Freedom of Commercial Expression and Public Health Protection at the European Court of Human Rights

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Keywords: European Convention on Human Rights, Public Health, Freedom of Expression, Tobacco Advertising, Margin of Appreciation

Abstract: This contribution considers the case law of European Court of Human Rights (ECtHR) and focuses on the extent to which the Contracting Parties to the European Convention on Human Rights (ECHR) can regulate the tobacco, alcohol, and food industries in a manner compatible with their ECHR obligations. After briefly presenting the two key cases dealing specifically with tobacco advertising, this contribution considers the main factors that the ECtHR takes into account when balancing competing concerns, and in particular freedom of commercial expression and public health protection. It concludes that none of these factors is absolute, as the Court considers the strength of each one of them on the facts of each case. Nevertheless, it is clear from its case law that States have a wide margin of appreciation to regulate marketing practices that are inimical to public health and the prevention of non-communicable diseases more specifically, to the extent that even extensive advertising restrictions can be compatible with Article 10 of the ECHR.

Introduction

In a suite of cases, the European Court of Human Rights (the ECtHR or the Court) has established that the protection granted to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR or the Convention) extends to commercial expression. However, the Court has also made it clear that such expression can be significantly restricted by States pursuing various public interest objectives, including the protection of public health. This short contribution considers the case law of ECtHR, focusing on the extent to which the Contracting Parties to the ECHR can regulate the tobacco, alcohol, and food industries in a manner compatible with their ECHR

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DOI: https://doi.org/10.1017/jme.2022.49

obligations. After briefly presenting the two key cases dealing specifically with tobacco advertising (1), this contribution considers the main factors that the ECtHR takes into account when balancing competing interests, and in particular freedom of commercial expression and public health protection (2).

The ECHR was adopted within the Council of Europe and all Member States of the Council of Europe are also parties to the ECHR. Readers who are not familiar with the Council of Europe should bear in mind that it is distinct from the European Union (EU). If all EU Member States are members of the Council of Europe, not all Council of Europe Member States are EU Member States.[1] However, as this short contribution shows, there are close links between the case law of the Court of Justice of the European Union (CJEU) and the case law of the ECtHR, particularly in relation to the balancing of public health and freedom of expression considerations. Therefore, even if this contribution does not, as such, purport to present the case law of the CJEU,[2] it does refer to it.

This short contribution considers the case law of ECtHR, focusing on the extent to which the Contracting Parties to the ECHR can regulate the tobacco, alcohol, and food industries in a manner compatible with their ECHR obligations. After briefly presenting the two key cases dealing specifically with tobacco advertising, this contribution considers the main factors that the ECtHR takes into account when balancing competing concerns, and in particular freedom of commercial expression and public health protection

1. The two judgments of the Court addressing specifically the compatibility of national tobacco advertising restrictions with the ECHR

In 2009, the ECtHR was called upon to rule in two similar cases on the compatibility of the French Loi Evin with Article 10 ECHR.[3] The Loi Evin is an Act of Parliament that was adopted in 1991 to protect public health and amended the Public Health Code by introducing measures prohibiting tobacco advertising and significantly restricting the advertising of alcoholic beverages.[4]

In 2002, the applicants (two companies and their publishing directors) published monthly magazines featuring the photographs of the Formula One driver Michael Schumacher with the sporting logos of the Marlboro cigarette brand. The accompanying article identified him as the highest paid sports personality in the world, indicating that he earned EUR 65 million a year: EUR 34 million as salary and the rest as sponsorship agreements. After ruling that such photographs infringed the Loi Evin, the French courts fined the applicant companies and ordered them to pay damages to the national anti-tobacco committee[5] for unlawful tobacco advertising. The French courts pointed out, among other things, the danger of displaying cigarette brands in a sports-related environment that attracted the attention of the general public and young people in particular. The applicants' appeals were dismissed domestically. They lodged separate applications to the ECtHR in 2005.

Bearing in mind the similarities between these two cases, the ECtHR delivered its judgments on the same day in June 2009 and held unanimously that there had been no violation of Article 10 of the ECHR.

Article 10(1) ECHR provides that "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." As discussed more fully below, the ECtHR adopts a broad interpretation of the notion of "expression" to include within its scope commercial speech which consists in the provision of information, expression of ideas or communication of images as part of the promotion of a commercial activity and the concomitant right to receive such communications.[6] Therefore, after determining that the Loi Evin interfered with the applicants' right to freedom of expression, the ECtHR assessed whether this interference was justified.

