

Legal Advice to Councils on policies to control High Carbon Advertising

As part of the due diligence in addressing the role of advertising in fuelling the climate emergency, Richard Wald KC of 39 Essex Chambers was commissioned by the New Weather Institute on behalf of Badvertising and Adfree Cities to produce this legal opinion, which provides legal advice to local councils implementing policies to restrict advertising for environmentally-damaging, high carbon goods and services.

In particular, the review sought to assess any legal issues potentially arising from the introduction of such policies, and addressed two main points: any legal risks attached to a policy to end high-carbon advertising; and the design of a lawful policy to control high-carbon advertising.

The review concludes that it is within local authorities' power and discretion to adopt advertising policies that exempt adverts and sponsorship from high-carbon products and services. It also considers that there is a strong legislative background to do so, given that the need to reach net zero carbon emissions is part of the UK's primary legislation, and that the UK's latest carbon budget makes explicit recognition of the need to reduce demand for high-carbon activities. As a result, the legal opinion produced in full below concludes that:

1. The adoption of an advertising policy banning 'high-carbon' advertising is squarely within the powers available to local authorities and therefore prima facie lawful.
2. The legal risks of adopting a high-carbon advertising ban are limited and the prospect of a successful challenge, low.
3. Councils have broad scope to design a policy according to their discretion, despite a lack of national definition of 'high carbon', with effective precedents already set and working in practice.

Legal Opinion on High Carbon Advertising

OPINION

A. INTRODUCTION AND SUMMARY

1. I am instructed by Adfree Cities and Badvertising to advise local authorities seeking to restrict 'high-carbon' advertising. In particular, I am asked to address the following key questions:
 - a. What are the potential legal consequences for councils of implementing a low carbon advertising policy;
 - b. In the absence of a tobacco-style law prohibiting 'high-carbon' advertising, and the current absence of a standard against which to deny/accept advertising by certain companies, would a local authority implementing a low-carbon advertising policy be vulnerable to being sued by companies they exclude;
 - c. Are there any legal bases by which to reassure councils regarding the legal risks of implanting such policies; and
 - d. How can local authorities design a policy to be in keeping with any relevant national legislation and thereby avoid the risk of legal challenges?

2. These four key questions can be distilled down to two main areas: (a) the legal risks of adopting a high-carbon advertising ban and (b) how to design a lawful policy. In summary, I consider that:
- a. Given the broad powers available to local authorities to make policy, the recognition in primary legislation of the need to reach net zero,¹ the explicit recognition in the UK's latest carbon budget of the importance of reducing demand for carbon-intensive activities,² and the wealth of collective knowledge in this area; in my view the legal risks of adopting a high-carbon advertising ban are limited and the prospect of a successful challenge low;
 - b. The design of a policy lies within the discretion of each local authority. Provided consideration is given to the Secretary of State's statutory guidance on publicity,³ and any policy is evidence-based and reasonable, a policy banning high-carbon advertising is likely to be lawful. The policy adopted by Cambridgeshire County Council⁴, an early adopter of such policies, provides a useful template or starting point.

B. FACTUAL BACKGROUND

3. In broad terms 'high-carbon' products and services, are those which are environmentally damaging and which must be phased out or limited to reach the UK's climate goals. These include fossil fuels, internal combustion vehicles and aviation.

¹ Climate Change Act 2008, s1

² The Climate Change Committee, 'The Sixth Carbon Budget – The UK's path to Net Zero', (December 2020) pg25; UK Government "UK enshrines new target in law to slash emission by 78% by 2035" (20 April 2021) <https://www.gov.uk/government/news/uk-enshrines-new-target-in-law-to-slash-emissions-by-78-by-2035>

³ Department for Communities and Local Government, 'Code of recommended practice on local authority publicity', Communities and Local Government Circular 01/2011, (31 March 2011) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/5670/1878324.pdf >

⁴ Set out in paragraph 7 below

4. Whilst a large part of climate legislation and policy focuses on Government measures to restrict the use or availability of ‘high-carbon’ products and services,⁵ encouraging and facilitating the public to make ‘low-carbon choices’ is recognised as a key part of tackling climate change.⁶ Members of the public are the consumers of high-carbon products and services and their advertising has been shown to increase or maintain consumer demand.⁷⁸ Therefore, tackling this through advertising restrictions is one way in which consumer demand for these products and services can be reduced or redirected.⁹

5. There is, at present, no national legislation or policy restricting the advertising of ‘high-carbon’ products and services. Therefore, the role of the UK advertising regulator, the Advertising Standards Authority, is limited to providing industry guidance and enforcing advertising codes which aim to prevent misleading ‘green claims’ and socially irresponsible behaviour related to environmental harm.

