

# FACT SHEET

## Legal possibilities of a comprehensive alcohol advertising ban in Europe

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### Introduction

One of the policy measures within an effective and comprehensive alcohol policy is the restriction of the volume of alcohol advertising. The volume of exposure to alcohol marketing practices affects the drinking behaviour. Youngsters who are more frequently exposed to alcohol marketing will start drinking alcohol earlier, drink more frequently, and will drink more units of alcohol during one occasion (Smith & Foxcroft, 2009; Anderson et al, 2009). Voluntary rules by the industry (self-regulation) are generally ineffective in protecting young people against harmful effects of exposure to alcohol advertising (de Bruijn et al 2010, Vendrame & Pinsky 2010; Babor et al 2010), which underlines the need for legal restrictions of alcohol advertising. Econometric studies by Saffer and colleagues (Saffer 1991; Saffer 2002; Saffer & Dave 2006) suggest that overall bans of alcohol marketing can be successful in decreasing the total alcohol consumption among adolescents. In accordance with this, in its European Action Plan (2011) the WHO recommends a total ban on alcohol advertising in Europe. The following factsheet describes the competence of the European Union to adopt a pan-European alcohol advertising ban and its legal possibilities.

### Possibilities of alcohol advertising bans in Member States

It has been shown in Norway, Sweden, and France that a national ban on alcohol advertising is not necessarily in conflict with EU law. Norway has a complete ban on alcohol advertising, which was upheld after several decisions in court in previous years (de Bruijn & Roseth 2009). In 2009, the Court of Oslo argued that advertisement bans make it extremely difficult for producers to get their product or brand name in front of consumers (de Bruijn & Roseth 2009). Consequently, products and brands that were available before the introduction of new or foreign products get a virtually monopolistic position in the minds of the consumers because they reach back to existing buying and drinking habits. However, the Court also noted that a ban on alcohol advertisements as seen in Norway is

still justified if it is suitable and necessary to uphold the state's alcohol policy.

The total ban on alcohol marketing in Norway shows that not only the prohibition of direct but also of indirect marketing does not necessarily violate EU legislation (Grill case 2011).

Existing alcohol marketing restrictions in Norway, Sweden and France show that national alcohol advertising bans do not necessarily violate EU law.

However, the Swedish case shows that it is not always easy for governments to uphold a complete ban on advertising. The European Court of Justice affirmed to leave it to the national courts to determine whether the advertising ban was suitable and necessary (C-405/98). Ultimately, the Swedish Market Court spoke against the ban, and new legislation was passed allowing print advertising for products over 16% alcohol volume (Baumberg & Anderson 2008).

The advertising restriction in France also shows that alcohol advertising bans on some marketing channels (e.g. television and sport sponsorship) can be upheld before the European Court. The alcohol industry has challenged but failed to suppress the legal foundation of the Loi Evin (Johansen 2009). In 2004, Bacardi took Loi Evin to the European Court - and lost (Johansen 2009; C-262/02 & C-429/02). In this instance, the General Advocate considered that the protection of consumers' health should prevail over the freedom of the provision of services, and that the legislation is appropriate to achieve the objective (Europanytt 2004).

Generally speaking, it is likely that in most European countries a comprehensive alcohol advertising ban at a national level is legally possible, and helps to protect minors and to prevent harmful alcohol use. This complies with fundamental EU rights, provided that sufficient communication channels for advertising (with content restrictions) are kept open.

### ***EU competence to create a comprehensive advertising ban***

The next step is to come to a pan-European advertising ban. The European Union's main competences are in creating a single European market. With respect to enacting legislation in the field of public health, the EU has "limited powers" in making policy. The European restrictions on advertising tobacco, gambling, and prescriptive drugs show that there are possibilities for the EU to protect its citizens by adopting extensive advertising bans. A comprehensive European alcohol advertising ban can be justified for health reasons, or on economic grounds.

### ***Justification of an advertising ban on grounds of protecting public health***

The EC Treaty (2006) article 28 stipulates that "Quantitative import restrictions and all measures with equivalent effect shall be prohibited", 'equivalent to quantitative restrictions'. Following this, it can be stated that when introducing a European alcohol advertising ban, and therefore implementing a measure that might be considered to be trade constrictive, there is the need for a justification. Moreover, even if the policy measure is considered to be trade-distorting, the instrument can be justified if it is "proportionate" and "appropriate" (Baumberg & Anderson 2008).

Since there is a clear link between exposure to alcohol advertising and youth drinking behaviour (Anderson et al 2009; Smith & Foxcroft 2009), an important argument in favour of a ban is the protection of public health. Article 30 of the EC Treaty states that 'the provisions of Articles 28. . . shall not preclude prohibitions or restrictions . . . justified on grounds of . . . the protection of health and life of humans'.

