

Prohibition of Political Outdoor Advertising in Estonia

Nele Parrest

Tartu University/Office of the Chancellor of Justice, Estonia

ABSTRACT

Although norms regulating the income of political parties have existed in Estonia for years, the first step to limit the expenses of electoral campaigns was made in 2005 when a law that prohibited political outdoor advertising during the active campaign period and provided for the liability of violating the prohibition was adopted. Soon after the adoption, the new norms received strong criticism from different sectors of society (scientists, politicians, lawyers, entrepreneurs etc) and brought about several problems, including cases that consciously tested the boundaries of the prohibition. Still the Supreme Court confirmed the constitutionality of the prohibition of political outdoor advertising. The article is based on the hypothesis that the prohibition may not "work" in practice in Estonia – the aims of the legislator may be unachievable. More concretely, J.G. Backhaus's evaluative and normative analyses are used in order to show why the prohibition did not and will not work in practice.

Key words: political outdoor advertising; freedom of political speech; law and economic analysis; Estonia

1. Introduction

Funding of political parties and electoral campaigns is a frequent topic in newspapers and also in academic literature, especially before and after elections. Discussions concentrate mainly on the questions of whether the state should give money to political parties (directly or indirectly) and if so, how much¹, which restrictions should be applied to the right of political parties to get money from private sources and how, on the other hand, political parties try not to follow these rules by hiding their expenses or incomes.

¹ Depending on elections, individual candidates and/or election coalitions can also participate in elections.

A regulation limiting the income of political parties has existed in Estonia for years (in the Political Parties Act). However, the first step to limit the expenses of electoral campaigns was not made before June 2005 when a law² that prohibited political outdoor advertising during the active campaign period and provided for the liability of violating the prohibition was adopted (hereinafter also *Amendment Act of Election Laws*).

Soon after the adoption, the prohibition received strong criticism from different sectors of the society – scientists, politicians and entrepreneurs (e.g. Ü. Madise in Seaver 2009; R. Taagepera in Raun 2009). It also caused many cases of consciously testing the boundaries of the prohibition – e.g. green advertisements of K-cheese curds reminiscent of the logotype of a party, social advertisements with flowers used as a distinctive mark by one of the parties etc. In addition, many practical problems/misunderstandings emerged, e.g. whether a car with the logotype of a party or a house belonging to a party with the name of the party on it were allowed, whether electoral tents/pavilions, distributing political leaflets or TV sets showing advertisements of a party in shopping centres should be considered political outdoor advertising and consequently prohibited. Also the Chancellor of Justice raised the question of the constitutionality of the prohibition.³

On the other hand, there were many people who were rather supportive towards the prohibition claiming that they just did not like (ugly and meaningless) political posters hanging in public space, that there was too much political advertising through which parties spent too much public money etc. This point of view was also supported by the Supreme Court, which on 1 July 2010 confirmed the constitutionality of the prohibition of political outdoor advertising.⁴

It has been said that representative democracy is not a phenomenon that can be characterised through cheapness and cost-effective expenses (Kangur 2009). Despite that, the following article tries to find out whether the prohibition of political outdoor advertising was justified in Estonia, using the methods of Law & Economics. More concretely, the article is based on the hypothesis that despite the confirmation of the constitutionality of the prohibition of political outdoor advertising by the Supreme Court, the prohibition may not “work” in practice in Estonia – the aims of the legislator may be unachievable.

² The Amendment Act of the European Parliament Election Act, the Local Government Council Election Act and the Riigikogu Election Act. Section 51 of the European Parliament Election Act, § 61 of the Local Government Council Election Act and § 51 of the Riigikogu Election Act stipulate: “Advertising of an individual candidate, political party or a person standing as a candidate on a political party list, [election coalition or a person standing as a candidate on an election coalition list – only in the Local Government Council Election Act (N.P.)], or their logo or other distinguishing sign or programme on a building, installation, on the outside or inside of a means of public transport or taxi, and other types of political outdoor advertising is prohibited during the active campaign period.” Section 71¹ of the European Parliament Election Act, § 67 of the Local Government Council Election Act and § 73² of the Riigikogu Election Act provide for liability for a violation of restrictions on political outdoor advertising.

³ See 6 September 2005 Report No. 2 of the Chancellor of Justice; 9 June 2008 Proposal No. 2 of the Chancellor of Justice to the Riigikogu; 18 December 2009 Request No. 2 of the Chancellor of Justice to the Supreme Court.