Establishing that a particular activity falls within the ambit of Article 10 does not mean that the Court will necessarily prohibit any type of state interference. Some forms of interferences are legal and justifiable under the Convention as interpreted by the Court. Article 10 itself recognizes that the right to freedom of expression is not absolute. States can restrict this right in order to achieve various legitimate aims. As Article 10(2) ECHR states,

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https://doi.org/10.1017/jme.2022.49 Published online by Cambridge University Press

> The exercise of [the freedoms to hold opinions and to receive and impart information and ideas], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for *the protection of health* or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[7]

This provision specifically identifies public health protection as one of the legitimate aims justifying that some limits may be set by law on the right to freedom of expression. Such restrictions must, however, be proportionate.

In order to determine the compatibility of the specific restriction under review with the ECHR, the ECtHR established a proportionality test:

- The Court first considers whether there is an interference with the right to freedom of expression and if so whether such interference complies with national law. This requirement did not raise any difficulty in the two tobacco cases, bearing in mind the contentious measure under review was an Act of Parliament.
- The Court then determines whether there is a legitimate aim for the restriction. The protection of public health clearly constitutes a legitimate aim that France was entitled to pursue, not least as the Court characterized smoking as "a social evil" for the public as a whole and young people in particular. Interestingly, the ECtHR noted in one of its two tobacco judgments that the Magazine *Entrevue* was the most read magazine by young men aged between 15 to 24 years of age.[8]
- Finally, and most importantly, the Court considers whether the measures adopted to achieve the legitimate aim are not excessive. In other words, the ECtHR determines whether less intrusive measures could have achieved the same aim. In the two tobacco cases under review, the Court considered what interests were at stake and whether these interests had been properly balanced against each other by the French authorities. In particular, the Court relied on the importance of public health protection as a legitimate aim, the existence of smoking as a social evil, the imperative to fight against it, as well as the existence of a European consensus on the need to ban tobacco advertising, to conclude that the sanctions imposed on the applicants were proportionate and that the extensive prohibition on tobacco advertising French law imposed did not infringe Article 10 ECHR on the facts.[9]

These two cases illustrate that, even though the right to freedom of commercial expression is protected by the ECHR, such protection is not absolute. States can interfere with this right provided that this interference is "necessary in a democratic society," namely that it is legal and proportionate. In their assessment of proportionality, the ECtHR recognizes that States have some discretion in assessing the situation and how they can best address it. The Court will intervene only when States overstep the boundaries of their discretion. In other words, the Court defers to the State's decision unless these decisions cannot be justified from the perspective of the Convention. The scope of this deference is traditionally labelled by the Court as the margin of appreciation.[10]

2. The Factors Determining the Margin of appreciation of States to Regulate the Tobacco, Alcohol and Food Industries to Protect Public Health

The following discussion identifies the key factors that the Court considers when assessing the proportionality of the interference and the margin of appreciation that States have in given circumstances. It is important to note from the outset that none of these factors is absolute. The Court considers the strength of each one of them on the facts of each case. Moreover, the list provided here does not purport to be exhaustive. However, it identifies the factors that often guide the Court's decision-making and are particularly relevant when considering the compatibility of advertising restrictions with the ECHR when such restrictions pursue public health interests.

The Type of Speech

The ECtHR has defined the notion of "expression" broadly, to include political speech,[11] artistic performances,[12] publication of photos,[13] statements on the Internet,[14] and commercial advertising.[15] The fact that the Court considers a particular activity as expression is a value neutral statement. The Court repeated on a number of occasions that Article 10

> is applicable not only to 'information' or 'ideas' that are favourably received or regarded as

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> inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'[16]

Whether commercial expression should fall within the ambit of protection of Article 10 was specifically discussed in *Casado Coca v. Spain* where the respondent state argued that commercial advertisement did not fall within the definition of expression as it "did not serve the public interest but the private interests of the individuals concerned."[17] However, the ECtHR rejected this argument, noting that Article 10 guaranteed freedom of expression to "everyone," without drawing any distinction according to whether the type of speech or the aim it pursued was motivated by making a profit or not.[18] The structure of Article 10 ECHR itself does not require the Court to provide any specific reason to protect freedom of expression: as soon as the ECtHR establishes that a particular action is expression, the protection follows almost[19] automatically.[20]

