

Commercial Advertising of Alcohol: Using Law to Challenge Public Health Regulation

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Abstract: In most countries, the alcohol industry enjoys considerable freedom to market its products. Where government regulation is proposed or enacted, the alcohol industry has often deployed legal arguments and used legal forums to challenge regulation. Governments considering marketing regulation must be cognizant of relevant legal constraints and be prepared to defend their policies against industry legal challenges.

1. Introduction

The marketing of alcoholic beverages is pervasive and problematic, yet few countries have adequately responded to this significant public health issue. Using digital media, more channels are available than ever before for the marketing of alcohol. This proliferation of alcohol promotion has occurred at the same time as knowledge has grown about the harms of alcohol consumption and the role that exposure to alcohol marketing plays in the occurrence of such harm, especially amongst young people.¹ Alcohol is commonly among the top 10 risk factors for ill-health or early death.² The level of harm attributable to alcohol approximately doubles when alcohol's harm to others (such as through family violence) is taken into account.³

The marketing of alcohol has become increasingly globalized. According to the market research firm Euromonitor, the top ten transnational alcohol corporations (TNACs) in global alcohol sales revenue sold over one-third (35.5%) of commercial alcoholic beverages in 2019, with the global market being most concentrated for beer (64.5%) and least for wine (13.8%).⁴ With TNACs, an international team, combining cosmopolitan marketing expertise with knowledge of specific target cultures, often manages the promotion of an alcohol brand, in accordance with a global positioning strategy.⁵

In the face of this evidence, the World Health Organization has repeatedly called for controls on alcohol marketing to protect minors and other at-risk

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groups. In 2010, the WHO Global Strategy to Reduce the Harmful Use of Alcohol expressed “serious concern” about the prevalence of alcohol marketing and its impacts on young people.⁶ Restrictions on alcohol marketing have been recognized by the WHO as one of the three most effective interventions for reducing alcohol-related risks.⁷ In May 2022, the WHO member states, meeting as the World Health Assembly, approved an alcohol action plan for 2022–2030 which calls on member states to implement “comprehensive and robust restrictions or bans across multiple types of media.”⁸ The action plan also calls on relevant economic actors, such as alcohol producers, importers, and retailers, to “take concrete steps towards eliminating the marketing and advertising of alcoholic products to minors...”,⁹ while avoiding “the targeting of new consumer groups with alcohol marketing, advertising and promotional activities...”.¹⁰

industry is pursuing its private interests and using law as just one more tool to achieve its commercial goals. In fact, there are instances, where unmeritorious legal arguments and threats of litigation have been made against government regulation, including against the government alcohol warning label scheme in the Yukon Territories.¹³ Such threats can nonetheless be a powerful influence in the policy-making process, potentially making regulators less keen to tackle the public health problem for fear that litigation, with all its attendant costs and difficulties, may ensue.¹⁴ One of the issues is that it is always difficult to know the extent of the use of legal claims to oppose public health regulation. However, where arguments are ventilated in open legal forums, it is possible to gain some greater insight into the industry’s concerns about public health regulation and the way in which industry leverages law to resist regulation.¹⁵

Our analysis reveals that industry has made use of international and domestic law in its arguments, and although rights-based arguments (human rights or constitutional rights) have been prominent, a range of areas of law have been utilised by the industry in its efforts to defeat the making or application of alcohol marketing regulation. Our analysis also shows that legal arguments have been used against particular features of alcohol marketing regulation: restrictions on “truthful” marketing (eg, the price of the product), health claims, no or low alcohol advertising, and “lifestyle” advertising; comprehensive advertising bans; and cross-border marketing regulation.

Acting to reduce the prevalence of alcohol marketing is no small undertaking for governments. It requires regulatory astuteness, given the creativity and resources of the industry in the production of new forms of marketing. It also demands strong political commitment, in the face of certain opposition from the alcohol, media and other interested industries.¹¹ Legal capacity is also essential as it is not uncommon for the industry to use legal arguments and legal forums, including litigation, to oppose public health measures around alcohol that are not to the industry’s liking. This is a strategy which has been used extensively in respect of other public health regulation, including tobacco control.¹² It is, of course, important that governments act lawfully in carrying out their public health functions. However, supervising government exercises of power in the public interest is arguably not the purpose of industry litigation and legal claims against public health policy. Rather,

In this article, we examine case studies from several jurisdictions where the alcohol industry has openly used law to oppose controls on alcohol marketing (Part 5). Our analysis reveals that industry has made use of international and domestic law in its arguments, and although rights-based arguments (human rights or constitutional rights) have been prominent, a range of areas of law have been utilized by the industry in its efforts to defeat the making or application of alcohol marketing regulation. Our analysis also shows that legal arguments have been used against particular features of alcohol marketing regulation: restrictions on “truthful” marketing (eg, the price of the product), health claims, no or low alcohol advertising, and “lifestyle” advertising; comprehensive advertising bans; and cross-border marketing regulation. This article places this analysis in the current context in which alcohol marketing is occurring: the marketing techniques deployed by industry interests (Part 2); the

evidence of marketing's connection to consumption and harm (Part 3); and current regulatory efforts to control alcohol marketing (Part 4). In the conclusion (Part 6), we discuss the implications for future alcohol marketing regulation.

