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This page looks at common arguments in challenges to comprehensive bans or restrictions on tobacco advertising, promotion and sponsorship in domestic courts.

Introduction

In Article 13 of the WHO FCTC, Parties 'recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products'. In the treaty's Preamble, they express their 'serious concern' about the impact of all forms of advertising, promotion and sponsorship aimed at encouraging the use of tobacco products.

Under article 13, Parties commit to undertake, 'in accordance with [their] constitution or constitutional principles', 'a comprehensive ban of all tobacco advertising, promotion and sponsorship'. Parties that are not in a position to undertake a comprehensive ban 'due to' their constitution or constitutional principles undertake to 'apply restrictions'. The term 'tobacco advertising and promotion' is defined in Article 1 to mean 'any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly'.

Guidance on implementing bans or restrictions and an indicative list of forms of advertising, promotion and sponsorship is contained in the article 13 guidelines. The guidelines emphasise that a 'ban on tobacco advertising, promotion and sponsorship is effective only if it has a broad scope', given the integrated nature of contemporary marketing and the ability of the tobacco industry to shift to other forms of marketing if only some forms are banned (para 5). The guidelines also emphasise that parties that cannot undertake a comprehensive ban due to their constitution or constitutional principles must apply restrictions as far as possible (35-36).

Common grounds of challenge and responses

Most commonly, the tobacco industry and others bringing legal challenges against bans or restrictions on advertising, promotion and sponsorship argue that such measures are a violation of freedom of commercial speech/expression. Persons bringing legal challenges may also argue that advertising bans or restrictions violate rights regarding free enterprise.

Common responses which parties have successfully used against such challenges include:

- In many legal systems, commercial speech (such as advertising) is granted a lesser degree of protection than other forms of speech, such as political or artistic speech. This is particularly so for commercial speech promoting the use of a product known to be harmful. (See below Canada v JTI Macdonald Corp; Judgment C-830/10, 20 October 2010, Constitutional Court of Colombia;
Protections for commercial speech or expression are rarely absolute, and generally can be outweighed or justified:

- By competing fundamental rights to health and/or a healthy environment (see *British American Tobacco South Africa v Minister of Health*; Legislative Consultation with Constitutional Division of the Supreme Court No. 2012-003918)
- Under public health exceptions or other provisions providing for permissible limitations on such rights (See Canada v JTI Macdonald Corp, and *Judgment C-830/10*, 20 October 2010, Constitutional Court of Colombia)
- By the competing state interest in implementing international obligations under the WHO FCTC (see *British American Tobacco South Africa v Minister of Health*)

As recognised in article 13 of the WHO FCTC and the article 13 guidelines, bans on advertising, promotion and sponsorship are known to be effective in reducing tobacco use and tobacco-caused harm. (See *Judgment C-830/10*, 20 October 2010, Constitutional Court of Colombia)

**The cases below illustrate how tobacco advertising, promotion, and sponsorship bans have been challenged since the WHO FCTC came into force; how parties have framed their defences to such challenges; and how courts have considered the issues at stake. The list is not exhaustive but rather shows examples of how issues have been framed in different legal challenges.**

**British American Tobacco South Africa (Pty) Ltd v Minister of Health** *(South Africa, 2012)*

The Supreme Court of Appeal of South Africa held that a comprehensive ban on advertising and promotion of tobacco products, including by one-to-one communications between consumers and tobacco manufacturers, importers, wholesalers and retailers did not violate the constitutional right to commercial speech or the right of tobacco consumers to receive information.

The Court held that the right to freedom of expression was not absolute. The limitation on the tobacco company’s speech was reasonable and justifiable, because public health considerations and South Africa’s obligations to implement a comprehensive advertising ban under WHO FCTC art 13 outweighed the economic interests of tobacco companies and the interests of smokers as a group.