6. Despite the lack of national legislation or policy, local authorities have broad scope¹⁰ to make policies on the money they will accept through sponsorship and the types of advertisements they will permit on their advertising estates. Most local authorities already have advertising and sponsorship policies. Some simply mirror national legislation and policy and thus prohibit the advertising of tobacco products, party political causes and unlawful gambling, while others go beyond.

⁵ Such as the UK Government’s decision to ban the sale of new petrol and diesel cars by 2030 < <https://www.gov.uk/government/news/government-takes-historic-step-towards-net-zero-with-end-of-sale-of-new-petrol-and-diesel-cars-by-2030> >

⁶ House of Lords Environment and Climate Change Committee, ‘1st Report of Session 2022-23, In our hands: behaviour change for climate and environmental goods’, (HL Paper 64, 2022) Summary, page 6 < <https://committees.parliament.uk/publications/30146/documents/174873/default/> >

⁷ Purpose Disruptors, ‘The Carbon Emissions Generated by UK Advertising’, (2021) < <https://www.purposedisruptors.org/advertised-emissions-report> >

⁸ Badvertising, ‘Advertising’s role in climate and ecological degradation’, (November 2020) < <https://static1.squarespace.com/static/5ebd0080238e863d04911b51/t/5fbfcb1408845d09248d4e6e/1606404891491/Advertising> >

⁹ (N6) [304-307]

¹⁰ Again, the legal framework is discussed in detail in Section D below

For example, Transport for London's advertisement policy also restricts advertising that;

“(d) could reasonably be seen as likely to cause pressure to conform to an unrealistic or unhealthy body shape, or as likely to create body confidence issues particularly among young people;

...

*(p) it promotes (directly or indirectly) food or non-alcoholic drink which is high in fat, salt and/or sugar ('HFSS' products), according to the Nutrient Profiling Model managed by Public Health England”.*¹¹

7. Some local authorities have already adopted policies which address 'high-carbon' products and services.¹² The policies of Cambridge, Basingstoke and Coventry are summarised below by way of example:

Cambridgeshire County Council¹³

3.3. Without any limitation on the Council's ability to exercise its discretion, the Council does not consider the following companies, partnerships, organisations or individuals as suitable for entering into advertising or sponsorship agreements with:

a) those involved in the manufacture, distribution or wholesaling of tobacco-related products, alcohol, fossil fuels, pornography or addictive drugs;

...

c) those whose business activities/practices do not align with the Council's wider values, corporate objectives and strategic goals, such as the environment and carbon accounting;

...

3.9. Exceptions may be considered if the companies, partnerships, organisations or individuals involved can prove that less than 5% of their overall income is derived from any of the excluded items detailed in 3.3. This decision will be made on a case by case basis by the Head of Procurement and Commercial and the Service Director for Finance and Procurement”

Basingstoke and Deane Borough Council¹⁴

¹¹ TfL Advertising Policy < <https://content.tfl.gov.uk/tfl-advertising-policy-250219.pdf> >

¹² Addressed in detail in Section D below

¹³ <https://www.cambridgeshire.gov.uk/asset-library/advertising-and-sponsorship-policy-2022.pdf>

¹⁴ <https://www.basingstoke.gov.uk/advertising-sponsorship-policy>

The council is keen to maximise revenue from advertising, and so rather than define all specific permitted advertising, we work on the basis that advertising is permitted unless it falls into a number of prohibited categories see following section, but the council still retains the right to reject inappropriate advertising, especially where this conflicts with its priorities

[...]