2. Strategies for Marketing Alcohol

WHO's Global Alcohol Strategy defines marketing as "any form of commercial communication or message that is designed to increase, or has the effect of increasing, the recognition, appeal and/or consumption of particular products and services."¹⁶ Traditional alcohol marketing strategies through "paid" media — such as television, radio, cinema, product placement in television and films, and print media — remain prominent and have been well-documented.¹⁷ Sponsorships of sporting, cultural and community enterprises and individuals have long been used as marketing vehicles by the industry, providing a way to create a positive, emotional relationship between the brand and consumers.¹⁸ Packaging and labelling of alcohol products also offer a valuable means to market the product to particular consumer segments, as they are "travel" with the product and are more visible to purchasers and consumers than any other form of marketing.

There has also been widespread uptake of the internet, and later social media, often serving to extend marketing campaigns beyond traditional media or to amplify the effect of such campaigns, for example, with sponsored events being live streamed on the internet. Social media influencer (SMI) and user-generated marketing are intrinsic to digital media.¹⁹ The use of digital technologies has also increased the alcohol industry's capacity to collect, store and analyze data, and has led to increasingly sophisticated and targeted alcohol marketing strategies.²⁰ This process of categorizing and targeting marketing is referred to as "market" or "customer" segmentation and generally involves "segmentation" based on geographic, demographic, psychological and behavioral characteristics of sub-groups of consumers.²¹ Heavy drinkers²² and abstainers²³ (especially women²⁴ in new markets in low- and middle-income countries²⁵) are important targets for personalized alcohol advertising. The prospect of creating these new cohorts of drinkers informs the development of new alcohol products (e.g., low calorie, and no- and low-alcohol beverages), as well as branding and promotional strategies.²⁶

3. The Relationship between Alcohol Marketing, Consumption, and Harm

There is a strong evidence base suggesting that alcohol marketing exposure leads to immediate, short- and medium-term increases in alcohol consumption, particularly among adolescents.²⁷ For instance, Stautz and colleagues conducted a systematic review of studies concerning the impact of alcohol marketing exposure on immediate consumption, finding that viewing alcohol advertisements led to small, but significant, increases in immediate consumption.²⁸ Similarly, longitudinal studies examining the impact of marketing exposure on subsequent alcohol consumption have also reported significant positive associations.²⁹ Most of the research to date has focused on the impact of traditional marketing; however, emerging evidence regarding the impact of digital marketing also provides evidence of a significant positive association.³⁰ Despite evidence of a causal relation between alcohol marketing exposure and consumption, the reported effect sizes are often small.³¹ A recent study examining the effect of a total ban on alcohol marketing implemented in Norway in 1975 found that the ban resulted in a 7.4% reduction in population-level consumption.³²

Concern about alcohol marketing tends to focus on the position of minors, although they are not the only sub-group who are at particular risk from exposure to alcohol marketing. Another such group is heavy and dependent drinkers. A common research finding is that "alcohol-dependent patients report a stronger urge to drink alcohol when confronted with alcohol-related cues,"³³ such as alcohol marketing. Furthermore, the recent targeting of alcohol marketing to LMICs to build new markets raises concerns for health equity now and in the future. These countries currently have low prevalence of alcohol consumption and high abstention rates, but they also experience greater "harm per liter of alcohol" than high income countries.³⁴ Increased consumption resulting from increased exposure to alcohol marketing has the potential to escalate the harms already being disproportionately experienced in LMIC countries.³⁵

4. Regulating Alcohol Marketing in the Public Interest

Many governments have controls on alcohol marketing, with the focus on the minimization of minors' exposure to alcohol industry marketing.³⁶ However, where national or subnational regulation exists, it is generally not very strong. Responses from 156 national reference points to the WHO's inquiry concerning the level of statutory regulation of alcohol marketing in 2016 found that, in half of the responses, the national

level of regulation was slight (15%) or less than that (35%). The level of regulation was classified as “very” or “most” restrictive in just 24% of the national responses. In almost half the countries, there was no restriction at all on internet or social media marketing of beer.³⁷ A study of policies to reduce risk factors for non-communicable diseases in 151 countries found that restrictions on marketing for alcohol were among the weakest compared to restrictions for other NCD risk factors.³⁸