⁴ See Supreme Court en banc judgement of 1 July 2010, No. 3-4-1-33-09 (at: <http://www.nc.ee/?id=1157> (accessed 10 September 2010; in English)). The judgement has three dissenting opinions by 7 judges (including the Chief Justice).

The example of Estonia is chosen because although the topic of political advertising (including outdoor advertising) has been repeatedly analysed from different angles in foreign literature (e.g. Kaid 2004, 155-202; Hagmann 2006, 323-330; Lewis 2005, 290-300), there has not been much academic discussion on the subject in Estonia. Other countries' experience can be used as examples, but conclusions made in other countries cannot be carried over to Estonia one-by-one due to differences in political culture, historical background and social context.

The article starts by describing the social context of the prohibition (I). After an explanation of the essence of J.G. Backhaus's evaluative and normative analyses (II), the mentioned methods are used in order to estimate the aims pursued by the legislator and their achievement in practice (III-IV). The article ends with conclusions made on the basis of the preceding analysis.

2. The social context of the prohibition prior to the adoption of the prohibition

As was said, the prohibition of political outdoor advertising was adopted in June 2005. One reason for that was the fact that several parties used especially massive advertising campaigns during the 2004 elections. However voter turnout was very low – only 26.83% (see also table 1). In addition, costs of election campaigns (including costs of advertising) constantly rose and have in general continued to rise. (See also table 2.)

Table 1: **Voter turnout in Riigikogu Elections, Municipal Elections and European Parliament Elections in 2002-2009**

	Riigikogu Elections	Municipal Elections	European Parliament Elections
2002	-	52.5%	-
2003	58.24%	-	-
2004	-	-	26.83%
2005	-	47.4%	-
2007	61.9%	-	-
2009	-	60.57%	43.9%

Source: Estonian National Electoral Committee at www.vvk.ee (accessed 10 June 2010)

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Table 2: The election expenses of four bigger parties represented in Riigikogu⁵

<u>Riigikogu Elections, 2003</u>			
	Total (EEK)	Advertising expenses (EEK)	Percentage of advertising expenses
Estonian Reform Party	14,625,750.85	11,931,593.59	81.58
Estonian Centre Party	20,374,196.78	16,921,999.28	83.06
Estonian Social Democratic Party	2,904,610.65	1,117,410.20	38.47
Estonian People's Union	5,940,053.78	4,948,769.83	83.31
<u>Riigikogu Elections, 2007</u>			
	Total (EEK)	Advertising expenses (EEK)	Percentage of advertising expenses
Estonian Reform Party	32,467,469.95	17,425,892.81	53.67
Estonian Centre Party	41,390,621.32	23,031,754.00	55.64
Estonian Social Democratic Party	7,942,607.61	4,802,473.37	60.46
Estonian People's Union	13,434,819.09	12,463,862.53	92.77
<u>European Parliament Elections, 2004</u>			
	Total (EEK)	Advertising expenses (EEK)	Percentage of advertising expenses
Estonian Reform Party	4,494,557.02	4,076,185.25	90.69
Estonian Centre Party	3,508,547.48	2,832,231.99	80.72
Estonian Social Democratic Party	1,503,453.53	1,096,494.65	72.93
Estonian People's Union	3,502,949.16	3,002,047.13	85.70
<u>European Parliament Elections, 2009</u>			
	Total (EEK)	Advertising expenses (EEK)	Percentage of advertising expenses
Estonian Reform Party	5,119,165.06	3,893,496.35	76.06
Estonian Centre Party	9,709,373.37	6,134,614.77	63.18
Estonian Social Democratic Party	2,013,797.00	1,726,141.10	85.72
Estonian People's Union	1,636,400.40	1,004,933.99	61.41
<u>Municipal Elections, 2005</u>			
	Total (EEK)	Advertising expenses (EEK)	Percentage of advertising expenses
Estonian Reform Party	15,667,215.97	10,242,360.96	65.37
Estonian Centre Party	16,159,717.47	13,199,115.05	81.68
Estonian Social Democratic Party	1,914,876.81	1,206,678.89	63.02
Estonian People's Union	4,182,520.47	3,325,940.42	79.52
<u>Municipal Elections, 2009</u>			
	Total (EEK)	Advertising expenses (EEK)	Percentage of advertising expenses
Estonian Reform Party	12,810,232.70	8,192,617.00	63.95
Estonian Centre Party	12,028,913.32	9,811,146.78	81.56
Estonian Social Democratic Party	3,122,231.15	2,066,410.24	66.18
Estonian People's Union	588,214.99	320,591.76	54.50

Source: Riigikogu Select Committee on the Application of the Anti-Corruption Act and Estonian National Electoral Committee.