An advertisement will not be accepted if, in the reasonable opinion of the council, it:

- a. is inappropriate or objectionable*
- b. may result in the council being subject to prosecution*
- c. promotes gambling*
- d. promotes payday loans*
- e. refers to tobacco or similar products*
- f. promotes the misuse of alcohol or promotes the use of alcohol to children*
- g. might be deemed inappropriate for children, for example, violent films*
- h. could promote goods or services that contradict the climate change and air quality strategy for example promotion of fossil fuels*
- i. appears to influence support for a political party or candidate*
- j. appears to conflict with the council's wider promotion of healthy and active lifestyles*
- k. appears to promote racial or sexual discrimination, or discrimination on the basis of disability, faith, gender, sexual orientation or age*
- l. is the subject of a complaint to the Advertising Standards Authority and upheld by such authority as a legitimate complaint.*

Coventry City Council¹⁵

“Coventry City Council will welcome all opportunities to work with sponsors where such arrangements support its core values

...

The industry categories that are not acceptable for entering into a sponsorship or advertising agreement include:

- 2. Tobacco/cigarettes*
- 3. Gambling*
- 4. Adult-oriented products/services*
- 5. Armaments*
- 6. Petrochemical Industry*
- 7. Payday Loans*

....

¹⁵ <https://www.coventry.gov.uk/advertisingsponsorshipolicy>

The above lists are not exhaustive, and the Council retains the absolute right to decline sponsorship or advertising opportunities (including through third party suppliers) from any organisation or individual or in respect of particular products which the Council in its sole and absolute discretion considers inappropriate.”

C. LEGAL AND POLICY BACKGROUND¹⁶

Climate Legislation and Policy

8. The Climate Change Act 2008 (“ **the CCA 2008**”) is the basis for the UK’s approach to tackling and responding to climate change. It requires reduction of emissions of carbon dioxide and other greenhouse gases and adaptation to climate change risks. The CCA 2008 also establishes the framework to deliver on these requirements. Section 1 of the Act commits the UK Government by law to reduce greenhouse gas emissions by at least 100% of 1990 levels (net zero) by 2050.
9. Sections 4 – 10 of the Act provide for Carbon Budgeting. Section 4(1) requires the Secretary of State to set a carbon budget for each succeeding period of five years beginning with the period of 2008-2012 and section 4(2) requires they must ensure that the net UK carbon account for a budgetary period does not exceed the carbon budget.
10. In 2021 the Government adopted the sixth carbon budget (2033–37)¹⁷ to cut emissions (including international aviation and shipping emissions) by 78% by

¹⁶ This section does not include the planning framework for advertising because it is considered to be outside the scope of the Opinion sought. For completeness, though, the key point there to note is that the regulation 3 of the TCP (Control of advertisements)(England) Regulations 2007 explicitly prevent local authorities from refusing or limiting express consent for an advert based on the subject matter, content or design - *unless necessary in the interests of amenity or public safety*. Local authority restrictions on advertising for high carbon products and services could be said to fall within this proviso. Please note also that the focus of this advice is on English local authorities. For those in Wales, The Well-being of Future Generations (Wales) Act 2015 (see in particular the provisions relating to the wellbeing goals and objectives at ss1-8) would be supportive of policies there which impose restrictions on high carbon advertising.

¹⁷ The Climate Change Committee, ‘Sixth Climate budget’, (2020)

<<https://www.theccc.org.uk/publication/sixth-carbon-budget/>>

2035. The Sixth Carbon Budget explicitly provides that one of the steps required to meet the budget is by “reducing demand for carbon-intensive activities.”¹⁸ This includes “an accelerated shift in diets away from meat and dairy products, reductions in waste, slower growth in flights and reductions in travel demand.” An additional step is the “take up of low-carbon solutions...[by] people and businesses”.¹⁹

Principles of Judicial Review

11. This overview of judicial review is set out for the sake of completeness. A public law act may be judicially reviewed on a number of grounds. In brief overview, these may be categorised under four broad heads – illegality, irrationality, procedural unfairness and legitimate expectation. The classification is artificial as the grounds for judicial review are fluid and overlapping but nevertheless provide a useful framework. Illegality and irrationality are the most relevant to consider for this advice:

- a. Illegality – for example when the decision maker:
 - i. Misdirects themselves in law;
 - ii. Exercises a power wrongly, such as by introducing insufficiently certain secondary legislation;²⁰
 - iii. Improperly purports to exercise a power that it does not have – acting ‘ultra vires’;
 - iv. Exercises a power for an improper purpose.²¹ For example, in *Porter v Magill*, a local authority using its powers to sell off council housing at a lower price in marginal wards to gain an electoral advantage was an improper purpose. Similarly, in *R v Lewisham ex parte Shell* [1988] 1 All

¹⁸ The Climate Change Committee, ‘The Sixth Carbon Budget – The UK’s path to Net Zero’, (December 2020) pg25

¹⁹ *Ibid*

²⁰ Craies on Legislation (12th edn, 2020), para 3.6.2.)

