The Influence of the Commercial Speech Doctrine on the Development of Tobacco Control Measures

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Abstract: Among the attempts to oppose tobacco control legislation, the tobacco industry has alleged violations of its right to commercial speech. While the disputes that took place in some jurisdictions like the United States (US), Canada, or the European Union (EU) have been already analyzed, much less is known about how, globally, this doctrine has influenced the adoption of tobacco control measures. This article contributes to filling this gap by illustrating how the commercial speech doctrine influenced the negotiations of the Framework Convention on Tobacco Control (FCTC). Moreover, using the Tobacco Control Database of Campaign for Tobacco-Free Kids, it shows that arguments on commercial speech have been used to challenge tobacco control measures in an increasing number of countries.

1. Introduction

Tobacco advertising has a long and dark history. For great part of the 20th century, tobacco manufacturers have freely employed virtually every possible advertising tool to market their deadly products: billboards, radio, television, cinema, comics, and even skywriting.[1] Not only did tobacco companies hide the dangers of smoking, they also actively tried to dispel fears by promoting allegedly safer cigarettes and recruiting doctors.[2] Marketing of cigarettes is a powerful tool for recruiting smokers, and the tobacco industry has used it to expand the market to specific groups of users, particularly teenagers,[3] minorities,[4] and women.[5]

As the late tobacco control advocate Ruth Roemer argued, restrictions on tobacco advertising are needed

> for the same reasons that the tobacco industry spends vast amounts of money on it — because advertising increases sales and consumption of tobacco, encourages smokers to continue, induces young people to start smoking, and creates an atmosphere in which smoking is viewed as socially acceptable.[6]

The first comprehensive restrictions on tobacco advertising were enacted in the 1970s by Finland, Iceland, and Norway.[7] The experience of these pioneer coun-

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tries and those that followed has allowed researchers to conclude that restrictions on advertising are among the most effective tobacco control measures.[8] Nonetheless, enacting, implementing, and enforcing restrictions on advertising for tobacco products has encountered fierce resistance by the tobacco industry. According to the most recent report of the World Health Organization (WHO), only 21% of the world population is covered by an effective ban on advertising, promotion, and sponsorship of tobacco products.[9] There are several difficulties that explain why it is so hard adopt effective restrictions on advertising for tobacco products, including the multitude of channels and forms in which direct and indirect advertising can take place. The rapid growth of internet platforms and social media, for example, has certainly created loopholes and difficulties in enforcement of old regulations.[10]

It is incontrovertible, however, that one of the hardest challenges in adopting restrictions on advertising is the interference by the tobacco industry. Over the last 70+ years, the tobacco industry has developed a considerable amount of tactics to influence policy-making.[11] Aggressive litigation and threats of litigation are among them. When it comes to restrictions on advertising, one of the tobacco industry's core arguments has been that these restrictions would violate their freedom of commercial speech.[12] As explained in the introduction to this special issue, freedom of commercial speech is the application of freedom of expression in the context of messages and advertising by private companies. Since the doctrine of commercial speech was developed by United States (US) courts in the 1970s, it has received considerable attention.[13] The tobacco industry has used this doctrine to challenge (or threaten to challenge) restrictions on advertising.[14]

While the disputes that took place in some jurisdictions like the US as well as Canada and the European Union (EU) have been already analyzed,[15] much less is known about how, globally, the commercial speech doctrine has influenced the development of tobacco control measures. This article contributes to filling this gap. Section 2 starts the analysis by illustrating how the commercial speech doctrine influenced the negotiations of the treaty on tobacco, the Framework Convention on Tobacco Control (FCTC). Section 3 proceeds to examine the impact of commercial speech in litigation. Using the Tobacco Control Database of Campaign for Tobacco-Free Kids, this section shows that arguments on commercial speech have been used to challenge tobacco control measures in an increasing number of countries. However, they have mostly been unsuccessful. Finally, Section 4 shows that, although with different approaches, all the judgements examined have adopted an interpretation of commercial speech and of the applicable proportionality test that represents a valuable precedent. In spite of the tobacco industry's attempts, this trend dims the hope that commercial speech can be successfully used against tobacco control regulations outside of the US.