The strong preference of industry interests, of course, is for industry self-regulation, particularly if it can take the place of an independent government regulator. Industry self-regulation of alcohol marketing is common at the international and domestic levels, despite its demonstrated ineffectiveness.³⁹ At the international level, the International Alliance for Responsible Drinking (IARD), with a primary membership of 12 TNACs, promotes commitments on such topics as limiting accessibility of marketing communications to children and promotion of “responsible drinking” messages.⁴⁰ At the national level, there may be self-regulation of marketing, operated by the industry or by other commercial interests, notably broadcasting companies. Or in many jurisdictions, there is a system of co-regulation, with both a government agency and representatives of the industry involved, although the former often plays a subsidiary role.⁴¹

Complete bans on alcohol advertising, other than in Muslim-majority countries where the sale of alcohol is also banned, have not been common. Lithuania and Norway are notable examples of complete bans. More often, there have been bans in a particular medium — for instance, television in France. Or there have been bans directed to particular marketing content (such as advertising appealing to children)⁴² or to particular times (such as bans on alcohol advertising on television until after 9.30pm) or places (such as bans on advertising on billboards near schools) at which marketing might appear. But such partial bans mean that the advertising budget for an alcohol brand is still intact and can simply be used in another medium or a different place or time. So, the effects of partial bans on alcohol consumption levels have tended to be minor,⁴³ as marketing shifts to the unregulated or under-regulated media.

5. Legal Strategies to Challenge Regulation of Alcohol Marketing

In this Part, we examine some examples of law being deployed against governments that have proposed to tighten their regulation of alcohol marketing or have enacted and applied regulation to alcohol advertising.

We take case studies from the European Union, Lithuania, South Africa, Thailand, and the United States. These case studies are not exhaustive, but they demonstrate some of the major points of tension in alcohol marketing regulation. As would be expected, the industry opposes comprehensive bans on alcohol marketing, but it also resists bans on “truthful” marketing (such as about pricing), bans on health claims and no- and low-alcohol advertising, and bans on “lifestyle” advertising. Cross-border marketing regulation has also been a particularly vexing issue for the EU. These case studies reveal the capacity of the industry to source legal advice and representation to craft legal arguments, using a range of areas of law at the domestic and international levels, and to launch legal action to protect their interests.

A. Restrictions on “Truthful” Alcohol Advertising — United States

A complete prohibition on alcohol marketing means that consumers cannot be provided with any information about the product, except by way of the product itself and at point of sale. This form of regulation of alcohol marketing raises questions about whether at least “truthful” advertising should be allowed, such as information about the product name, type, volume, alcohol content, price, and source/country of origin. On the one hand, this information enables consumers to make informed choices about different products, but there is also an argument that this information drives harmful alcohol consumption. The banning of such information might further public health goals but sits uneasily in many legal systems where the control of consumer information is directed to protecting “rational” consumers and only ensuring they are not misled or deceived in their purchasing decisions.

This issue has been litigated in the US. A ban on price was implemented by the Rhode Island authorities, and was subject to a constitutional challenge by the offending liquor store, 44 Liquormart. In the case of *Liquormart Inc v. Rhode Island* in 1996 (“44 Liquormart”),⁴⁴ the US Supreme Court found that a price ban infringed the First Amendment to the US Constitution which prohibits Congress from “abridging the freedom of speech”. First Amendment protection had been extended to commercial speech in 1976 in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.⁴⁵ In the 44 Liquormart case, a liquor store had advertised alcohol, cigarettes, snacks and mixers. Specific prices were listed for all of the products, except the alcohol brands, which had the word “WOW” next to each of them. The regulator had fined 44 Liquormart \$400.00 for breaching the

ban on showing the price of alcohol products in its advertising.

In finding the ban to be unconstitutional, the US Supreme Court applied a more exacting standard of review — “intermediate scrutiny” — to the government’s ban than it would to other forms of speech,⁴⁶ because the speech in question was “truthful” speech (ie, price information). The Supreme Court found against the ban on two bases:⁴⁷ (1) because the government did not provide sufficient evidence that the suppression of pricing information would reduce consumption;⁴⁸ and (2) there were a range of regulatory options besides a ban on speech that could have achieved the government’s “temperance” goal but would have been less interfering with commercial speech, including setting taxes, limiting purchase amounts and education campaigns.