²¹ *Porter v Magill* [2002] 2 AC 357

ER 938, Lewisham Council's decision to boycott Shell in light of the duty to promote good race relations pursuant to section 71 of the Race Relations Act 1976 was influenced by an extraneous and improper purpose, namely, to oblige Shell to sever links with South Africa when those links were not contrary to English law;

- v. Exercises a power that frustrates the purpose of the empowering legislation;²² and
- b. Irrationality - where the decision under challenge is outside the range of reasonable responses of a public authority;²³
 - i. The range of reasonable responses is an undemanding standard for a decision maker to meet²⁴ and the courts are generally reluctant to find that a decision is irrational, particularly where the decision maker is an expert whose judgement the court would be unwilling to substitute with its own save for in a case of blatant unreasonableness;²⁵
 - ii. A decision may also be irrational where significant reliance has been placed on an irrelevant consideration, there was no evidence to support an important step in the reasoning,²⁶ or where a consideration had been omitted which, had account been taken of it, might have caused the decision-maker to reach a different conclusion.²⁷

12. Also of relevance is the principle of 'no fettering' which is, essentially, that policy must not be set out or followed in a way that prevents the exercise of discretion. For

²² *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

²³ *R (Pantellerisco) v Secretary of State for Work and Pensions* [2021] EWCA Civ 1454 [55].

²⁴ *Kashmiri v Secretary of State for the Home Department* [2005] EWCA Civ 105, [28]

²⁵ *R (Great North Eastern Railway Ltd) v Office of Rail Regulation* [2006] EWHC 1942

²⁶ *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) [98]

²⁷ *R v Parliamentary Commissioner for Administration, ex parte Balchin* [1998] 1 PLR 1 [35]

example, in *R v Harrow LBC Ex P Carter* [1992] 9 WLUK 142 it was held that the council had unlawfully fettered its discretion under section 67 of the Housing Act 1985 by adopting a strict policy of referring all cases where a homeless person was shown to have a legitimate local connection elsewhere.

13. The classic statutory requirement concerning guidance is, therefore, to “have regard to it”. This requirement means that the deciding authority is not to be bound by the guidance but rather able to pursue its own thought process to reach a conclusion that is appropriate in all the circumstances. During the thought process the authority should bear in mind the approach that the guidance seems to be suggesting and should depart from it not based on a general disagreement but only based on considerations relevant to the particular case in hand that seem to require a different approach.²⁸

14. Lastly, given the subject matter it is important to also address freedom of expression. This is protected by Article 10 of the European Convention on Human Rights, brought into domestic law in Schedule 1 of the Human Rights Act 1990. The European Court of Human Rights has confirmed that commercial advertising is protected by Article 10.²⁹ Therefore, any interference with the right must be in pursuit of a legitimate aim, necessary in a democratic society and proportionate. There is a wide margin of appreciation for member states and it is worth noting that challenges to restrictions on gambling³⁰ and tobacco marketing³¹ resting, in part, on freedom of expression and freedom to pursue an economic activity, have generally failed on these grounds.

²⁸ *Craies*, 3.7.4.2

²⁹ *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, (Application no. 10572/83) 20 November 1989

³⁰ *Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture Media and Sport* [2014] EWHC 3236 (Admin) – *nb in this case* gambling restrictions were challenged under EU law provisions rather than convention rights, the principle of a broad level of deference however is much the same

³¹ *The Queen on the Application of Swedish Match AB, et al. v. Secretary of State for Health*, Case C-210/03, Court of Justice of the European Union (2004)

Local Authority Powers

General powers

15. Local Authorities have very broad powers by virtue of both section 111 of the Local Government Act 1972 and section 1 of the Localism Act 2011.

16. Section 111(1) of the 1972 Act provides:

“subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.”