In reaching its decision, the court weighed the low value of commercial speech that seeks to promote a harmful and addictive product against:

- The ‘undoubtedly hazardous’ nature of smoking and its adverse impact on health care
- South Africa’s international obligations under the WHO FCTC
• The fact that many other open and democratic societies had adopted comprehensive advertising bans
• The absence of a less restrictive alternative: the court rejected an argument that the legislation should be read down to exclude one-to-one communications with ‘consenting’ adult smokers. Many smokers were trying to quit and it could not be presumed that they were all consenting to receive one-on-one communications from tobacco manufacturers and retailers, nor was it feasible to carve out ‘consenting’ from ‘non-consenting’ smokers
• The fact that the less restrictive alternatives posed by the tobacco company all involved exceptions aimed at selling its product, which was the exact mischief the Act sought to address
• The fundamental rights to health care and a healthy environment under the South African constitution

Canada v JTI Macdonald Corp (Canada, 2007)

The Canadian Supreme Court upheld several restrictions on tobacco advertising, promotion and sponsorship, including a ban on ‘lifestyle advertising’, a total ban on advertising to minors, a ban on sponsorship, a ban on false and misleading advertising (including false and misleading advertising on packaging), and a ban on showing tobacco products in advertisements. The legislation also provided for an increase in the size of graphic health warnings from 33% to 50%, discussed here. The Court ruled that the restrictions were proportional and did not violate the right to freedom of expression under the Canadian Charter of Rights and Freedoms. The value of the suppressed expression — the inducement of increased tobacco consumption — was low ‘compared with the significant benefits in lower rates of consumption and addiction that the ban may yield’. The Court noted that many other countries had adopted similar or stricter restrictions on advertising, promotion and sponsorship, and that such restrictions were required by the WHO FCTC (note that this case predates the adoption of the WHO FCTC Article 13 Guidelines).

Judgment C-830/10, 20 October 2010, Constitutional Court of Colombia (Colombia, 2010)

The Constitutional Court of Colombia held that a comprehensive ban on the advertising and promotion of tobacco products did not violate the right to freedom of commercial speech, freedom of enterprise, or the right of consumers to receive information.

The court first considered the scope of the relevant rights:

• In relation to freedom of enterprise, the Court considered that freedom of enterprise was not an absolute right, and could be validly limited by the state for social objectives, the purpose of the right being to strike a balance between free market principles and state intervention.
• In relation to the right to receive information, the Court considered that this right was not just about the ability of the consumer to receive advertising, but was also aimed at guaranteeing that decisions about consumption were informed and reducing information asymmetries between consumers and manufacturers regarding the quality and safety of the products
In relation to freedom of commercial speech, the Court held that commercial speech was not invested with the same level of protection as other forms of speech under the Constitution, because it aimed not to facilitate participation and democratic deliberation, but merely facilitate economic transactions. Commercial speech promoting an activity could therefore be limited if it should be discouraged due to the damage it caused to others, regardless of whether the activity itself was legal.

The court then considered that any restriction on these economic freedoms as a result of the advertising ban was justified because the purpose of the advertising ban was to protect public health and the environment. The ban contributed to the protection of the fundamental rights of life, health, and physical integrity, as well as collective guarantees to a healthy environment. The means chosen by the state were not prohibited under the constitution – it was permissible to completely prohibit advertising under the constitution provided there were sufficient constitutionally relevant grounds for doing so. Such grounds were evident from the high social costs of tobacco, as recognised by the statement of the ‘devastating’ effects of tobacco use in the WHO FCTC. The ban was also suitable and proportionate, as evidenced by the WHO FCTC’s recognition that a comprehensive advertising ban would reduce tobacco consumption and its obligation on states to do so.

In reaching its conclusion, the Court placed significant weight on the fact that the legislation was implemented in fulfilment of Colombia’s obligations under article 13 of the WHO FCTC. It also cited Article 13.1 and Art 13.2 as evidence of the effectiveness of a comprehensive advertising ban and the Article 13 Guidelines as evidence of the nexus between advertising and tobacco consumption.

Further resources line References

- Guidelines for implementation of Article 13 (tobacco advertising, promotion and sponsorship)
  http://www.who.int/fctc/guidelines/adopted/article_13/en/

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