⁵ Pro Patria and Res Publica Union and the Green Party are left out as their expenses are not easily comparable (due to the unification of the parties Pro Patria and Res Publica and the creation of the Green Party only before the Riigikogu elections in 2007). The costs of the election campaigns also include expenses made separately and reported by members of the parties. According to the law, if a person who stands as a candidate on the list of a political party incurs expenditure for the election campaign separately from the campaign expenditure of the political party, the report shall also contain information on these expenses; the provisions concerning the reports of political parties apply to the specified expenditure.

Before the adoption of the Amendment Act of Election Laws, there had been several attempts in 2004 and 2005 to regulate political advertising in one way or another and/or to limit the costs of campaigns.⁶ Namely, there were at least 5 draft laws pending in parliament (in addition to the draft law of the Amendment Act of Election Laws (620 SE) that was adopted). However, none of them was successful:

1. The Advertising Act and Broadcasting Act Amendment Act (235 SE), initiated on 21 January 2004 by Faction of the Pro Patria Union – withdrawn after the first reading on 15 June 2005;
2. The Election Acts and Referendum Act Amendment Act for Limitation of Political Advertising and Electoral Expenses (234 SE), initiated on 21 January 2004 by Faction of the Pro Patria Union – withdrawn after the first reading on 15 June 2005;
3. The Riigikogu Election Act and Related Acts Amendment Act for Abolition of National List of Candidates and Limitation of Electoral Expenses (302 SE), initiated on 22 March 2004 by the Government of the Republic – withdrawn after the first reading on 2 May 2005;
4. The Advertising Act Amendment Act (387 SE), initiated on 18 May 2004 by the members of Riigikogu – rejected at the first reading on 13 October 2004;
5. The Broadcasting Act and Political Parties Act Amendment Act (593 SE), initiated on 7 March 2005 by the members of Riigikogu – upon termination of the term of authority of the Riigikogu withdrawn from legislative proceeding.

In addition, at that time, the financing of political parties was becoming more and more important as a topic for the general public (it became even more topical later, in 2008, when GRECO published its report on Estonia⁷, and the Supreme Court decided that the law regulating the supervision of financing of political parties was constitutional⁸).

Taking the aim of the article into account, as well, it must be added that the first version of the draft law of the Amendment Act of Election Laws (620 SE) did not foresee the prohibition, but a limitation of political outdoor advertising.⁹ It should also be stressed that some pre-analyses were made by the Economic and Social Information Department of the Chancellery of the Riigikogu: 1) on regulations of political advertising in different countries and 2) on electoral advertising before the elections of Riigikogu in 2003.

⁶ Thence the legislator acknowledged that legislative initiative was needed to regulate social relationships – good practices, political culture and/or “gentlemen agreements” were not suitable/effective enough in practice.

⁷ The Council of Europe’s Group of States against Corruption (GRECO). Third Round Evaluation Report on Estonia. Available at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/ReportsRound3_en.asp (accessed 10 June 2010).

⁸ Supreme Court en banc judgement of 21 May 2008, No. 3-4-1-3-07.

⁹ The first version foresaw the obligation for local governments to decide 60 days prior to elections on places where parties and independent candidates could exhibit their information sheets etc. The limitation was turned into a prohibition during the second reading of the draft law on 8 June 2005.

3. Methods of Law & Economics used

Wolfgang Drechsler has said that Law & Economics is a form of legal realism the concern of which is “what effect a law really has, rather than the effect it is supposed to have or which problem it addresses. The basis of this kind of Law & Economics, thus, lies in Plato’s sentence, ‘This is what the law-maker must often ask himself: What is my purpose? Do I indeed achieve this or rather miss my goal?’” (Drechsler 2000, 238)

There are different methods of Law & Economics that can be used in order to find the right measure for the attainment of one’s aim. In the following analysis, the approach elaborated by J.G. Backhaus is used, who has distinguished between 3 types of analysis: evaluative analysis, economic reconstruction of legal arguments and normative analysis (Backhaus 1999, 272). The article will mainly concentrate on the first one – evaluative analysis, the aim of which is to explain the consequences of the concrete legal decision (not only from an economic point of view but also from other spheres). It must be borne in mind that the consequences of the concrete legal decision and the purpose of the legislator should not be equated; they are not the same – the aim of the evaluative analysis is to show whether and how they coincide (Backhaus 1999, 272-273).