2. Using Commercial Speech to Oppose Strong Language in the Framework Convention on Tobacco Control

By the time the negotiations of the FCTC started in 2000, it was already demonstrated that restrictions on advertising were among the most effective measures to curb tobacco consumption.[16] However, there is a catch. Restrictions on advertising are effective "only if they are comprehensive, covering all media and all uses of brand names and logos."[17] The basic idea is that restricting advertising only, for example, in television would be not a very effective measure because the tobacco industry would simply move to invest more resources in newspaper advertisement or in other promotional activities like smoking in movies and sport sponsorship. To avoid this "leaking," policy-makers must adopt restrictions that cover all possible channels and forms of advertisement of tobacco products.

However, the proponents of a ban on advertising of tobacco products encountered strong resistance among the negotiating States. One of the most repeated arguments against such a measure was that a comprehensive ban would infringe their constitutional rights and particularly freedom of commercial speech. The oppo-

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sition of Germany is well documented.[18] Moreover, from the official records of the negotiations, we can see that the list of countries invoking constitutional limits against a comprehensive ban on advertising includes countries like Brazil,[19] Argentina,[20] Japan,[21] and the United States.[22] It is hard to know exactly what led these countries to raise the concern regarding commercial speech doctrine. What we can say, however, is that raising constitutional arguments in an international negotiations can be a powerful strategy. In a context where the effectiveness of a measure has already been demonstrated, there is little room for a debate on its merits and potential pitfalls of a measure. Instead, invoking a constitutional argument draws a red line that can be hardly confuted by the other negotiating parties.

Eventually, this opposition led the negotiating parties to agree to a less stringent wording on tobacco advertising than originally proposed. The final text of the FCTC thus represents an intricate compromise between recognizing that a total ban would be most effective, and acknowledging that some States' constitutions may prevent them from adopting a total ban. The article on advertising restrictions begins by "recogniz[ing] that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products."[23] The obligation to adopt such a measure, however, is softened by the caveat that this should be done "in accordance with [the] constitution or constitutional principles,"[24] For this reason, it is foreseen that if a party "is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles [it] shall apply restrictions on all tobacco advertising, promotion and sponsorship."[25] To avoid the risk of an excessively narrow interpretation of this provision, the article clarifies that "[a]s a minimum" the FCTC parties must adopt some measures such as prohibition of "false, misleading or deceptive" advertising, health warnings, and restrictions on advertising in media and international sport events.[26]

To the best of my knowledge, since the adoption of the FCTC in 2003, no party to the FCTC or other actor has tried to challenge, or even simply debate, the idea that the commercial speech doctrine could prevent the adoption of restrictions on advertising in the context of tobacco control. The Guidelines to Article 13 of the FCTC, adopted in 2008, clarify the scope of application of the prohibition on advertising and give some guidance to States on how to adopt it.[27] However, they do not discuss any development on the issue of commercial speech. This seems to confirm that tackling constitutional debates in an international forum like the FCTC is considered very hard or, perhaps, even inappropriate.

In order to understand how the doctrine of commercial speech has impacted tobacco control after the conclusion of the FCTC, hence, we should focus our attention to domestic courts.

