

Position paper: A well-designed national ban on fossil advertising is legal under EU law

To: Vaste commissie voor Klimaat en Groene Groei, Tweede Kamer der Staten-Generaal

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I research EU climate and constitutional law. In 2024 I published a peer-reviewed study on the question of whether a ban on advertising for fossil fuels and other carbon-intensive products (“fossil advertising ban”) is lawful under European law.¹ The study found that a fossil advertising ban is compatible with EU law if it is implemented in a consistent manner. It is most secure if it follows the model of the existing tobacco advertising ban.² This position paper sums up the main findings of the study.

1. A fossil advertising ban is in line with the EU’s own objectives

A fossil advertising ban aims to protect health and the environment, shield consumers from misleading promotion, and protect public debate from industry pressure. These are aims that the EU itself pursues. The EU Treaties require a high level of protection for health, the environment and consumers. Moreover, the EU has bound itself to deep cuts of greenhouse gas emissions.³ Its own scientific advisory board reports that the EU is not on track to meet its climate targets, and recommends the adoption of additional demand-reduction measures, advertising restrictions among them.⁴ A ban on fossil advertising therefore advances the EU's own objectives rather than obstructing them.

2. Legislative competence: the Netherlands is authorised to enact a fossil advertising ban

The legislative competences in the fields of environmental and consumer protection are shared between the EU and the Member States. This means that Member States may legislate for themselves, as long as the EU has not already regulated the matter in full.⁵ Fossil advertising has not been regulated at EU level. The Dutch legislator is therefore free to enact a fossil advertising ban.

3. A fossil advertising ban does not violate fundamental rights

A fossil advertising ban touches two rights: the freedom of (commercial) expression (Article 11 of the EU Charter of Fundamental Rights, and Article 10 of the European Convention on Human Rights) and the freedom to conduct a business (Article 16 of the Charter). In

¹ C Kaupa, "Promoting the Apocalypse? The Legality of a Ban on Advertising for Fossil Fuels and Other Carbon-Intensive Products under European Law" (2024) 15 *European Journal of Risk Regulation* 310.

² Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L 152/16 (Tobacco Advertising Directive II)

³ Regulation (EU) 2021/1119 (European Climate Law), arts 2(1) and 4(1).

⁴ European Scientific Advisory Board on Climate Change, *Towards EU Climate Neutrality: Progress, Policy Gaps and Opportunities – Assessment Report 2024* (2024) 8, 28, 166.

⁵ Arts 2(2) and 4(2) TFEU.

principle a ban restricts both. However, neither right is absolute. Each may be limited where the government pursues a legitimate aim in a proportionate way. Commercial advertising enjoys weaker protection than political speech. The European Court of Human Rights gives governments wide latitude to restrict it, and has accepted far-reaching limits on tobacco advertising in order to protect public health.⁶ Similarly, a fossil advertising ban that is implemented in a consistent manner does not violate the freedom of commercial expression.

The freedom to conduct a business is limited in the same way. A ban on advertising does not stop a company from making or selling its product; it only restricts how the product is promoted. For that reason the EU Court of Justice has held that such bans do not affect the core of the freedom to conduct a business, and it upheld a near-total ban on advertising for e-cigarettes on exactly that basis.⁷ The same holds for the fossil advertising ban: it limits promotion, not sale, and therefore does not violate the freedom to conduct a business.

4. A fossil advertising ban does not violate internal market rules

EU internal market law forbids national rules that restrict cross-border trade for no good reason, or that disguise protectionism. A national measure is permitted when it pursues a legitimate public interest – such as the protection of health or the environment – and goes no further than necessary.⁸ A fossil advertising ban that is implemented in a consistent manner falls within this principle. The EU Court of Justice has repeatedly upheld advertising restrictions that protect health or the environment, for products such as alcohol and tobacco.⁹ The EU's own tobacco advertising ban has survived repeated challenges before the Court.

¹⁰

One specific instrument, the EU Services Directive, could be invoked against a fossil advertising ban. However, in my view it does not apply to an advertising rule of this kind at all – and even if it did, the same public-interest justification would apply.¹¹

In April 2025 a Dutch court rejected every EU-law argument brought against the municipal fossil advertising ban in The Hague, including those based on the internal market rules.¹²

⁶ *Kaupa* (n 1) 325–326; *Société de conception de presse et d'édition et Ponson v France* App no 26935/05 (ECtHR 2009); *Hachette Filipacchi Presse Automobile et Dupuy v France* App no 13353/05 (ECtHR 2009).

⁷ Case C-477/14 *Pillbox 38* EU:C:2016:324.

⁸ Art 36 TFEU.

⁹ Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior* EU:C:1991:327; Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini* EU:C:1997:344; Case C-405/98 *Gourmet International Products* EU:C:2001:135.

¹⁰ Case C-380/03 *Tobacco Advertising II* EU:C:2006:772; Case C-547/14 *Philip Morris Brands* EU:C:2016:325.

¹¹ Transport services such as air travel fall outside the Directive: art 2(2)(d) Directive 2006/123/EC. A non-discriminatory advertising rule is in any event not an authorisation scheme, and may be justified on public-interest grounds: see Case C-360/15 *Visser Vastgoed (Appingedam)* EU:C:2018:44.

¹² Rb Den Haag 25 April 2025, ECLI:NL:RBDHA:2025:6874 (*ANVR and TUI v Gemeente Den Haag*).

5. A comprehensive fossil advertising ban is lawful

A fossil advertising ban need not stop at advertising for fossil products and services. In my view it may lawfully reach further: to the brand, image and corporate advertising of fossil fuel companies, and to their sponsorship of events and institutions. The tobacco ban already works this way. It covers not only product advertising but corporate image campaigns, the placing of brand names on other goods, and sponsorship.

6. Recommendations for design

- **Follow the tobacco model.** Cover direct product advertising, indirect and brand advertising, and sponsorship of fossil fuel companies.
- **Support each category with evidence.** Build the ban on the scientific record, such as the IPCC reports, the reports of the EU's climate advisory board, and the Dutch advisory reports. Give every category of banned advertising its own evidential basis
- **An EU-wide ban would be more effective – but a national ban is lawful.** A coordinated EU measure would reach further; however, the Netherlands is fully entitled to act on its own.