However, some words are also spoken from the normative point of view, the aim of which is to indicate the relationship and possible conflict of values underlying the legal decision (Backhaus 1999, 272).

Why were these methods chosen? First, it is natural that in cases of restrictions/prohibitions, the addressees try to ignore them – try to disregard them and still find ways to achieve their aim, including walking on the edge of allowed and not allowed. The evaluative analysis is the most suitable for finding the answer to whether the prohibition of political outdoor advertising was formulated in a law “waterproof” enough to ensure the observance of the prohibition and through this the attainment of the purpose of the legislator. The real validity of a rule depends on the observance of the rule in practice (*de facto* validity).

Second, the activity of legislature is always an *ex-ante* decision/evaluation of the situation. Yes, previous analyses can and should be made in order to predict how addressees will react to new norms. However, some uncertainty always remains – there is always the possibility that circumstances emerge that have an impact on the attainment of the wished outcome which could not be foreseen. In the current case, these circumstances can be, e.g., the economic crisis that has diminished the supply of money to political parties. Also, the behaviour of people (including the electorate) can never be predicted with 100% certainty. That is why today, when *ex-post* analysis is made, it may not be fair to condemn legislature for not foreseeing that not all outcomes can be attained. That is also why normative analysis is used where the differentiation between *ex-ante* and *ex-post* evaluation is not so important. The fact that in regulating political advertising, very important constitutional values come into conflict also speaks in favour of using normative analysis.

The following analysis is mainly hypothetical, i.e. it tries to reconstruct the abstract analysis that must have been done prior to the adoption of the law by the legislature in circumstances of limited knowledge of possible effects of the prohibi-

tion. The hypothetical approach is used for two reasons. First, if the legislature really wants to achieve its aim, it must always bear in mind “the worst case” – the norm must be applicable in almost all possible circumstances despite possible changes in factual context and real reactions of different actors. That is why phrases like “may”, “it is probable”, “it is questionable” etc. are used in the text. Second, as was said in the introduction, political (outdoor) advertising as a topic has not received much attention from academics in Estonia. That is why there is not enough thorough, detailed and reliable empirical social data available in this field (e.g. proportions between different political advertising channels in terms of amounts and expenditures, reliable measuring of the effects of different forms of advertising etc.) to draw clear conclusions.¹⁰ In order to illustrate a little the real outcome of the prohibition in Estonia, only a few examples of the actual effects of the law are put forward.

4. Evaluative analysis

According to the explanatory memorandum of the Amendment Act of Election Laws (620 SE), the limitation/prohibition of political outdoor advertising was necessary in order to avoid the gigantomania of advertising as advertising had “changed political discourse into ordinary marketing.” The limitation/prohibition would help to attain the following aims¹¹:

1. reduce the costs of election campaigns and increase the transparency of the financing of political parties (as the wish to conceal campaign costs would be smaller);
2. reduce the relative importance of money in achieving power, which would better ensure the equality of candidates;
3. increase the proportion of political argumentation in election campaigns (it would force candidates to provide more substantive information);
4. liberate the public space (there would no longer be election posters the size of a whole building or arbitrary sticking of posters on walls of buildings and fences);
5. reduce the resentment of the public towards political advertising and politics in general caused by the outdoor advertising used during elections.

¹⁰ “The impact of the prohibition, as the Chancellor of Justice admits, is not clear. No reliable information exists on how the prohibition has influenced electoral behaviour in Estonia or the activities of political parties, election coalitions and individual candidates upon finding supporters for their views. In abstract proceedings regarding the review of regulations, it is not clear in which way and how strongly the prohibition affects the equal opportunities of candidates, election coalitions and political parties to organise election campaigns and thereby the uniform right to stand as a candidate.” (Supreme Court en banc judgement of 1 July 2010, No. 3-4-1-33-09, 61.) Compare research made in USA: Kaid 2004, 166-175 (effects on voter knowledge levels, on candidate evaluations, on behaviour, negative advertising effects).

¹¹ This is a summary of the explanatory memorandum as the aims were disorderly brought out in the text. Those aims were also mentioned in the course of debates in parliament of the draft law No. 620 SE as well as in the debates of other draft laws mentioned before. The Supreme Court has emphasised the first two aims, see Supreme Court Constitutional Review Chamber judgements of 14 November 2005, No. 3-4-1-27-05; Supreme Court en banc judgement of 1 July 2010, No. 3-4-1-33-09, 51.