B. Restrictions on Health Claims — European Union

Related to the issue of “truthful” marketing is the use of health claims in alcohol advertising. Often these health claims appear on the product label and are repeated in the product marketing across multiple media. Information about the sugar, carbohydrate, caloric, gluten, animal content of a product is potentially useful to the consumer in their decision-making about whether to purchase or consume a particular brand. As with “truthful” marketing, health claims also raise a tension between the provision of accurate, useful information to consumers⁴⁹ and the way in which this information might nonetheless drive consumption and harm. Most regulators resolve this tension by opting to stringently control the use of health claims in relation to alcohol, either prohibiting their use entirely or limiting the health claims which can be made (eg, allowing energy, carbohydrate and gluten claims only).⁵⁰

Such a health claim was in issue in the *Deutes Weintor* case before the Court of Justice of the European Union (CJEU) in 2012. In that case, a wine label stated that the product was “easily digestible” followed by a statement about acidity levels. The relevant government authority in Rhineland-Palatinate claimed that this was a health claim, which are prohibited for alcohol products above 1.2% alcohol content under the relevant EU regulation.⁵¹ The government authority’s claim was contested by *Deutes Weintor eG* (the wine-growers’ cooperative) and questions were referred to the CJEU about the interpretation and application of the regulation.

The CJEU found that the information that the wine was “easily digestible,” followed by a statement about acidity levels, amounted to a “health claim” because it

“implies the absence or reduction of effects that are adverse or harmful to health and which would otherwise accompany or follow such consumption.”⁵² The prohibition on such health claims were also found to be compatible with the fundamental rights found in the Lisbon Treaty of 2009 and the European Charter of Fundamental Rights, in particular the high level of protection given to human health in the EU Charter. The CJEU emphasized the “risks of addiction and abuse as well as the complex harmful effects known to be linked to the consumption of alcohol.”⁵³ The freedom to choose an occupation and the freedom to conduct a business were found to be restricted by the prohibition on health claims, but the restrictions were directed to achieving the health objective and were not a disproportionate interference with those rights. The CJEU also found that those rights were maintained by the fact that alcohol was still able to be produced and marketed through other means.

C. Restrictions on “Lifestyle” Advertising — Thailand

Many jurisdictions have restrictions on “lifestyle” advertising. “Lifestyle” advertising is where the producer uses words, images, and other strong aesthetic design features to make connections between the product and consumers’ ideas about their actual (or more often, desired) lifestyle.⁵⁴ The use of imagery of attractive people enjoying positive occasions involving alcohol are common forms of lifestyle marketing. Popular actors, sports people and other celebrities often feature in lifestyle advertising. Lifestyle advertising can operate in a subtle manner and speak to consumers’ unconscious or unarticulated desires about the “good life.” Most jurisdictions regulate lifestyle advertising in some manner, often through prohibitions on alcohol being marketed in connection with high-risk activities such as driving or watersports, and on claims that the consumption of alcohol brings about social, sexual, financial, professional or sporting success.⁵⁵ The industry is often able to creatively navigate its way around such restrictions on “lifestyle” advertising, but will strongly resist any attempts to completely disable its use of this highly effective form of marketing.⁵⁶

Such industry opposition was seen in respect of Thailand’s 2015 ban on certain forms of “lifestyle” marketing on the product label. The ban has a broad ambit and includes prohibitions on label promotions that use pictures of athletes, singers, movie stars or actors; that use cartoons; or that link alcohol and activities such as music, sports, contests or recreation. The ban aroused considerable opposition in the World Trade Organization Committee on Technical Barriers to Trade (TBT Committee).⁵⁷ In the Committee, member states repeatedly argued that the Thai law infringed

various WTO rules, including intellectual property protections and rules prohibiting unnecessary barriers to international trade.⁵⁸ The Thai ban has not been subject to formal dispute settlement in the WTO, and Thailand has managed to resist demands in the TBT Committee for the law to be repealed. However, the pressure brought to bear in the WTO TBT Committee has resulted in some softening of the interpretation and application of the law by Thailand.⁵⁹

D. Comprehensive Bans — South Africa

As discussed above, comprehensive bans on alcohol marketing are relatively uncommon. However, in 2013, South Africa released a new proposal for the regulation of alcohol marketing, which if it had passed, would have been one of the most comprehensive bans on alcohol marketing in the world. South Africa proposed the banning of all alcohol marketing (except for price information at point of sale), alcohol sponsorships and all gifts, competitions and associated strategies used by alcohol companies.⁶⁰ The law has never been passed. It seems that the industry lobbied extensively against the proposal,⁶¹ including arguing that the regulations would breach human rights by impairing rights to free expression for producers and consumers, to engage in trade and commerce, and to be treated with dignity.⁶² Although international human rights law does not recognize corporations or non-natural persons to be rights-holders, the Constitution of South Africa includes a bill of rights which is extended to non-natural persons. South Africa's bill of rights has been used in the past to argue (unsuccessfully) against a ban on tobacco advertising of a similar scope to South Africa's proposed ban on alcohol advertising.⁶³

