroad) the Court referred to the sophistication evidenced by examples of tobacco advertising presented to it.⁸⁵

The legal framework to assess the admissibility of restrictions on freedom of speech is quite similar to the European one. It requires a proportionality analysis of whether the limits are reasonable, prescribed by law and demonstrably justified in a free and democratic society (Section 1 of the Canadian Charter of Rights and Freedoms⁸⁶). Hence, the courts will analyse the following elements:

- (1) the purpose of the law imposing restrictions (it must be important (pressing and substantial⁸⁷),
- (2) the rational connection between the means and objective,

⁷⁸ *RJR-MacDonald Inc. v Canada* (Attorney General), [1995] 3 S.C.R. 199.

⁷⁹ S.C. 1988, c. 20.

⁸⁰ *Canada (Attorney General) v JTI Macdonald Corp.*, [2007] 2 S.C.R. 610, 2007 SCC 30, para 6.

⁸¹ S.C. 1997, c. 13.

⁸² *JTI Macdonald Corp.*, *supra* note 81.

⁸³ *Idem*, para 8.

⁸⁴ *Idem*, para 9; further references to the quality and amount of evidence presented by the government in paras 114, 135, 137.

⁸⁵ *Idem*, paras 93, 114 (the record is replete with examples).

⁸⁶ See <http://laws.justice.gc.ca/en/charter/1.html> (last accessed on 13 November 2009).

⁸⁷ *R v Oakes*, [1986] 1 S.C.R. 103, p. 139.

- (3) minimal impairment,
- (4) proportionality of effects.

The Tobacco Act has three purposes: (1) to protect the health of Canadians and tackle public health problem, (2) to protect the young, and (3) to enhance public awareness of health hazards related to tobacco products. The Court noted that the objectives expressed in broad terms might pose problems in terms of proportionality analysis (difficult to demonstrate that means restricting the rights are justified). In the case at hand the objective has been expressed in both broad (1 above) and more narrow (2 and 3 above) terms and as the Court put it: “no one disputes the importance of this objective.”⁸⁸ The rational connection analysis is an inquiry into the link between the objective and means employed to achieve it and it seems to be rather uncontroversial in its application.⁸⁹

Minimal impairment means that measures must be carefully tailored to achieve the objective pursued.⁹⁰ Under the minimal impairment analysis the Canadian Supreme Court, like the ECJ, linked the reasonableness test with the complexity of the matter subject to regulation. The Court stated:

“Crafting legislative solutions to complex problems is necessarily a complex task. (...) [O]n complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives.”⁹¹

The proportionality of effects analysis is about balancing the conflicting interests, i.e. objective to be achieved against the impact (effects) on the right in question.⁹² Courts examine the benefits that the measure might bring for a fundamentally important objective of collective good, the gravity of impairment of the right and the justification.⁹³

The challenge in *JTI Macdonald* consisted of several claims related to different provisions of the Tobacco Act. For example, the provisions prohibiting promotion, the use of brand names in sponsorship, lifestyle advertising, or those ordering expansion of warnings on packages were challenged. The Court upheld government’s prohibition on promotion of tobacco products explaining that it did not cover publication of legitimate scientific works. The term ‘promotion’ was interpreted as commercial promotion and scientific research was classified as neither commercial nor directed at consumers. The Court noted that a manufacturer would be prohibited from paying for a particular brand to be included in a commercial scientific work directed at consumers. This limitation would however withstand the constitutional

⁸⁸ *JTI Macdonald Corp.* (n 81 above), paras 37-8.

⁸⁹ *Idem*, para 40.

⁹⁰ *Idem*, para 42.

⁹¹ *Idem*, para 43.

⁹² *Idem*, para 45-6.

⁹³ *Idem*, paras 37, 45.

scrutiny.⁹⁴ An important part of the Court's reasoning under the proportionality test was that the ban was not a total ban on advertising. It allowed information and brand preference advertising (exceptions are: advertising in places likely to be frequented by young people, in publications not directed to adults, lifestyle advertising, advertising creating reasonable grounds to believe that it could be appealing to young people as a group).⁹⁵ There are also quite a few referrals to 'low value speech'.⁹⁶ Although the constitutional status of commercial speech in Canada has been recognised *inter alia* because it provides information necessary for consumers' purchasing decisions,⁹⁷ the Canadian Supreme Court – unlike its US counterpart – did not analyse a lot this aspect of the freedom of expression. The rights of recipients of the speech are mentioned briefly. For example:

“the prohibited speech is of low value. Information about tobacco products and the characteristics of brands may have some value to the consumer who is already addicted to tobacco. But it is not great.”⁹⁸

In relation to the prohibition of sponsorship by means of using corporate name the Court held that beneficial effects of the ban outweighed speech interests due to the limited value of expression at issue.⁹⁹

The analysis demonstrates that the standards of protection of commercial speech are similar to those in Europe or the US. Seemingly the most important element of the (newest) case is the difference in how governments evidenced its position (studies, examples of advertising to demonstrate the level of sophistication and refinement of tobacco advertising). It seems that a similar reasoning was present in *Lorillard*. The US Supreme Court stated that “the broad sweep of the regulations indicates that the Attorney General did not carefully calculat[e] the costs and benefits associated with the burden on

⁹⁴ *Idem*, para 56.