The aims listed above are connected to each other. E.g. the aim to reduce the costs of election campaigns (aim No. 1) should also reduce the relative importance of money in achieving power (aim No. 2). The liberation of the public space (aim No. 4), in turn, helps to avoid potential negative emotions of the public caused by political outdoor advertising and to decrease the potential resentful attitude of the public towards political advertising and politics in general (aim No. 5).

Consequently there were three aims:

1. reducing the importance of money in achieving power through the reduction of costs of election campaigns;
2. increasing the proportion of political argumentation in election campaigns;
3. liberating public space from too much outdoor advertising that can cause the resentment of the public towards political advertising and politics in general.

It may be said that the aims mentioned above are interim objectives due to the fact that they are all related to general (electoral) principles: transparency of public power, the principle of equal treatment of candidates stemming from the principle of uniform elections, the principle of the representativeness (representation of different interests in society) of representative bodies. In one way or another, all listed principles could consequently be traced back to the principle of democracy (Art. 1 and 10 of the Constitution).¹²

At first sight, it seems that the prohibition of political outdoor advertising helps to reduce the costs of campaigns and the importance of money in achieving political power and forces candidates to engage more in substantive campaign work (aims No. 1 and 2). It also liberates public space from too much outdoor advertising (aim No. 3). However, a closer look indicates that the outcome may be totally different.

The prohibition of political advertising concerned only one form/channel of advertising – outdoor advertising. Consequently it is probable that political outdoor advertising “not done” will transfer to other advertising channels. As a result, electoral campaign expenditure (aim No. 1) may remain at the same level, but the use of other means of advertising (broadcasting, printed media, internet, direct mailing) may increase.

It is also not certain that the prohibition of political outdoor advertising will force candidates to engage considerably more in the provision of more substantive information to their voters (aim No. 2). Although outdoor advertising emphasises visual information (display of photos, slogans, etc.) rather than oral information, the adver-

¹² See, e.g.: “The principle of democracy in forming representative bodies of local governments is aimed at achieving sufficiently representative bodies.” (Supreme Court Constitutional Review Chamber judgement of 15 July 2002, No. 3-4-1-7-02, 20.) “Under the proportional electoral system, the principle of uniform elections gives rise to the requirement that different groups of persons who wish to register lists of candidates must have equal possibilities for standing as candidates.” (Supreme Court en banc judgement of 19 April 2004, No. 3-4-1-1-05, 16.) Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns (Adopted by the Committee of Ministers on 8 April 2003 at the 835th meeting of the Ministers’ Deputies).

tising distributed in the printed media, on the internet and by direct mailing is not necessarily very different.¹³

In addition, political outdoor advertising is prohibited only during the active campaigning period – only before elections. Consequently outdoor advertising may shift to an earlier period before the prohibition begins and/or increase in other advertising channels. Such a reorientation may in essence mean that the public space is “occupied” simply in an earlier period. Advertising that so far was not disturbing in other advertising channels may become excessively disturbing there, as well. Consequently, the attainment of aim No. 3 is also questionable.

Due to differences in nuances, different channels of advertising are not comparable.¹⁴ However, prohibiting advertising only in one channel and only during a limited period, the legislature should have made a thorough and deep analysis of whether and how the prohibition really helps to achieve the pursued aims – to reduce campaigning costs, oblige candidates to engage in substantial discussions and liberate public space. As indicated before, it is clearly questionable. The truthfulness of the listed assumptions – increase in other advertising channels, shift in time – depends on the behaviour of candidates and presupposes detailed analysis. However, practice seems to confirm the assumptions.¹⁵

It should also be added that data contained in reports of campaigning costs is very inconsistent. That is why it is difficult to make certain empirical conclusions about the real impact of the prohibition of political outdoor advertising. The biggest item of expenditure has certainly been advertising, but it is not possible to define how large a proportion of the overall expenditure is allocated to outdoor advertising as advertising campaigning costs are divided according to the law in the following way: expenses for publications, television advertising, radio advertising and adver-

¹³ To the contrary (without reference to supportive research or empirical data): “The prohibition only directs political discussions into other channels where there is more likelihood that they become more substantial than the slogans and pictures displayed in outdoor advertising. At the same time, in these channels, there are fewer possibilities to influence voters inappropriately.” (Supreme Court en banc judgement of 1 July 2010, No. 3-4-1-33-09, 63)