3. Using Commercial Speech to Oppose Tobacco Control via Judiciary Action

As noted in the introduction, US courts have been the first to develop the doctrine of commercial speech, and the first where commercial speech has been used to oppose restrictions to tobacco advertising. In this regard, it is worth recalling that, in principle, US case-law recognizes that tobacco advertising can be restricted to protect public health. However, the legality of advertising restrictions is subject to a proportionality-like test.[28] In assessing whether the challenged measures were more extensive than necessary, US courts have in some notable instances struck down restrictions on tobacco advertising.[29]

Outside of the US, the best place where to look for the impact of the commercial speech doctrine on the case-law on tobacco control measures is a website called Tobacco Control Laws. This is a database of laws and judgements about tobacco control measures managed by the nongovernmental organization Campaign for Tobacco-Free Kids.[30] At the time of writing, its database of judicial decisions contains more than 1000 entries, both from countries that have ratified the FCTC and from those who have not.[31] Of these decisions, 33 are relevant for this discussion as they are actions against government policies or regulations concerning advertising, and contain arguments on freedom of expression and commercial speech.[32] Most likely, these decisions do not represent the entirety of all decisions on commercial speech. However, they offer a sizeable sample to understand how the doctrine of commercial speech has been used to oppose tobacco control regulations on advertising around the world.

An analysis of the relevant decisions shows that, outside of the US, the doctrine of commercial speech has been used to oppose tobacco control measures in many different countries with different legal traditions, including India, South Africa, Argentina, Canada, Costa Rica, Colombia, the EU, and Sri Lanka. Second, with respect to historical trends, the first cases on commercial speech outside of the US reported in the database date back to 2006, but cases have increased in the most recent years. Commercial speech, hence, appears to be increasingly used to oppose tobacco control legislation, in terms of both the number of countries and the number of cases concerned. The

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most important fact that these judgements reveal, however, is that in the vast majority of the cases the restrictions on tobacco advertising have been upheld, and the courts have ruled that the protection of public health overrides any right to freedom of expression of the tobacco companies.

Among the non-US courts, only two courts appear to have invalidated tobacco control regulations on the ground that they would violate freedom of expression: the Supreme Court of Canada,[33] and the High Court of Delhi in India.[34] In both cases, however, the context of the decisions is critical to understanding the ruling. In the case of Canada, the ruling is from 1994, before the FCTC negotiations even took place and consensus on the effectiveness of a comprehensive ban was crystallized. The court held that a complete ban on advertising would be unconstitutional because it was not proportional. Among the reasons it gave, it noted that the Canadian government had not demonstrated that a total ban would be more effective than "a less invasive ban."[35] The court, thus, did not rule that tobacco advertisement could not be lawfully restricted, and did not even rule out the legality of a comprehensive ban, but only held that, in that specific case, there was no evidence supporting it.

In the case of India, understanding the dispute is more complex because it concerns film production, a specific sector where commercial speech is inextricably linked with freedom of speech in creative arts.[36] The dispute was brought by a film director, who challenged a rule that prohibited display of tobacco products in new Indian movies. Interestingly, the court held that the doctrine of commercial speech should be applied only "when a manufacturer places the product in the film for an economic purpose and not a mere exposure of the brand name in a film."[37] Since the rule prohibited *any* display of tobacco products, and not only those that are placed in films for economic purposes, the court found that the rule was in violation of freedom of expression. Although the provision was struck down, hence, the Indian case can be interpreted as recognizing that commercial speech can be lawfully restricted, while a higher threshold is needed for freedom of speech in the context of creative arts.

Overall, the rulings from Canada and India seem both to be the result of the circumstances of the specific cases than rulings affirming a strong stance in favor of protecting commercial speech in the context of tobacco. Therefore, at least as far as the Tobacco Control Laws database allows us to see, the US appears to be an outlier. In the rest of the world, arguments on commercial speech seem to have mostly failed in opposing tobacco advertising restrictions.

This finding, however, should be interpreted carefully. The fact that lawsuits based on commercial speech arguments have been largely unsuccessful outside of the US does not mean that the doctrine does not bear influence. Commercial speech may be working in a prior step, preventing regulations from being adopted at all. The tobacco industry is well-known for using the threat of litigation to dissuade governments from adopting tobacco control measures.[38] The disputes where commercial speech has been invoked, thus, may well represent the proverbial tip of the iceberg.