17. Section 1 of the Localism Act 2011 provides:

*“(1) A local authority has power to do anything that individuals generally may do.
(2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise-
(a) unlike anything the authority may do apart from subsection (1), or
(b) unlike anything that other public bodies may do.
(3) In this section “individual” means an individual with full capacity.
(4) Where subsection (1) confers power on the authority to do something, it confers power (subject to sections 2 to 4) to do it in any way whatever, including-
(a) power to do it anywhere in the United Kingdom or elsewhere,
(b) power to do it for a commercial purpose or otherwise for a charge, or without charge, and
(c) power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.
(5) The generality of the power conferred by subsection (1) (“the general power”) is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.
(6) Any such other power is not limited by the existence of the general power (but see section 5(2)).”*

Powers in relation to advertising policies

18. There is no specific statute providing that local authorities may or must have a policy in respect of advertising and sponsorship. Even, however, where there is no specific power to make regulations or issue guidelines, the courts have recognised

the power to issue policy and guidance as implicit. Lord Clyde in *The Alconbury Case* held that the provision of guidance of discretion is “perfectly proper” and that policies are “an essential element in securing the coherent and consistent performance of administrative functions”.³²

19. The Local Government Act 1986 provides in section 4(1) that: “*the Secretary of State may issue one or more codes of recommended practice as regards content style distribution and cost of local authority publicity...Local Authorities shall have regard to the provision of any such code in coming to any decisions on publicity*”. Section 6(4) of the Act provides that “‘*publicity*’ or ‘*publish*’ and ‘*publication*’ refer to any communication, in whatever form, addressed to the public at large or to a section of the public”.

20. The then, Department for Communities and Local Government issued a code of practice under the 1986 Act³³ which sets out seven principles underpinning publicity decisions made by local authorities. Publicity must:

- a. Be lawful;
- b. Be cost effective;
- c. Be objective when relating to policy and proposals;
 - i. If referring to policy and proposals from central government, the local authority may set out its views and reasons for those but should avoid anything likely to be perceived by readers as constituting a political statement;
- d. Be even-handed;

³² *R v Secretary of State for the Environment, Transport and the Regions Ex p. Holdings & Barnes Plc (the Alconbury Case)* [2001] UKHL 23 [2003] 2 AC 295 per Lord Clyde at [143]

³³ Department for Communities and Local Government, ‘Code of recommended practice on local authority publicity’, Communities and Local Government Circular 01/2011, (31 March 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/5670/1878324.pdf>

- i. It is acceptable for local authorities to host publicity prepared by third parties. Where publicity addresses matters of political controversy, it should seek to present the different positions in relation to the issue in question in a fair manner;
- e. Be appropriate in that it should not be designed to influence public officials;
- f. Accord with the relevant law on equality and diversity; and
- g. Be issued with care during periods of heightened sensitivity.

21. Local authorities, therefore, have broad discretion in the matters that they choose to publicise or facilitate the publication of, subject to consideration of the Code of Practice, any local authority policy and general public law principles.

Relevant Case Law

22. The following two decisions are relevant in demonstrating the approach shown by the courts to decisions by public bodies directly or indirectly restricting advertising..

23. In *Gibraltar Betting & Gaming Association Ltd* the Claimant sought judicial review of the regulatory framework issued by the Secretary of State in the Gambling (Licensing and Advertising) Act 2014. Although this matter was primarily concerned with the application of EU law regarding the free movement of services, Mr Justice Green's remarks regarding the Secretary of State's reasons and evidence base are useful to consider.

24. Under the Gambling Act 2005, the Commission regulated only those operators who had equipment in the UK. The 2014 Act extended the Commission's regulatory reach to any operator which was either based in the UK or operated facilities which could be accessed in the UK - 'consumption based regulation'. The issues included whether the new regime was either unlawful under domestic law or a

disproportionate restriction on the freedom to provide services guaranteed by article 56 of the Treaty on the Functioning of the European Union. As it is a crime to advertise unlawful gambling,³⁴ by virtue of the expansion of the Commission's reach this advertising restriction was also expanded.

25. Mr Justice Green held that the Secretary of State's decision to expand the regulatory reach of the Commission was not unlawful. He noted in summary at [15] that:

"It served a number of legitimate objectives and was not disproportionate, discriminatory or irrational. The government had addressed all the relevant considerations and had a sufficient evidential basis for its position. It had explained the policy and there were no flaws in its logic or its procedures."