Commercial expression is the least protected type of expression,[21] particularly when compared to political or artistic expression. Therefore, States enjoy a broader margin of appreciation in how they can interfere with commercial expression than with other types of expression. Such difference in protection is based on the value of expression for democracy: the ECtHR has recognized that freedom of political debate "form[s] the bedrock of any democratic system."[22] At the opposite end of the spectrum, commercial expression is considered the furthest from the core aim of the Convention and therefore is the least protected, even if it recognized as a form of expression. In advertising cases, Contracting Parties therefore have a very broad margin of appreciation.[23] In the Court's eyes the importance of a particular form of expression for the public debate determines its value. Since the key aim of commercial expression is not to initiate a public debate but to promote a particular product, service or brand, its value is not considered as particularly high. Another factor that might broaden the margin of appreciation vis-à-vis commercial expression is its complexity. In *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, the Court stated that "margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition."[24]

The scope of the margin of appreciation seems to become even broader when commercial speech is deemed offensive. The Court summarized its approach in its 2018 judgment in *Sekmadienis LTD v. Lithuania* dealing with the use of religious symbols in commercial advertising, which some Lithuanians found offensive:

> … there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on matters of public interest. However, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Similarly, States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising.[25]

Even though this classification system seems relatively straightforward, it is often very difficult in practice to identify a precise type of expression. Cases will often involve "mixed speech." Artistic expression can have a commercial component to it, while commercial publications can raise issues of public interest and therefore contribute to public debate. For example, in *Hertel v. Switzerland*, the applicants published a scientific article suggested that the food cooked in microwave ovens was unsafe. The Swiss courts

> prohibited… [him] from stating that food prepared in microwave ovens is a danger to health and leads to changes in the blood of those who consume it that indicate a pathological disorder and present a pattern that could be seen as the beginning of a carcinogenic process, and from using, in publications and public speeches on microwave ovens, the image of death.[26]

The argument of the Swiss government that the applicant's article was in effect commercial speech that created unfair competition and therefore enjoyed a lesser degree of protection was rejected by the Court which concluded that the expression was not purely commercial. Consequently, the Court ruled that the State's margin of appreciation should be reduced and the Court's scrutiny of the proportionality of the restriction correspondingly heightened

> When what is at stake is not a given individual's purely "commercial" statements, but his participation in a debate affecting the general interest, for example, over public health; in the instant case, it cannot be denied that such a debate existed.[27]

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Similarly, in the above mentioned case of *Société de conception de presse et d'édition and Ponson v. France* the image containing the cigarette brand was published as a part of the news article intended to inform the public on the salaries of sports people. The ECtHR noted that it had consistently highlighted the existence of a right for the public to receive information and concluded, on this basis, that the expression at stake in this case was not "strictly" commercial and that the margin of appreciation of the State was consequently more limited.[28]

Thus, the type of expression does affect the Court's balancing exercise, even though it may often be difficult to clearly distinguish between different types.

The Nature of the Legitimate Aims Pursued

Even if the ECHR does not as such contain a specific provision dedicated to the right to health, the ECtHR has recognized the importance of protecting the health of the public. States can therefore legitimately endeavour to protect public health.[29] This is explicit in Article 10(2) itself. Public health imperatives can be of such importance that the ECtHR has granted States a broad margin of appreciation in determining how far they intend to protect health and the means they intend to deploy to this effect.

Article 10(2) therefore provides for the possibility for States to limit freedom of expression on public health grounds. In such cases, the Court considers the connection between the expression and the degree to which the expression offends the protected interest. In particular, the Court has been clear that States can adopt wide ranging restrictions on tobacco advertising due to the serious public health implications smoking entails:

> The Court is of the opinion… that the restriction of advertising of tobacco and tobacco products constitutes an essential axis of a more global strategy on the fight against the social evil of smoking. This policy raises the sustained interest of the public and public authorities. Thus, overriding public health considerations… may take precedence over economic imperatives, and even certain fundamental rights such as freedom of expression.[30]

In other words, the Court decided that the State's interference with the freedom of expression pursued a legitimate aim and, since this aim was of such importance to society, then even a significant interference with such freedom could be justified. The ECtHR specifically noted, as the French courts had observed, that the magazines in question were aimed at the general public, and in particular young people, who were more vulnerable. It was therefore necessary to consider the impact of the cigarette logos on those readers, who were particularly attentive to success in sports or finance.