In respect of the claim about freedom of expression, Bertscher, London and Röhrs argue that, drawing on the jurisprudence relating to the right as found in Article 19 of the *International Covenant on Civil and Political Rights*,⁶⁴ the proposed South African alcohol advertising law would not have violated human rights law standards. The right to free expression is clearly engaged by restrictions on alcohol marketing, which limit both a producer's right to convey information to consumers and a consumer's right to receive information about the product. However, under both international law and the South African Constitution, rights may be limited as provided by law and as necessary for a circumscribed set of purposes, such as the protection of national security or of public order (*ordre public*), or of public health or morals.⁶⁵ A strict necessity and proportionality test is applied to restrictions on the right to free expression, meaning that laws which affect free speech must be tightly drafted and must represent the least restrictive means of achieving the goal in ques-

tion,⁶⁶ including where the law in question is enacted in pursuit of the realization of another human right, such as the right to health in the case of alcohol marketing.⁶⁷ As with the analysis in the US constitutional context (see above Part 5a), the compatibility of alcohol marketing restrictions with human rights will turn on (i) the extent of the contribution that the marketing restrictions make to fulfilment of the public health goal of reducing alcohol-related consumption; and (ii) the availability of any less restrictive measures. Compared to tobacco,⁶⁸ these two issues may be more difficult, but not impossible, for a government to argue in respect of alcohol, given that there is not the strongest evidence of the impacts of marketing restrictions on consumption (see above Part 4) and given that many jurisdictions have not introduced other interventions to reduce alcohol consumption.

E. Restrictions on Advertising Non-Alcoholic Beverages — Lithuania

An issue which has recently emerged is whether restrictions on alcohol marketing should apply to the marketing of non-alcoholic beverages. As discussed above, there has been a proliferation of no and low alcohol beverages into many markets. "Surrogate marketing" is common with respect to no- and low-alcohol beverages — they are generally packaged and labelled in the same livery as the alcoholic version of the product, and the marketing often adopts the same designs, colors, symbols for both products.⁶⁹ It has been argued that the packaging, labelling and marketing of non-alcoholic beverages in the same manner as alcoholic beverages serves to indirectly advertise the company's alcoholic products, with companies using the non-alcoholic beverages to evade restrictions which apply to the marketing of alcoholic beverages.⁷⁰ However, there is still work to be done to fully understand how consumers perceive and use no and low-alcohol products.⁷¹

The issue of how to regulate no-alcohol products has been agitated in Lithuania in two recent cases. The issue arises in the context of Lithuania having banned alcohol advertising since 2018.⁷² In 2021, the Supreme Administrative Court of Lithuania upheld a decision of the Department of Drug, Tobacco and Alcohol Control that Vilnius Degtine had breached the ban on alcohol advertising by the company's marketing of its product, "epkeli" non-alcoholic cranberry soft drink. The breach arose from the company's actions in placing a product on the market with a trademark and design which was essentially identical to those used for its alcoholic bitters, and by including that trademark and design in advertising on billboards and on internet sites.⁷³

However, in January 2022, the court seemed to change its position on no-alcohol marketing. The Supreme Administrative Court of Lithuania quashed a finding of the Department of Drug, Tobacco and Alcohol Control that the company, Švyturys-Utenos alus, had breached the prohibition on alcohol advertising through the company's promotion of its non-alcoholic beers, Utenos and Kronenbourg 1664.⁷⁴ The appearance of the non-alcoholic beers was essentially identical to that of the company's alcoholic beers, with the only difference being the inclusion of the words "non-alcoholic" on the label in several places. The Supreme Court rejected the argument that the advertising of the non-alcoholic beer intended to, or did, in fact, promote the alcoholic beer. The court placed emphasis on the absence of any evidence that consumers associate or confuse non-alcoholic beverages with alcoholic beverages. There was considerable concern expressed by the court about overreach in the interpretation of the alcohol advertising prohibition, in a situation where no laws have been expressly enacted to control branding and marketing of non-alcoholic products.