26. Further, the Claimants sought to criticise the expansion as disproportionate on the basis that it would be ineffective. Mr Justice Green rejected this argument, noting at [181]:

"Ultimately, the issue is not whether the enforcement regime will, in certain respects, lack efficacy; the issue is whether the decision adopted by Parliament to move to consumption based regulation was defective in view of the enforcement powers available to the Gambling Commission. In my judgment the policy decision adopted by the Secretary of State was a legitimate one, even if, for the sake of testing the argument, enforcement powers were suboptimal. Such deficiencies as emerged over time can be remedied by future amendments to the legislation."

27. Although concerned with the decision of the Secretary of State, endorsed by Parliament, the decision is useful in demonstrating that where one is implementing measures that will restrict marketing or advertising, a strong evidence base and legitimate reasons for the policy are key elements of staving off a successful challenge.

³⁴ Gambling (Licensing and Advertising) Act 2014, section 330

28. *R (on the application of Core Issues Trust) v Transport for London* [2014] EWCA Civ 34 was an appeal against the decision of the High Court that the respondent, TfL, had been entitled to refuse to display the Claimant's advertisements on the side of its London buses. The Claimant was a Christian organisation who sought to place an advert on London buses which stated "NOT GAY! EX-GAY, POST-GAY AND PROUD, GET OVER IT!".
29. TfL's advertising policy provided that adverts would not be approved if they were "likely to cause widespread or serious offence" or "related to matters of public controversy or sensitivity. The policy had been created pursuant to paragraph 1(3) of Schedule 10 of the Greater London Authority Act 1999 which empowers the Greater London Authority "to do such things....as are calculated to facilitate, or are conducive or incidental to, the discharge of any of its functions".
30. The Claimant's second ground of challenge was that the banning of the advert was an unjustified interference with the Claimant's right to freedom of expression.
31. The Court of Appeal unanimously rejected the appeal and upheld the High Court's decision that the banning of the advert was not an unlawful restriction of the Claimant's Article 10 rights. An interference with Article 10 would be prescribed by law where it had a basis in national law, the law was accessible, and was formulated with sufficient precision to enable an individual to foresee when it might be applied.
32. TfL's policy was introduced to give effect to the public sector equality duty under the Equality Act 2010 section 149. It was readily accessible, being available on TfL's public website. The policy pursued the legitimate aims of avoiding causing serious offence to the public, protecting the rights of others, and ensuring that TfL complied with its statutory duties under section 149. TfL's decision was justified and proportionate.

33. The following passages of Lord Dyson's judgement are particularly relevant:

- a. The Claimant had argued that because "advertising space on London buses is sold on a commercial basis, there is a "right to buy" and there should be no restriction on contact".³⁵ Lord Dyson rejected this argument, holding at [54] that "the ECtHR has clearly established that it is permissible for public bodies to restrict advertising on the basis of content, provided that any restrictions are prescribed by law and necessary in pursuit of a legitimate aim". Further he noted the judgement of the ECtHR in *Mouvement Raelien Suisse* that "individuals do not have an unconditional or unlimited right to the extended use of public space, especially in relation to facilities intended for advertising or information campaign";
- b. The Claimant also argued that TfL's advertising policy was too vague and imprecise to satisfy the requirements of legal certainty. Again, Lord Dyson disagreed, he held at [58] "a law that confers a discretion is not in itself inconsistent with the requirement of legal certainty, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual adequate protection against arbitrary interference." Further, "both "offence" and "controversy" are uncomplicated ordinary English words. They are both concepts that are frequently used to set regulatory standards of decency";
- c. In respect of proportionality, at [83] Lord Dyson held "the restrictions imposed on the Trust only apply to the advertisements placed on the TfL network. The Trust is not faced with a total prohibition on publishing and disseminating its message. There are many other ways by which it can express its view. This is an important factor in the proportionality assessment".

³⁵ *Core issues Trust*, per Lord Dyson at [52]

D. ANALYSIS

34. The four key questions posed by those instructing can be distilled down into two main issues:

- a. The legal risks of adopting a high-carbon advertising ban; and
- b. How to design a lawful policy – particularly given the lack of an accepted definition of ‘high carbon’.

D.a – Legal Risks

35. The underlying risk for local authorities in adopting a ‘high-carbon’ advertising ban is of the policy or the decision to implement it being judicially reviewed on the basis that:

- a. It was beyond the powers of the local authority to implement such a policy and doing so was therefore unlawful;
- b. The policy amounts to an unlawful fettering of the local authority’s discretion;
- c. The adoption of the policy was irrational and/or made without evidence; and/or
- d. The policy amounts to an unlawful interference with convention rights, in particular Article 10 – freedom of expression.