¹⁴ Different channels of advertising differ – they are not directly comparable in terms of the effect of advertising, the scope of the audience, the volume of the resource, advertising costs, “avoidance” of advertising etc. E.g. outdoor advertising is characterised by the fact that, unlike other methods of distribution of information (e.g. radio, television, newspapers), it is not possible to avoid or regulate it according to a person’s own wish because public space surrounds all of us, and it cannot be avoided. Outdoor advertising is in a sense the most imposing form of advertising. It has also been said that television is the scarcest resource but at the same time has the widest audience and the strongest effect. The European Court of Human Rights has stressed: “The Court has acknowledged that account must be taken of the fact that the audio-visual media have a more immediate and powerful effect than the print media.” (European Court of Human Rights judgements of 10 July 2003, No. 44179/98, *Murphy vs. Ireland*, 69, 74; 28 June 2001, No. 24699/94, *VgT Verein gegen Tierfabriken vs. Switzerland*, 73-74; 11 December 2008, No. 21132/05, *TV Vest & Rogaland Pensjonistparti vs. Norway*, 60, 76.) See also: TNS EMOR 2003.

¹⁵ E.g.: “Actually the prohibition initiated political propaganda earlier than usual – three and a half month prior to elections the city is full of enormous photos of Andrus Ansip and ‘pink ladies’ of Central Party.” (Äripäev Online 2006) Same conclusion: BNS 2006. E.g.: “Political parties use money left due to the prohibition of political outdoor advertising for publishing newspapers, publishing in Tallinn over 500,000 exemplars of different city, city district or foundation news-papers.” (BNS 2005)

tising in newspapers and magazines.¹⁶ In addition, expenses of outdoor advertising can be included e.g. under the heading “Rent Expenses”.

Statistics show that voter turnout has recently increased (see table 1) and campaigning costs have decreased (see table 2). However, it is questionable whether these are consequences of the prohibition of political outdoor advertising. These developments can be caused by an increase of the general activism of the third sector and economic recession. It is difficult to find empirical data in order to make substantial conclusions.

Also behavioural approaches of Law & Economics could have been used by the legislature in order to analyse the outcome of the prohibition of political outdoor advertising (both, *ex ante* as well as *ex post*). (Sunstein 1999, 115) E.g. it has been said that, differing from other European countries, Estonians vote on the basis of the personality of a candidate, not relying on his/her campaign (Saar Poll 2009). This conclusion would make it possible to say that electoral advertising, including outdoor advertising and regulating it does not have a considerable impact on the behaviour of a voter. However, there have also been analyses that claim that there is a dangerously large correlation between campaign expenses and votes received (the coefficient of this correlation has been over 0.9 during three elections), which shows a clear relationship between expenses made and votes received (Sikk 2006, 75) and puts in question the above-mentioned conclusion.

It must be added that the explanatory memorandum of the draft law of the Amendment Act of Election Laws (620 SE) and the memorandums of all other draft laws mentioned before contained the following sentence: “Draft law does not bring with it any additional costs.” In other words, the question of how the prohibition will influence costs borne by supervisory institutions was totally ignored.

The prohibition of political outdoor advertising definitely caused additional administrative workload to supervise the observance of the prohibition. The main problem related to the question of what should be considered “political outdoor advertising” (and consequently prohibited and punishable) as it was defined very vaguely in the law (using undefined legal norms).¹⁷

Mainly it was a problem for the police. According to election laws, extra-judicial proceedings in matters of misdemeanours regarding violations of the restriction established on political outdoor advertising are conducted by police prefectures. These cases are heard and decided by county courts.

The Supreme Court has explained that electoral committees also have the power and the obligation to decide on problems related to political outdoor advertising: they have to decide whether an advertisement was political outdoor advertisement or not and take a stand on whether the violation of the prohibition had an effect or may have

¹⁶ European Parliament Election Act § 65(2), Local Government Council Election Act § 61(2), Riigikogu Election Act § 67(2): The types of expenditure are “1) advertising expenses (expenses for publications, television advertising, radio advertising and advertising in newspapers and magazines shall be set out separately); 2) public relations expenses; 3) publication expenses; 4) transportation expenses; 5) rent expenses; 6) expenses for the organisation of public events; 7) communication expenses; 8) postal expenses; 9) other expenses.”