F. Cross-Border Alcohol Marketing – European Union (Sweden)

The regulation of cross-border marketing (ie, marketing that is created or published in one country and that reaches audiences in another country) can be legally complex and these complexities have, on occasion, been exploited by the alcohol industry. Particular difficulties with regulating cross-border alcohol marketing have arisen in the EU context, with the application of the EU internal market law and the state of establishment principle.⁷⁵

Sweden has encountered problems at times with both legal requirements,⁷⁶ as it has attempted for many years to place extensive restrictions on alcohol marketing.⁷⁷ In 2001, its ban on alcohol advertising in periodicals was found to "have a potential and indirect influence upon the free movement of goods and/or services"⁷⁸ and was therefore caught by the Treaty for the Functioning of the European Union and required justification.⁷⁹ The question of whether the ban was justified on public health grounds was decided by the Swedish courts which found that the ban was disproportionate and therefore unjustified.⁸⁰

More recently, Sweden's regulation of alcohol marketing on television has fallen foul of the state of establishment principle because of the existence of the EU's Audiovisual Media Services Directive ("the Directive") which sets basic standards for the regulation of alcohol marketing in audiovisual media in the EU.⁸¹ Members are obliged to ensure "freedom of reception and shall

not restrict retransmissions on their territory of audiovisual media services" from other EU members "for reasons which fall within the scope of [the] Directive" (Art 3.1). The state of establishment rule prevented Sweden from applying its stricter rules on alcohol marketing to two broadcasters who had established themselves in the United Kingdom, starting in 1987, and who broadcast in Swedish to Sweden in a manner that was inconsistent with Sweden's alcohol advertising rules. Sweden notified the European Commission to take measures against the two broadcasters under Swedish law. In 2018, the European Commission ruled that Sweden "could not derogate from the State of Establishment principle and rejected the claim that the broadcasters had established themselves in the United Kingdom in order to circumvent the stricter Swedish alcohol advertising rules."⁸² However, when the UK left the EU in 2020, the two broadcasters returned to Sweden and again became subject to the Swedish restrictions on alcohol advertising on TV.⁸³

6. Conclusion

The alcohol industry is very resistant to increased regulation of its commercial activities and prefers that interventions to address harms from alcohol focus on the duty of individuals to "drink responsibly." The industry has made some use of legal arguments and litigation to stymie new policy proposals for alcohol marketing regulation and to limit the impacts of regulation where it exists. As our study of several jurisdictions demonstrates, some of these attempts have been successful and some have not. However, the alcohol industry is certain to continue to explore ways in which to use law to protect its interests, especially if the current momentum for alcohol policy reform at the global level flows down to regional and national contexts.⁸⁴ This likelihood points to the need for governments to carefully evaluate the legality of policy measures that they are considering and pursue measures which have a sound basis in law. At the same time, governments need to be cognisant that even legally sound measures may be subject to legal challenge as part of industry's strategy to derail new policies. This may occur where there is genuine disagreement about the legality of the measure or where the legal claim by the industry is thin. In both scenarios, governments need to resource themselves with excellent legal advice to defend such challenges. The case studies in this article also show that a further critical requirement is a solid evidence base to be able to demonstrate the problem being addressed and the capacity of the contested measure to contribute to ameliorating the problem. Finally, even with all of these material resources at its disposal, governments need to steel themselves and

support each other against attacks on public health by the alcohol industry.