4. Different Approaches to the Interpretation of Commercial Speech in the Context of Tobacco Advertisement

Another reason why it is important to go beyond a simple analysis of the numbers of successful cases is that even disputes that look favorable (i.e., that have upheld restrictions on tobacco advertising) may have adopted an expansive interpretation of commercial speech that creates a potentially dangerous precedent for future disputes. For this reason, examining how courts have interpreted commercial speech is key to understanding the long-term implications of these judgements.

In this regard, the first thing that should be noted is that, since a claim of violation of the commercial speech doctrine typically requires an assessment of a proportionality or proportionality-like test, courts can apply various degrees of scrutiny in balancing the protection of public health and commercial speech. Depending on the circumstances of the case, US courts have applied three different forms of scrutiny in the tobacco control disputes: a rational basis scrutiny, an intermediate scrutiny, and a strict scrutiny.[39] Although there is some variability in how the tests are employed by different courts, the Supreme Court has usually adopted the looser scrutiny (the rational basis), when the advertising is potentially misleading; the strictest scrutiny when the government mandates a specific form of commercial speech, like in the case of graphic warnings; and the intermediate scrutiny in all the other cases.[40]

While it is hard to fully compare the case-law from the different jurisdictions, it is possible to review the relevant judgements to understand which levels of scrutiny have been applied by the courts outside of the US. Some courts ruled that freedom of expression would guarantee only a very narrow protection to advertising, or could not be applied at all — hence rebuffing the application of the doctrine of commercial speech. For example, in upholding a provincial law prohibiting advertising and sponsorship of tobacco

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products, the Supreme Court of Argentina recognized that a loose scrutiny would apply to a claim of violation of freedom of speech that "does not bear a close relationship with the functioning of the republic and democratic system," but rather merely protects economic interests.[41] Even more vehemently, the Supreme Court of Sri Lanka held that advertising did not fall within the scope of the protected right to freedom of speech because it is not intended "to safeguard the natural right of an organized freedom loving society to impart and acquire information about a matter of common interest."[42]

Other courts recognized that commercial speech could be considered a protected right, but allowed an ample leeway to limit it in the public interest. The Supreme Court of Panama, for example, upheld the measures on tobacco advertising by simply noting that the protection of public health justified a restriction to the freedom of expression. The Court held that "[w]hen the social interest (collective wellbeing) is invoked and pursued, the adoption of a particular decision or act on the part of State authorities is justified."[43] Similarly, the EU Court of Justice held that "human health protection — in an area characterised by the proven harmfulness of tobacco consumption, by the addictive effects of tobacco and by the incidence of serious diseases … — outweighs the interests put forward by the claimants in the main proceedings."[44] In both these cases the courts seem to have applied a loose scrutiny, similar to the rational basis test employed by US courts. The mere existence of a public health interest, in fact, seems sufficient to justify the restriction of the tobacco companies' freedom of expression.

A third category of judgements, very relevant for this article, provided an interpretation of commercial speech specific to tobacco advertising — thus recognizing the exceptional history and characteristic of tobacco products. This was the case of the Supreme Court of Canada and of the Supreme Court of Appeal of South Africa. These courts recognized that the plaintiffs' claims could not be successful because "[w]hen commercial expression is used, as alleged here, for the purposes of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous."[45] The issue, hence, is not that commercial speech cannot be protected, but that it cannot be protected in the case of a harmful and addictive product. Another very interesting judgement is represented by a ruling of the Constitutional Court of Colombia, which examined the double nature of commercial speech: as a protection of economic interest and as a protection of consumers' right to be informed.[46] The Constitutional Court started by engaging in an analysis of the reasons underlying the choice to protect commercial speech. It held that by its nature "commercial advertising" contains two forms of expression: an "informative" one and a "persuasive" one.[47] While the former is protected because it "ties to the protection of consumer rights," the latter "is exclusively an expression of economic freedoms," and for this reason it can be "limited, even quite stringently."[48] Accepting this understanding of commercial speech, the Constitutional Court went on to explain that restrictions on advertisement of "intrinsically hazardous" products like tobacco products do not impinge upon the "informative aspect" of commercial speech, but only its persuasive one — which, as stated above, is only expression of economic freedoms.[49] Accordingly, it found, the plaintiffs' claim could not be accepted as it did not encroach the constitutionally protected form of commercial speech.[50] This ruling represents a strong precedent to oppose possible future claims of violation of freedom of speech by the tobacco industry or similar industries. By holding that commercial speech by tobacco companies does not meet the requirements of constitutionally protected commercial speech, the Constitutional Court of Colombia basically barred any future claims on the constitutionality of restrictions on advertisement of tobacco products. In this view, restrictions on advertising of products like tobacco would be always lawful insofar as those forms of advertising does not serve the purpose of providing meaningful information to consumers.