Very importantly too, the ECtHR upheld the stance taken by the French courts that it was not necessary to take account of the actual impact of an advertising ban on tobacco consumption to determine whether the ban may be justified. The fact that the publications in question were regarded as capable of inciting people to consume such products was, for the Court, a "relevant" and "sufficient" reason to justify the interference.[31] This is welcome bearing in mind the complexity of NCDs and the fact that only comprehensive, coordinated, multi-sectoral strategies can effectively prevent and control NCDs. More specifically, as the impact of advertising of tobacco, alcohol or unhealthy food on public health is unavoidably difficult to quantify, the Court should indeed ensure that it does not substitute its assessment to that of legislative authorities without good reasons.[32]

The Existence of a European Consensus

The concept of European consensus determines the scope of the margin of appreciation in that it lays down a rebuttable presumption in favour of the solution adopted by the majority of the Contracting Parties to the ECHR.[33] The state has a narrower margin of appreciation in relation to issues where a European consensus exists,[34] whilst in the absence of such consensus, this margin is broader. Even though European Consensus is not a decisive argument, the presumption it establishes is not easily rebutted.

The Court did invoke the existence of European consensus in the two tobacco advertising cases discussed above. The Court's deployment of consensus is somewhat unusual in these cases. Normally, the Court uses consensus when the regulation in question falls outside of such consensus. However, in *Société de conception de presse et d'édition and Ponson v. France*, the Court highlighted that the measures adopted by the respondent state were part of a European consensus confirming the appropriateness of such actions. The Court stated:

> There is in fact European consensus in favour of strict regulation of the advertising of tobacco products… In addition, the Court observes that a general trend towards regulation is now displayed at the global level.[35]

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In the two tobacco cases decided in 2009, the ECtHR assessed the French Loi Evin considering the broader context in which it was challenged, and it relied extensively on a range of European and international sources to identify a European consensus on the imperative to restrict tobacco advertising. Firstly, it noted that EU Member States were all bound by the directive prohibiting the cross-border advertising and sponsorship of tobacco products,[36] whose validity was upheld by the CJEU in 2006.[37] In its decision, the CJEU was called upon to consider whether a complete EU-wide ban on tobacco cross-border advertising infringed Article 10 of the ECHR. It noted that commercial expression was a lesser form of expression and could, as such, be restricted significantly on public health grounds. In particular, relying on its earlier ruling in the *Karner* case, the CJEU noted that it would be reluctant to intervene with the margin of discretion left to competent authorities in relation to the commercial use of freedom of expression, particularly "in a field as complex and fluctuating as advertising."[38] On this basis, it concluded by upholding the compatibility of the 2003 EU Tobacco Advertising Directive with the EU Treaties:

> In the present case, even assuming that the measures laid down in Articles 3 and 4 of the Directive prohibiting advertising and sponsorship have the effect of weakening freedom of expression indirectly, journalistic freedom of expression, as such, remains unimpaired and the editorial contributions of journalists are therefore not affected.
>
> It must therefore be found that the [EU] legislature did not, by adopting such measures, exceed the limits of the discretion which it is expressly accorded.
>
> It follows that those measures cannot be regarded as disproportionate.[39]

Drawing on this case law, the ECtHR concluded that the EU legislature had "reasonable grounds" to consider that an extensive prohibition of tobacco advertising and sponsorship at EU level could lead to a significant reduction in the levels of tobacco consumption and could therefore protect public health. After also referring to the works of the Council of Europe, and in particular a resolution of the Parliamentary Assembly of the Council of Europe of 2002,[40] the Court noted that the general trend towards increasing tobacco advertising regulation had now become global. It mentioned specifically the Framework Convention on Tobacco Control (FCTC), which was adopted in 2003 and entered into force in 2005. In particular, the ECtHR noted that France was one of the (then) 150 signatories and referred to the specific provision of the FCTC calling on States to prohibit all forms of advertising, promotion, and sponsorship for tobacco products.[41]

The existence of a European consensus was one of the reasons why the Court found that there had been no violation in this case despite the existence of significant restrictions on the freedom to advertise tobacco products.