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35. See Global Strategy, *supra* note 6, section 30.
36. Some of the options for regulation are discussed in Esser and Jernigan, *supra* note 25.
37. See Global Status Report, *supra* note 34, at 106–107.
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40. International Alliance for Responsible Drinking, *Digital Guiding Principles: Self-Regulation of Marketing Communications for Beverage Alcohol* (2014), available at <<https://www.iard.org/IARD/media/Documents/Digital-Guiding-Principles-FINAL-2014.pdf>> (last viewed May 10, 2022).
41. For example, in Australia, there is ABAC Scheme Limited see *ABAC Code*, ABAC Website, available at <<https://www.abac.org.au/about/thecode/>> (last visited May 10, 2022); in the UK, there are the codes and rules created by the Portman Group see *Codes of Practice*, Portman Group Website, available at <<https://www.portmangroup.org.uk/codes-of-practice/>> (last visited May 10, 2022) and *Rules*, Portman Group Website, available at <<https://www.portmangroup.org.uk/rules/>> (last visited May 10, 2022); and in the US, there is the Beer Institute Code see *Advertising & Marketing Code*, Beer Institute Website, available at <<https://www.beerinstitute.org/responsibility/advertising-marketing-code/>> (last visited May 10, 2022).
42. S. Pettigrew et al., "The Extent and Nature of Alcohol Advertising on Australian Television," *Drug and Alcohol Review* 31, no. 6 (2012): 797–802.
43. See Saffer, *supra* note 31.
44. *44 Liquormart, Inc v Rhode Island*, 517 US 484 (1996). See discussion in William D. O'Neill, "Governmental Restrictions in Beverage Alcohol Advertising after *44 Liquormart v. Rhode Island*," *Saint Louis University Law Journal* 42, no. 1 (Winter 1998): 267–300. In another case, a ban on advertising of the alcohol content of distilled spirits was also found to be unconstitutional: see *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995).
45. *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).
46. F. Schauer, "Free Speech and Commercial Advertising" in A. Stone and F. Schauer, eds., *The Oxford Handbook of Freedom of Speech* (Oxford: Oxford University Press, 2021): 444–454.
47. The Court applied the four-prong test from *Central Hudson Gas & Electric Corp v. Public Service Commission*, 447 U.S. 557 (1980).
48. O'Neill, *supra* note 44, 290.
49. Tuomas Mylly, "CJEU Approves Ban on Health Claims Related to Alcoholic Beverages," *European Journal of Risk Regulation* 4, no. 2 (2013) 271–4, 272.
50. See, in the Australian context: *Australian New Zealand Food Standards Code – Standard 1.2.7 – Nutrition, Health and Related Claims* (Cth) s 1.2.7–4(c)(i); *Australian New Zealand Food Standards Code – Schedule 4 – Nutrition, Health and Related S4-3*.
51. *Regulation (EC) No 1924/2006 of the European Council and of the Parliament on 20 December 2006*.
52. Mylly, *supra* note 49, at 272.
53. *Id.*, at 273.
54. See R. W. Belk and R. W. Pollay, "Images of Ourselves: The Good Life in Twentieth Century Advertising," *Journal of Consumer Research* 11, issue 4 (March 1985): 887–897.
55. Portman Group, *Rules*, *supra* note 41, rules 3.2(d), (e) and (f).
56. See also A. Alemanno, "The HOB-vin Judgment: A Failed Attempt to Standardise the Visual Imagery, Packaging and Appeal to Alcohol Products," *European Journal of Risk Regulation* 4, no. 1 (2013): 101–112.
57. A.D. Mitchell and P. O'Brien, "If One Thai Bottle Should Accidentally Fall: Bottle: Health Information, Alcohol Labelling and International Investment Law," *Journal of World Trade and Investment* 20 (2020): 674–97.
58. See P. O'Brien and A.D. Mitchell, "On the Bottle: Health Information, Alcohol Labelling and the WTO Technical Barriers to Trade Committee," *Queensland University of Technology* 18 (2018): 124–155.
59. See Mitchell and O'Brien, *supra* note 57.
60. A. Bertscher, L. London, and S. Röhrs, "A Human Rights Analysis of South Africa's Control of Marketing of Alcoholic