When justifying an advertising ban as proportionate, the legislator has to examine and assess the possibility of less restrictive, cheaper and equally efficient alternatives for a comprehensive advertising ban (Zöckler 2010). Alternatives such as informative educational campaigns and providing consumer information about the dangers of alcohol are policy measures often mentioned by the alcohol industry (Zöckler 2010). However, scientific studies (e.g. Babor et al 2010) suggest these measures are ineffective. The Federal Constitutional Court in Germany is clear about this point; it considers it contradictory when first attractive forms of advertising are allowed, and afterwards the interest that is generated by

advertising the product or brand is limited (Zöckler 2010).

When the introduction of a ban on alcohol advertising is considered to be "proportionate", it is important for legislators to assess whether a comprehensive ban is appropriate, or whether there are alcohol marketing regulations available that are less restrictive but equally effective. Legislators need to consider whether content restrictions or partial volume bans can be good alternative measures. Key issue is the need for the scope of the ban on the advertising: can exceptions be approved by the advertising ban without compromising the effectiveness of the overall concept of youth and health protection? What about, for example, allowing alcohol advertisements that are not "targeting" youngsters, but still reach youngsters and are often attractive to

Pan-European advertising bans are not new: the EU already introduced extensive advertising restrictions on advertising tobacco, gambling and prescriptive drugs.

both adults and young people (STAP 2011)? In practice, boundaries between approved and disapproved content of alcohol advertisements within content restrictions are often questionable (Bruijn et al 2010). When exceptions are allowed to the prohibition of advertising (as with tobacco advertising in Europe), the effectiveness of the restriction might be in jeopardy (Zöckler 2010, EC 2008). When traditional brand advertising and direct sponsorship of a cross-border nature are prohibited, but other types of marketing are allowed, an intensification of local merchandising and marketing at points of sale can be expected (EC 2008). All obstacles mentioned above suggest that a comprehensive ban is the most effective way to protect youth against the harmful effects of exposure to alcohol advertising.

### ***Justification of an advertising ban on economic grounds***

When considering an alcohol advertising ban, not only arguments based on the protection of health can be taken into account. By harmonizing existing alcohol marketing regulations in Europe, a total ban on alcohol advertising can be enforced by the European Union. According to article 95 of the EC Treaty, the EU has the competence to harmonize legislation for the implementation

on the internal market (goods, services), and for cross-border radio, television and audio-visual media as referred to in article 57, paragraph 2, article 66 of the EC Treaty (Zöckler 2010).

The harmonization of Member States' legislation was used as an argument for introducing an EU directive on Tobacco Advertising (Alegre 2003). Before 2001, Member States had implemented a large variety of tobacco advertising restrictions, similar to the large variety of alcohol advertising regulations that are currently in place in Europe. The European Union adopted the ban on tobacco advertising as a harmonizing measure in the internal market created by the cross-border characteristics of television broadcasting (Alegre 2003). Its validity has not yet been questioned. Presumably, the Television Without Frontiers Directive contributed to eliminating distortions in competition in tobacco advertising on television (Alegre 2003). Unregulated types of tobacco marketing such as the cross-border features of radio broadcasting and the Internet may lead to distortions of tobacco advertising competition. Alegre (2003) states that the European Court of Justice is likely to find that further EU regulations of these types of advertising actually contributes to eliminating these distortions for the same reasons that the Television Without Frontiers Directive eliminates distortions in tobacco advertising on television. For this reason, prohibiting these kinds of marketing channels for harmful substances may justify prohibition at the European level as well.

Even when considered to be trade-distorting, a European advertising ban can be justified on health grounds when the policy instrument proposed is seen as "proportionate" and "appropriate". Alternatively, a European advertising ban can be justified on economic grounds.

### Conclusion

Restricting the volume of alcohol advertising is one aspect of a comprehensive evidence-based alcohol policy to combat alcohol-related harm (Babor et al 2010). Extensive alcohol advertising restrictions are already in place in some European countries (e.g. France, Norway and Sweden). A pan-European alcohol advertising ban is the next

step in limiting the large volume of alcohol advertising in Europe, and is recommended by the World Health Organization (WHO 2011). Existing European restrictions on advertising tobacco, gambling, and prescriptive drugs show that the EU is competent to protect its citizens by adopting extensive advertising bans. Such a ban, even when considered to be trade-distorting, can be justified on health grounds when the policy instrument proposed is seen as "proportionate" and "appropriate". Alternatively, justification for an extensive advertising ban on economic grounds was given when an EU ban on tobacco advertising was introduced. By harmonizing volume restrictions of advertising on the internal market, distortions of tobacco advertising competition are aimed to be avoided. A similar approach can be taken by legislators who want to regulate alcohol advertising.

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