However, as pointed out above the Court rarely establishes that the regulation in question is part of a European consensus and finds no violation as a result. More commonly, the Court finds no violation in the absence of a European consensus, allowing a broad margin of appreciation to the respondent state. In *Animal Defenders International v. the United Kingdom*, the Court established the absence of a European consensus before concluding that there had been no violation of Article 10 ECHR. The ECtHR stated:

> there is no European consensus between Contracting States on how to regulate paid political advertising in broadcasting... It is recalled that a lack of a relevant consensus amongst Contracting States could speak in favour of allowing a somewhat wider margin of appreciation than that normally afforded to restrictions on expression on matters of public interest... [W]hile there may be a trend away from broad prohibitions, it remains clear that there is a substantial variety of means employed by the Contracting States to regulate such advertising, reflecting the wealth of differences in historical development, cultural diversity, political thought and, consequently, democratic vision of those States.[42]

Thus, the Court considers the state of European consensus in determining the scope of margin of appreciation in freedom of expression cases. The Court is more likely to find no violation if the disputed interference is either part of European consensus or when there is no European consensus.

The Decision-Making Process Adopted by the State

Another important factor that the Court considers is the process by which national authorities came up with the rule or decision in question. The proceduralization of human rights is a growing issue in European

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Human Rights Law.[43] It means that the ECtHR pays more attention to how the decision has been reached rather than what the actual decision is.

In *Animal Defenders International v. the United Kingdom*, the Court acknowledged that the national decision-maker carefully considered the positive and negative aspects of a ban on paid political advertisement. The Court stated:

> The Court… attaches considerable weight to … exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process.[44]

> universally accepted moral and ethical norms" and "religious people react very sensitively to any use of religious symbols or religious persons in advertising" — demonstrates that the authorities gave absolute primacy to protecting the feelings of religious people, without adequately taking into account the applicant company's right to freedom of expression.[45]

The Court was much more sympathetic in *PETA Deutschland v. Germany*. Even though this case did not involve commercial speech, it concerned social advertising and contains interesting reasoning of the Court that could similarly apply in a commercial advertising context. The applicant started an advertising campaign which aimed at drawing attention to animal suffering. To this effect, they produced posters which depicted animals in cages in the top section of the posters and Holocaust victims in the bottom section. These posters were banned from circulation by German authorities, a decision which was challenged before the ECtHR. In its ruling, the Court paid particular attention to the decision-making of national authorities to conclude that there was no ECHR violation. In particular, the Court stated that

> the domestic courts adjudicating the applicant's case carefully examined whether the issue of the requested civil injunction would violate the applicant association's right to freedom of expression. In doing so, the domestic courts applied the standards developed by the Court…[46]

Importantly, none of the factors we have identified above in our review of ECtHR case law is absolute. The Court considers the strength of each one of them on the facts of each case. Nevertheless, it is clear from the case law that States have a wide margin of appreciation to regulate marketing practices that are inimical to public health and the prevention of non-communicable diseases more specifically, to the extent that even extensive advertising restrictions can be compatible with Article 10 of the ECHR.

As a result, the Court found no violation in this case. By contrast, in *Sekmadienis LTD v. Lithuania*, the Court determined that the Lithuanian decision to ban an advertising campaign on public morality grounds violated Article 10 ECHR. In this case, the applicant was a clothing company that released the advertisement campaign using references to "Jesus" and "Mary" that some religious people in Lithuania found offensive. The ECtHR considered the reasoning of national courts and decided that, by placing "absolute primacy to protecting the feelings of religious people," the Lithuanian courts had not struck a proper balance. The government therefore failed to persuade the Court that the interference was proportionate. The Court's disapproval of the reasoning adopted by the Lithuanian courts was vividly expressed:

> The wording of [the national courts'] decisions — such as "in this case the game has gone too far", "the basic respect for spirituality is disappearing", "inappropriate use [of religious symbols] demeans them [and] is contrary to

The Extent to which the Penalty Imposed is Commensurate with the Legitimate Aim Pursued

The severity of the sanctions applied is also subject to the review of the ECtHR. More severe sanctions require convincing justifications, while lighter ones might fall within the margin of appreciation of the respondent State. The Court assesses whether the

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sanctions can be seen as producing a "chilling effect" on public debate[47] and if so, concludes that they might be deemed disproportionate. Although the Court considers the seriousness of a given punishment, the "chilling effect" is much more difficult to rely upon in commercial speech cases. In *Perrin v. the United Kingdom*, the Court assessed an application of the owner of the website that was selling obscene images, who was sanctioned to a prison term and argued that this sentence was disproportionate. The ECtHR disagreed:

> the purpose of the present expression was purely commercial and there is no suggestion that it contributed to any public debate on a matter of public interest or that it was of any artistic merit: the applicant's conviction cannot therefore be said to engender any obviously detrimental chilling effect. Moreover, given that the applicant stood to gain financially by putting obscene photographs on his preview page, it was reasonable for the domestic authorities to consider that a purely financial penalty would not have constituted sufficient punishment or deterrent.[48]

In the two tobacco cases discussed above, the applicants challenged the penalties imposed on them as unduly burdensome. The French courts had imposed fines of EUR 30,000 and EUR 20,000 and ordered the two companies to pay EUR 10,000 each in damages to the national anti-tobacco committee. When asked to review these sanctions, the Court concluded in both cases that the amounts were certainly not negligible, but that in assessing whether they were unduly harsh they had to be assessed in light of the revenue and the high circulation of the magazines in which the two contested adverts appeared.

It is important to reiterate here that none of the factors we have identified above in our review of ECtHR case law is absolute. The Court considers the strength of each one of them on the facts of each case. Nevertheless, it is clear from the case law that States have a wide margin of appreciation to regulate marketing practices that are inimical to public health and the prevention of non-communicable diseases more specifically, to the extent that even extensive advertising restrictions can be compatible with Article 10 of the ECHR.

Note

The authors have no conflicts to disclose.

References

1. "46 Member States," *available at* <https://www.coe.int/en/web/portal/46-members-states> (last visited June 16, 2022).
2. For a discussion of the prevention of non-communicable diseases in the EU, see A. Garde, "The Lack of Coherence in the European Union's Approach to Non Communicable Disease Prevention," in D. Orentlicher and T. Hervey (eds), *Oxford Handbook of Comparative Health Law* (Oxford University Press, 2021), DOI: 10.1093/oxfordhb/9780190846756.013.45.
3. *Société de conception de presse et d'édition and Ponson v. France*, no. 26935/05, March 5, 2009, and *Hachette Filipacchi Presse Automobile et Dupuy v. France*, no. 13353/05, March 5, 2009.
4. Loi Evin n°91-32 of 10 January 1991 to protect public health from tobacco and alcohol, JORF n°10, 12 January 1991.
5. Comité national contre le tabagisme or CNCT.
6. See, eg, *Markt Intern v. Germany* Series A no 165 (1990) 12 EHRR 161, at paragraphs 25 and 26; *Groppera v Switzerland* Series A no 173 (1990) 12 EHRR 321, at paragraph 55; and *Casado Coca v Spain* Series A no 285 (1994) 18 EHRR 1, at paragraphs 35 and 36.
7. Emphasis added.
8. *Société de conception de presse et d'édition and Ponson v. France*, no. 26935/05, March 5, 2009, at paragraph 5.
9. For a more detailed analysis of the proportionality test used by the ECtHR, see, F. de Londras and K. Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave, 2018), chapter 5.
10. The margin of appreciation is one of the most widely discussed doctrines developed by the ECtHR. See for example, G. Letsas, "Two Concepts of the Margin of Appreciation," *Oxford Journal of Legal Studies* 26 (2006); J. Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine," *European Law Journal* 17 (2011); O.M. Arnardóttir, "Rethinking the Two Margins of Appreciation," *European Constitutional Law Review* 12 (2016); H. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Springer, 1995): 13; Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights (Council of Europe, 2000), 5, D. Tsarapatsanis, "The Margin of Appreciation Doctrine: a Low-Level Institutional View," *Legal Studies* 35 (2015): 675.
11. For example, *Observer and Guardian v. the United Kingdom*, 26 November 1991, Series A no. 216.
12. For example, *Wingrove v. the United Kingdom*, 25 November 1996, Reports of Judgments and Decisions 1996-V.
13. *Verlagsgruppe News GmbH v. Austria*, no. 76918/01, 14 December 2006.
14. *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015.
15. The protection of commercial speech was first established in M*arkt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, Series A no. 165.
16. *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) [GC],* no. 32772/02, ECHR 2009, at paragraph 96.
17. *Casado Coca v. Spain*, 24 February 1994, Series A no. 285-A, at paragraph 33.
18. *Société de Conception de Presse et d'Edition et Ponson v. France*, at paragraph 33. See also *Autronic AG v. Switzerland*, 22 May 1990, at paragraph 47.
19. The only exception is perhaps cases that trigger Article 17. In the judgments concerned with Holocaust denial cases the Court stated that claims for freedom of expression in these cases constitute an abuse of rights.
20. It is therefore arguable that the reason why the ECtHR protects freedom of commercial expression differs from those the US and EU courts have invoked, namely the fundamental role advertising plays in a liberal market economy, to extend the scope of protection to commercial expression.
21. For a discussion of the reasons for such differentiation see, Maya Hertig Randall, Commercial Speech under the Euro-