¹⁷ See footnote 2.

had an effect on voting results to a significant extent.¹⁸ Consequently, if the effect of the prohibited outdoor advertising on voting results was challenged, the following bodies were engaged in resolving the dispute: the county electoral committee, the National Electoral Committee and the Supreme Court. In 2005, five cases went through all mentioned levels of challenge proceedings¹⁹, in 2009, one case.²⁰

Expenses of supervision do not only cover the administrative costs of investigating concrete cases, but also costs that arise in connection to responding to requests for information or explanations, whether something should be considered political outdoor advertising or not. E.g. in 2009, 21 requests for information or explanations were submitted to the National Electoral Committee before the European Parliament elections and 32 before the local government elections.²¹

The most famous cases about the nature and the observance of the prohibition of political outdoor advertising have been the case of the K-cheese curds (in resolving the case, the following bodies were engaged: electoral committees, the Supreme Court, the Select Committee on the Application of the Anti-Corruption Act of Riigikogu, the Prosecutor General, the Estonian Security Police, the Northern Police Prefecture, the Harju County Court, the Consumer Protection Board, the Tallinn Enterprise Department), the advertisement of a cornflower of Estonian People's Union and the posters of leaders of the Estonian Green Party.

All described administrative expenses that accompanied the prohibition of political outdoor advertising were totally disregarded by legislature when the prohibition was adopted.

5. Normative analysis

As was said, according to J.G. Backhaus, normative analysis explores the relationship and possible conflict of various value judgements underlying the legal decision.

The aim of the prohibition was the limitation of electoral campaign costs and the relative importance of money in achieving power. This should help to guarantee the transparency and legitimacy of public power and the formal equality of candidates and those who present candidates (incl. parties). The requirement stems from the principle of uniform elections (Art. 60(1) and Art. 156(1) of the Constitution) that requires equal possibilities for all candidates to stand as candidates and to be successful in the elections.

The aim of the legislature to increase the knowledge of voters (increase of the

¹⁸ See Supreme Court Constitutional Review Chamber judgements of 4 November 2005, No. 3-4-1-18-05, 13; 9 November 2005, No. nr 3-4-1-26-05, 9. At the same time, the Supreme Court has acknowledged that it is very difficult to determine whether an advertisement had an impact or not on voting turnout or on the distribution of mandates – there is no methodology. “The fact that a big proportion of the population considered advertisements of K-cheese curds to be political does not indicate yet that they had an effect to voting results.” (Supreme Court Constitutional Review Chamber judgement of 30 November 2005, No. 3-4-1-34-05, 12.)

¹⁹ See Supreme Court Constitutional Review Chamber judgements of 4 November 2005, No. 3-4-1-18-05; 7 November 2005, No. 3-4-1-22-05; 9 November 2005, No. 3-4-1-26-05; 14 November 2005, No. 3-4-1-27-05; 30 November 2005, No. 3-4-1-34-05.

²⁰ Supreme Court Constitutional Review Chamber judgement of 13 November 2009, No. 3-4-1-28-09.

²¹ Data received from an advisor of the National Electoral Committee (25.11.2009 e-mail).

proportion of political argumentation in election campaigns) and voter turnout (bearing in mind the possible resentment of the public towards political advertising and politics in general) should help to increase the representativeness of representative bodies. The described aim is essential and necessary to ensure democracy.

It follows from the above that the aims of the prohibition of political outdoor advertising were meant to foster democracy as one of the most fundamental principles.

However, despite important aims, the prohibition (and punishment by way of misdemeanour proceedings for the violation of the prohibition) also brings with it intensive interference into several fundamental rights, e.g. the freedom of enterprise stipulated in Art. 31 of the Constitution, the right of ownership enacted in Art. 32 and the freedom of political speech covered by the freedom of expression in Art. 45. The restriction may also interfere with electoral rights (on the national level Art. 57 and 60 of the Constitution, on the local level Art. 156 of the Constitution) and the fundamental right of political parties (2nd sentence of Art. 48 § 1 of the Constitution). The prohibition may also interfere with other fundamental rights, e.g. the right of self-realisation stipulated in Art. 19 § 1 of the Constitution and the freedom of contract covered by the general right to liberty.

At first sight, it seems that the interference is not intensive as the prohibition of political advertising concerns only one channel of advertising and is only in place for a limited period. However, the European Court of Human Rights has emphasised that the time prior to elections is especially important to voters as this is the "... critical period when their minds are focused on their choice of representative" (European Court of Human Rights 1998, 45). That is why free distribution of information should be guaranteed before elections.²² As the potential effect of political advertising on voters is bigger just before elections and the active campaigning period is the time when candidates are devoted to presenting their opinions, the argument of the limited period of the prohibition does not diminish the intensity of interference.