- Beverages Bill," *International Journal on Human Rights and Business* 4 (Jan-Dec 2020): 1-27.
61. A. Bertscher, L. London, and M. Orgill, "Unpacking Policy Formulation and Industry Influence: The Case of the Draft Control of Marketing of Alcoholic Beverages Bill in South Africa," *Health Policy and Planning* 33 (2018): 786-800.
 62. Bertscher, London, and Röhrs, *supra* note 60, at 3
 63. *British American Tobacco South Africa (Pty) Ltd v Minister of Health* (463/2011) [2012] ZASCA 107; [2012] 3 All SA 593 (SCA) (20 June 2012).
 64. International Covenant on Civil and Political Rights, art. 19, *opened for signature* December 16, 1966, 993 U.N.T.S. 171 (entered into force March 23, 1976). [hereinafter cited as ICCPR].
 65. *Id.*
 66. F. La Rue, *Report of The Special Rapporteur on the Promotion and Protection of The Right to Freedom of Opinion and Expression*, U.N. Doc. A/HRC/17/27/Add (May 27, 2011); M. Hamilton, "Freedom of Speech in International Law," in A. Stone and F. Schauer, eds., *The Oxford Handbook of Freedom of Speech* (Oxford: Oxford University Press, 2021): 193-212.
 67. A right to health is central to international human rights law and found in all of the major human rights treaties, including Article 12 of the International Covenant on Economic, Social and Cultural Rights, art. 12, *opened for signature* December 16, 1986, 983 U.N.T.S. 3 (entered into force January 3, 1986); Convention on the Elimination of All Forms of Racial Discrimination, art. 5(iv)(e), *opened for signature* March 7, 1966, 660 U.N.T.S. 195 (entered into force January 4, 1969); Convention on the Elimination of All Forms of Discrimination Against Women, art. 12, *opened for signature* December 18, 1979, 1249 U.N.T.S. 13 (entered into force September 3, 1981); Convention on the Rights of the Child, art. 24, *opened for signature* November 20, 1989, 1577 U.N.T.S. 3 (entered into force September 2, 1990) [hereinafter cited as CRC]; Convention on the Rights of Persons with Disabilities, arts. 25-26, *opened for signature* March 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008); Convention on the Protection of All Migrant Workers and Their Families, art. 28, *opened for signature* December 18, 1990, 2220 U.N.T.S. 93 (entered into force July 1, 2003). It is also part of the WHO Constitution. See World Health Organization, *Constitution of the World Health Organization* (October, 2006) *available at* <https://www.who.int/governance/eb/who_constitution_en.pdf> (last visited May 10, 2022).
 68. See O. A. Cabrera and L.O. Gostin, "Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems," *International Journal of Law in Context* 7 (2011): 285-303.
 69. M. Miller, S. Pettigrew, C.J. Wright, "Zero alcohol Beverages: Harm minimisation Tool or Gateway Drink?" *Drug and Alcohol Review* (2021) (early view) doi:10.1111/dar.13359.
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 72. *The Law on Alcohol Control No I-857 (Lithuania)*, Lietuvos Respublikos Seimas website, *available at* <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.17752>> (last visited May 10, 2022), art 29. Alcohol marketing is defined in art 2(10) "information which is disseminated in any form and through any means and which is connected with commercial, economic and financial activities of undertakings and promotes the acquisition or consumption of alcohol products." See also J. Rehm et al., "Classifying Alcohol Control Policies with Respect to Expected Changes in Consumption and Alcohol-Attributable Harm: The Example of Lithuania, 2000-2019." *International Journal of Environmental Research and Public Health* 18, issue 5 (2021): 2419-2432.
 73. *Department of Drug, Tobacco and Alcohol Control v AB Vilniaus Degtine (Supreme Administrative Court of Lithuania, 2 June 2021)*, Liteko website, *available at* <<https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=ab7f9273-6ce3-490e-ab86-ce5e6ad41051>> (last visited May 10, 2022).
 74. *Department of Drug, Tobacco and Alcohol Control v UAB Švyturys - Utenos alus (Supreme Administrative Court of Lithuania, 28 January 2022)*, Liteko website, *available at* <<https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=f7dbfe5d-f64e-452c-a212-8f4d64fa12da>> (last visited May 10, 2022). See summary of the cases: "Advertising of Non-alcoholic Beer Does Not Violate the Alcohol Control Law in Lithuania", Ellex website, *available at* <<https://ellex.legal/project/advertising-of-non-alcoholic-beer-does-not-violate-the-alcohol-control-law-in-lithuania>> (last visited May 10, 2022).
 75. See, for example, *Bacardi-Martini SAS v Television Française 1 SA (TF1) (C-429/02) [2004] ECR I-6613, [2004] 3 C.M.L.R. 2.*
 76. Note in 2021, the Swedish Supreme Court did uphold the conviction of a company for its alcohol advertising, rejecting the company's arguments that the Swedish advertising ban was in breach of EU market access requirements: see *Two Whiskey Ads are Banned*, Högsta Domstolen website, *available at* <<https://www.domstol.se/hogsta-domstolen/nyheter/2021/12/tva-whiskyannonser-forbjuds/>> (last visited May 10, 2022).
 77. *Alcohol Act (Sweden)*, Sveriges Riksdag website, *available at* <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/alkohollag-19941738_sfs-1994-1738> (last visited May 10, 2022).
 78. *Case C-405/98 Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*, Judgment of the Court (Sixth Chamber) of 8 March 2001. O. Bartlett and A. Garde, "The EU's Failure to Support Member States in their Implementation of the WHO Recommendations: How to Ignore the Elephant in the Room," *European Journal of Risk Regulation* 8, no. 2 (2017): 251-269, at 262.
 79. Bartlett and Garde, *supra* note 78.
 80. O. Bartlett, "Under the Influence? The Alcohol Industry's Involvement in the Implementation of Advertising Bans," *European Journal of Risk Regulation* 4, no. 3 (2013): 383-388.
 81. Audiovisual Media Services Directive (European Union) 2010/13, OJ 2010 L 95/1, as amended by Directive 2018/1808, OJ 2018 L 303/69. These rules have been subject to extensive criticism in respect of alcohol: O. Bartlett and A. Garde A, "Time to Seize the (Red) Bull by the Horns: The EU's Failure to Protect Children from Alcohol and Unhealthy Food Marketing," *European Law Review* 38, no. 4 (2013): 498-520; Bartlett and Garde, *supra* note 78.
 82. A. Garde, "Harmful Commercial Marketing and Children's Rights: For a Better Use of EU Powers," *European Journal of Risk Regulation* 11, issue 4 (2020): 841-850.
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 84. World Health Organization, *supra* note 8.