36. In this section when referring to a ‘high-carbon’ advertising ban I am referring to the definition set out by Badvertising, namely advertisement of/by:

- a. Airlines and airports: all advertising by airports and airlines which might reasonably be deemed to promote more flying;
- b. Fossil fuel companies: all firms and associated sub-brands or lobbying organisations that extract, refine, produce, supply, distribute, or sell any fossil fuels;

c. Cars: petrol, diesel and hybrid vehicles and Plug-In Hybrid Electric Vehicles.

37. This is, in my view, the high-water mark of a ‘high-carbon’ advertising ban. As set out in section D-b, the specific products and services to be covered by a policy are very much matters for a local authority’s discretion.

Unlawfulness

38. As set out above,³⁶ local authorities have very broad powers to implement policy, including advertising policy. In *Core Issues Trust* it was noted that TfL’s advertising policy had been introduced pursuant to paragraph 1(3) of Schedule 10 of the Greater London Authority Act 1999 which empowers the Greater London Authority “to do such things....as are calculated to facilitate, or are conducive or incidental to, the discharge of any of its functions”. This is essentially the same power as set out in section 111 of the Local Government Act 1972 and therefore it is reasonable to conceive that local authorities are empowered by this section to introduce an advertising policy.

39. If this is not the case, section 1 of the Localism Act 2011 would more likely than not encompass such a power. Alternatively, in any event, as Lord Clyde noted in *Alconbury*, the provision of guidance of a discretion is “perfectly proper” and policies are “an essential element in securing the coherent and consistent performance of administrative functions”.³⁷

40. Whilst the *Lewisham v Shell* decision may provoke some anxiety, it is important to note that this arose out of a policy boycotting a specific company motivated in part by an improper purpose of discouraging Shell from lawfully carrying out business in South Africa. The adoption of an advertising policy concerned broadly with ‘high-carbon’ products and services, rather than targeting a specific company, is far

³⁶ In paragraphs 15-21

³⁷ (N31), [143]

removed from the facts of this case. Further, it is hard to conceive of the purpose in adopting such a policy, namely discouraging consumers from utilising 'high-carbon' products and services to help reach net zero, being conceived as improper given the pursuit of net zero is explicitly set out in primary legislation and the need to reduce demand for carbon intensive activities recognised in Government policy.

41. In my view the adoption of an advertising policy banning 'high-carbon' advertising is therefore squarely within the powers available to local authorities and therefore prima facie lawful.

Fettering of discretion

42. In terms of unlawful fettering, analysis of this risk would depend on the language of the policy and how it was adhered to in practice. Broadly, reducing the risk of successful challenge on this basis is likely to be satisfied by making clear the policy is one that will be taken into account and providing that the policy maintains scope for discretion in respect of advertising decisions.

Irrationality

43. The Courts are generally unwilling to interfere with the lawful exercise of a discretion by a public body on the basis of irrationality.³⁸ All a decision maker must show is that the decision taken was one within a reasonable range of responses. Further, whilst the decision maker must consider relevant matters and evidence before making a decision. it is not always the case that additional evidence gathering is required to underpin such a decision. For example, where the decision is made by an expert or where officials advising the decision-maker have a strong collective knowledge base a court is more likely to find the lack of additional evidence is permissible.³⁹

³⁸ Set out in paragraph 11(b) above

³⁹ *R (Article 39) v Secretary of State for Education* [2022] EWHC 589 (Admin) per Holgate J at [108]

44. In my view, again given the importance attached to reaching net zero in primary legislation and policy, adopting a policy banning high-carbon advertising is prima facie a reasonable and rational course. Further, whilst a local authority should ensure they are aware of and consider relevant evidence before adopting such a policy, given the evidence base that exists⁴⁰ I do not consider that it would be irrational or unreasonable⁴¹ to fail to carry out further evidence gathering.

45. In sum, in respect of irrationality, I consider that provided a local authority acquaints itself with, and considers, the existing evidence base relevant to deciding on adopting a 'high-carbon' advertising ban; the decision to adopt such a ban is more likely than not to be a rational one.

Fundamental rights

46. The primary right likely to be raised is Article 10, freedom of expression, which applies also to commercial advertising.⁴² A ban on 'high-carbon' advertising would constitute an interference with this right and therefore must be prescribed by law, in pursuit of a legitimate aim, necessary in a democratic society and proportionate.