⁹⁵ *Idem*, para 92.

⁹⁶ *Idem*, para 94.

⁹⁷ *Ford v Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 766-67; generally on the recognition of constitutional status of commercial speech see *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

⁹⁸ *JTI Macdonald Corp.* (n 81 above), para 94.

⁹⁹ *Idem*, paras 127-8: “This is clear when the corporate name is connected with the brand name of a tobacco product. (The appellant argued that all the respondents have brand names that include portions of their corporate names; the respondents did not contradict this.) But even where there is no overt connection between the corporate name and the brand name of a tobacco product, the corporate name may serve to promote the sale of the tobacco product. Connections may be established in a variety of ways. The corporate name may, without referencing a brand name, nevertheless contain a reference to tobacco. Or the corporate name may have historically been associated with tobacco. The evidence established the tobacco industry's practice of using shell corporations as an element in brand identification. Associations between the parent company and the shell company may persist in the public mind. As a result, the corporate name in the sponsorship promotion or on the building or facility may evoke a connection with the shell company and its brand.”

speech imposed by the regulations.”¹⁰⁰ Further references to evidence followed like that “the State had ample opportunity to develop a record with regard to tailoring”¹⁰¹ or that “Attorney General has provided ample documentation of the problem with underage use of smokeless tobacco and cigars.”¹⁰²

Conclusion

There have been quite a few developments in the area of tobacco regulation in the recent years, both in terms of judicial decisions following challenges to tobacco advertising restrictions but most notably in terms of legislative action tightening the regulation of tobacco advertising and sales practices. The governments and parliaments in many countries have persistently and determinately intensified their anti-tobacco actions and programs.

Tobacco advertising cases contributed to the development of commercial speech doctrine, demonstrating the links and tensions between the market and freedom of speech. Commercial speech is, in the eyes of some, a ‘sacrilege’ of the notable world of freedom of speech. But as long as smoking remains a lawful activity, tobacco manufacturers will claim free speech rights, most notably the right to disseminate truthful and non-misleading information about their products in order to propose a commercial transaction.

The courts in the analysed legal systems apply the reasonableness test and analyse whether restrictions leave alternative channels of communication open. In all the analysed systems the courts accentuate that the advertising ban is not a total ban. Evidence to justify restrictions on speech (studies demonstrating effects of particular forms of communication on the level of consumption, examples of sophistication and subtlety of advertising) is crucial to the legislator’s case.

Freedom of speech changes the dynamics of the market. Tobacco advertising restrictions have twofold impact. On the one hand, advertising restrictions impact the consumption level (it is their very purpose). The governmental action to raise public awareness of health hazards related to smoking impacts demand for tobacco products. On the other hand, advertising restrictions force tobacco manufacturers to develop new, more sophisticated advertising techniques. In view of the general trend of perfecting advertising techniques in many sectors, tobacco advertisers might face a more difficult task. However, the same is true for all sectors where health or social hazards lead to stricter advertising and marketing regulation (e.g. alcohol). There is also a general trend to introduce stricter advertising and marketing regulation which

¹⁰⁰ *Lorillard*, 533 U.S. 525, 528 (2001) with reference to *Cincinnati v Discovery Network Inc.*, 507 U.S. 410, 417 (1993).

¹⁰¹ *Lorillard*, 533 U.S. 525, 565 (2001).

¹⁰² *Lorillard*, 533 U.S. 525, 528, 561 (2001).

is vitiated by ever-raising consumer protection standards (e.g. development of unfair competition law, false and misleading advertising laws). In one way or another restrictions on advertising and marketing apply to all products and services. Freedom of speech serves as signpost on which the legality (proportionality) of restrictions is judged, from the perspective of the commercial speaker's right to speak and the consumer's right to receive information. In that sense freedom of speech impacts the market indirectly through advertising restrictions by invalidating or upholding them.

Commercial issues are issues of public concern. In *Virginia Board* Justice Blackmun stated that the "consumer's interest in the free flow of commercial information, (...) may be keen, if not keener by far, than his interest in the day's most urgent political debate."¹⁰³ It applies to purely commercial speech (about prices and qualities of products) and but also to business participation in public debates, especially debates concerning a particular sector of business activity where commercial speaker brings to the table an invaluable expertise. Cases of mixed speech are on the rise as well as those in which companies advertise with reference to their human rights or labour standards record or environmental footprint.

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¹⁰³ *Virginia Board*, 425 U.S. 748, 763 (1976).