Overall, the review of the cases above shows that the case-law on commercial speech and tobacco products around the globe is replete with favorable precedents. Although with different approaches, all the judgements examined have rejected the possibility of protecting commercial speech rights of tobacco companies. Not only did these judgements reject claims of violation of commercial speech, but they did so adopting an interpretation of commercial speech (or of how commercial speech protection applies to tobacco products) that would make it harder for future similar cases to be successful.

5. Conclusions

This article has analyzed how the commercial speech doctrine has been used to oppose restrictions on advertising of tobacco products outside the US. First, Section 2 has illustrated how potential violations of commercial speech were used by several delegations to influence the negotiations of the FCTC. This argument was one of the main reasons why the text of Article 13 of the FCTC acknowledged the need of a total ban on tobacco advertisement, promotion and sponsorship, but stopped short from recommending it. Section 3 has continued the inquiry by reviewing how

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commercial speech has been used in litigation. Using the database of Campaign for Tobacco-Free Kids, it has shown that commercial speech has been used to oppose restrictions on tobacco advertising in a number of different jurisdictions, including India, South Africa, Argentina, Canada, Costa Rica, Colombia, the EU, and Sri Lanka. The number of cases in the past few years seems to have increased. Although only very few of these legal challenges have been successful, this article has cautioned against quickly declaring that the commercial speech doctrine has not influenced policy-making. The tobacco industry is known to use threats of litigation to prevent the adoption of tobacco control measures. Thus, commercial speech may have been used as an argument to oppose the very adoption of restrictions on advertising.

Finally, Section 4 has examined how the courts adopt different approaches in assessing the balance between public health and commercial speech rights. US courts have applied different tests for cases of commercial speech and tobacco products, resulting in a mix of looser or more stringent scrutiny according to the circumstances of the case. Conversely, all of the other jurisdictions examined seem to have adopted a favorable precedent. Some courts like the Supreme Court of Argentina and the Supreme Court of Sri Lanka have rejected the notion that commercial speech, generally, could receive a broad protection, or some protection at all. Others, like the Supreme Court of Panama and the EU Court of Justice have recognized that such protection exists but they have allowed for it to be limited when public health is at stake. Arguably, the most interesting rulings have been issued by the Supreme Court of Canada, the Supreme Court of Appeal of South Africa, and the Constitutional Court of Colombia. These courts, in fact, have decided that, although commercial speech is generally protected, it is less so in the specific case of tobacco products, for they are hazardous, harmful, and addictive products.

This analysis reveals that, despite the tobacco industry's attempts to use commercial speech to oppose restrictions on tobacco advertising around the globe, the US remains an outlier in terms of protecting the commercial speech of the tobacco industry. The other judgements examined in this article show that, although with different approaches, other courts tend to reject the idea that commercial speech can receive any protection at all or a strong protection. Not only commercial speech arguments have not been successful so far, but there is also little possibility that possible future disputes opposing restrictions on tobacco advertising on these grounds could be successful. Bearing these considerations in mind, it is fundamental that any policy-makers consider carefully any attempt by the tobacco industry to use commercial speech to hinder the advancement of tobacco control.

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