In addition, the freedom of expression, especially political speech, is a value that is considered to form the bedrock of democratic society.²³ First, the question of whether an advertisement should be considered to be disgusting, disturbing etc. is very subjective. It is also questionable whether a candidate aiming to be successful at elections would want to make an advertisement that contradicts his/her aim. Second, the European Court of Human Rights has emphasised that freedom of expression "... is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no

²² "... it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely." (European Court of Human Rights judgement of 9 January 2007, No. 51744/99, *Kwiecień vs. Poland*, 48.)

²³ "The freedom of communication is one of the preconditions for the functioning of a democratic society ..." (Supreme Court Civil Law Chamber judgement of 5 December 2002, No. 3-2-1-138-02, 9.) "The principle of the freedom of speech is an indispensable guarantee of a democratic society and thus one of the most important social values." (Supreme Court Criminal Law Chamber judgement of 26 August 1997, No. 3-1-1-80-97, 1.)

‘democratic society’.” (European Court of Human Rights 1976, 49). Consequently there is little scope for restrictions on political speech (European Court of Human Rights 2009, 92).

It is also clear that if bigger political parties are rich enough to publish newspapers and to broadcast radio and TV advertisements instead of using outdoor advertising, election coalitions that can participate in local elections and still have considerable support among the general public are not so powerful in terms of money. Through the prohibition of political outdoor advertising, political parties belonging to Riigikogu have cut away an important communication channel for election coalitions, and through this, parties have acquired a considerable advantage.

It follows from the above that very important values came into conflict when the prohibition of political outdoor advertising was established. How much importance should be attributed to one or another value depends on the evaluator and his/her value system. Conclusions made on the basis of evaluative analysis (that the effectiveness of the achievement of the aims of the legislature is dubitable) should also be taken account.

6. Conclusion

Limitations to the financing of political parties are usually divided into two. First, those that limit the supply of money to the parties (e.g. in Estonia only physical persons can make donations); second, those that should limit the need of parties for money (e.g. limits to overall expenditures or certain expenditures, limitations to certain activities etc.). As R.S. Katz has said, limits to the supply should “prevent those with money from buying candidates” and limits to the demand/need should “prevent candidates or parties from buying elections” (Katz 1996, 124). The limitations to political outdoor advertising that came into force in Estonia in June 2005 belong to the latter category of limitations.

Problems of regulating political advertising are familiar not only to Estonia. The practice of the European Court of Human Rights shows that also older democracies have failed in doing so.²⁴ Political speech is the cornerstone of a democratic state and one of the most important values. That is why legislature must be very careful in regulating it, especially in imposing prohibitions.

The aims of the prohibition of political outdoor advertising declared by the legislature were all perfect – reducing the costs of election campaigns and the relative importance of money in achieving power, increasing the proportion of political argumentation in election campaigns, liberating public space and reducing the resentment of the public towards political advertising and politics in general. In short, they are all reducible to the principle of democracy.

At first sight, it seems that the aims are achievable. However, a closer look seems to provide a different result: political advertising may shift to a time before the ban comes into force and increase in other channels, costs of elections may not be reduced etc. Consequently the effectiveness of the achievement of the aims pursued

²⁴ Most recently e.g. European Court of Human Rights judgement of 11 December 2008, No. 21132/05, *TV Vest & Rogaland Pensjonistparti vs. Norway*.

by the legislature is dubitable. Also the increase of the workload and the concurred costs of the relevant institutions that had to supervise the observance of the prohibition, resolve election complaints and answer requests for clarification of whether something constitutes political outdoor advertising were totally disregarded by the legislature.

The analysis based on methods of Law & Economics (more concretely J.G. Backhaus's evaluative and normative analysis) brought up before indicates that legislature probably did not honestly and rationally answer Plato's question, "Do I really achieve my aim?" Emotional populist arguments and hope for possible political profit at the expense of others are probably the causes why means that probably would not help to achieve the aims were chosen. It is unfortunate when political parties try to resolve problems through "coercive" laws with the help of police, electoral committees and courts at the expense of fundamental rights instead of agreeing among themselves on principles of good campaigning.

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NELE PARREST, Mag.Iur., is a Doctoral Student at the Faculty of Law of the University of Tartu and Deputy Chancellor of Justice of Estonia. Her main research interest is public law, especially administrative law. Correspondence: Nele Parrest, Faculty of Law, University of Tartu, Näituse 20, 50409 Tartu, Estonia; E-mail: parrest@ut.ee.