47. For the interference to be prescribed by law it must have a basis in national law, be accessible, and be formulated with sufficient precision to enable an individual to foresee when it might be applied. As set out above,⁴³ local authorities have broad powers to introduce policies including advertising policy and therefore introducing such an advertising policy would have a basis in national law. The accessibility and precision of any policy will naturally depend on the wording and publication adopted by a local authority. Provided the advertising policy is accessible and set

⁴⁰ For example, that set out in the factual background above, in particular the report and references of the House of Lords Environment and Climate Change Committee

⁴¹ Bearing in mind the Tameside duty which provides that a decision maker is required to take such steps to inform himself as are reasonable and proportionate - *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014

⁴² N27(Markt intern Verlag GmbH and Klaus Beermann v. Germany)

⁴³ In paragraphs [38]-[41]

out in plain language, as those referred to in paragraph 7 above are, in my view, this is likely to be unobjectionable.

48. Again, in my view the aim of discouraging consumers from 'high-carbon' products and services is a legitimate aim, necessary in a democratic society, given its recognition in primary legislation and policy.

49. The key question, therefore, is likely to be whether an advertising ban is proportionate. The proportionality assessment requires considering whether the means employed are proportionate to the legitimate aim pursued and whether a fair balance has been struck between the interests of the community and the protection of the individual's rights.

50. As Lord Dyson stated in *Core Issues Trust*, the fact that local authorities sell advertising space does not impact the proportionality assessment. He stated also that an important factor in the proportionality assessment will be the fact that restrictions by a public body do not amount to a total prohibition on publishing and disseminating a message, they apply only to advertising on the public authority's advertising estate.

51. Whether a local authority adopting a ban on high-carbon advertising is proportionate will ultimately turn on the specific factual context but, in principle, in my view, a ban is more likely than not to be considered a lawful restriction on Article 10. This is in large part based on the fact any ban would be limited to only the local authority's advertising estate.

Conclusions on legal risks

52. In short, in my view, given the broad powers available to local authorities to make policy, the recognition in primary legislation of the need to reach net zero,⁴⁴ the

⁴⁴ Climate Change Act 2008, s1

explicit recognition in the UK's latest carbon budget of the importance of reducing demand for carbon intensive activities,⁴⁵ and the wealth of collective knowledge in this area; in my view the legal risks of adopting a high-carbon advertising ban are limited and the prospect of a successful challenge, low.

D.b – Designing a Lawful Policy

53. In making an advertising policy, regard must be had to the Secretary of State's code of recommended practice regarding publicity.⁴⁶ The code of recommended practice is focused mostly on advertising made by local authorities and should not present any real restriction on adopting a high-carbon advertising ban.

54. Beyond the need to have regard to the code of recommended practice, as has already been made clear local authorities have broad discretion in this area. Whilst practical concerns will undoubtedly inform the scope of a policy it is useful to note Mr Justice Green's remarks in *Gibraltar Betting and Gaming Association* that the court is not deeply concerned with the efficacy of a policy, more that there is evidence underpinning it and that it is rational.

55. Thus, provided regard is had to evidence and that this evidence is used to inform the policy, given the lack of legal definition of 'high-carbon' products and services, what an individual local authority wants to address is a matter for their discretion.

56. For local authorities keen on implementing a policy quickly or simply looking for a template, the framework adopted by Cambridgeshire County Council provides a useful and thorough starting point. It addresses the need to avoid unlawful fettering, explicitly restricts fossil fuel advertising and also makes clear that there is a residual discretion to refuse adverts which conflict with any of the council's

⁴⁵ The Climate Change Committee, 'The Sixth Carbon Budget – The UK's path to Net Zero', (December 2020) pg25

⁴⁶ Local Government act 1986 s4(1). The code of recommended practice is discussed in paragraph 20 above

principles such as on the climate. Similarly, the policies adopted by Basingstoke and Coventry are two equally appropriate alternative examples.

E. CONCLUSION

57. I have given a summary of my advice in section A above and do not repeat it here.

58. If I can be of any further assistance those instructing should not hesitate to contact me further.

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RICHARD WALD KC

39 ESSEX CHAMBERS

81 CHANCERY LANE

LONDON WC2A 1DD