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pean Convention on Human Rights: Subordinate or Equal? *Human Rights Law Review* 6, no. 1 (2006): 53.
22. *Bowman v. the United Kingdom*, 19 February 1998, Reports of Judgments and Decisions 1998-I, at paragraph 42.
23. *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, ECHR 2012, at paragraph 61.
24. *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, Series A no. 165, at paragraph 33.
25. *Sekmadienis Ltd. v. Lithuania*, no. 69317/14, 30 January 2018, at paragraph 73.
26. *Hertel v. Switzerland*, August 25, 1998, Reports of Judgments and Decisions 1998-VI, at paragraph 31.
27. *Id.*, at paragraph 47.
28. *Société de Conception de Presse et d'Edition et Ponson v. France*, at paragraph 57.
29. The ECtHR has also interpreted certain Convention rights to impose positive obligations on States to protect public health and provide medical assistance in specific settings. For example, the Contracting Parties are under an obligation to provide medical assistance to people in custody, see, *Aleksanyan v. Russia*, no. 46468/06, December 22, 2008.
30. *Société de conception de presse et d'édition and Ponson v. France*, no. 26935/05, March 5, 2009, at paragraph 56.
31. *Id.*, at paragraph 58.
32. On the role of evidence in assessing the proportionality of NCD prevention measures in the EU, see A. Alemanno and A. Garde, "The emergence of EU lifestyle risk regulation: new trends in evidence, proportionality and judicial review," in H.W. Micklitz and T. Tridimas (eds), *Risk and EU Law* (Cheltenham: Edward Elgar, 2015), Chapter 7, 134.
33. See, K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015). See also, V. Tzevelekos and P. Kapotas (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019).
34. See, for example *Bayatyan v. Armenia* [GC], no. 23459/03, ECHR 2011.
35. *Société de conception de presse et d'édition and Ponson v. France,* at paragraph 57.
36. Directive 2003/33 on tobacco advertising and sponsorship, O.J. 2003, L 152/16 (and articles 3 and 4 more specifically).
37. Case C-380/03 *Germany v Council and the European Parliament* [2006] ECR I-11573.
38. Case C-71/02 *Karner* [2004] ECR I-3025, at paragraph 51.
39. At paragraphs 156 to 158.
40. Resolution of June 24, 2002. On the contribution of the Council of Europe to tobacco control, see A. Garde and B. Toebes, "Is There a European Human Rights Approach to Tobacco Control?" in M. Gipsen and B. Toebes, Human Rights in Tobacco Control (Elgar, 2020), On the case law of the ECtHR and tobacco control more specifically, see A. Tsampas, The European Court of Human Rights and (Framework Convention on) Tobacco Control, European Convention on Human Rights Law Review (2021) 1.
41. Article 13 of the FCTC. See M. Melillo, "The Influence of the Commercial Speech Doctrine on the Development of Tobacco Control Measures," *Journal of Law, Medicine & Ethics* 50, no. 2 (2022): 233-239.
42. *Animal Defenders International v. the United Kingdom,* at paragraph 123.
43. See, for example, J. Gerards and E. Brems (eds) "Procedural Review in European Fundamental Rights Cases" (Cambridge University Press, 2017); P. Popelier, 'The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights', in P. Popelier et al. (eds.), O M Arnardóttir, "'The 'Procedural Turn' under the European Convention on Human Rights and Presumptions of Convention Compliance," *International Journal of Constitutional Law* 15, no. 1 (2017). For a discussion beyond the ECtHR, see, for example, L. M. Huijbers, *Process-based Fundamental Rights Review: Practice, Concept and Theory* (Cambridge: Intersentia, 2019).
44. *Animal Defenders International v. the United Kingdom*, at paragraph 116
45. *Sekmadienis Ltd. v. Lithuania,* at paragraph 83.
46. *PETA Deutschland v. Germany*, no. 43481/09, 8 November 2012, at paragraph 47.
47. See, for instance, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, ECHR 2004-XI, at paragraph 114.
48. *Perrin v. the United Kingdom* (dec.), no. 5446/03, ECHR 2005-XI.

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