

COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 6 June 1991

Modified Proposal for a

COUNCIL DIRECTIVE

on advertising for tobacco products

(presented in accordance with Article 149(3) of the Treaty)

EXPLANATORY MEMORANDUM

This proposal for a Council Directive concerns advertising for tobacco products on the radio, in the press, on bills and posters, in films and by any other advertising means and/or support. Television advertising is already covered by Council Directive 89/552/EEC of 3 October 1989⁽¹⁾ in as far as the provision of services between Member States is concerned, Article 13 of which prohibits all forms of television advertising for cigarettes and other tobacco products.

I. CURRENT SITUATION

All the Member States of the European Community have legislation, rules or regulations on advertising for tobacco products.

Legislation (laws or regulations): Belgium, France, Greece, Ireland, Italy, Luxembourg, Portugal.

Voluntary agreements: United Kingdom.

A combination of the two: Germany, Denmark, Spain, Netherlands.

France, Italy and Portugal have regulations based on a total advertising ban, although exceptions are permissible in all three countries. For instance, in Portugal and France, the ban affects only point-of-sale advertising. In other countries, more restrictive standards, up to and including outright bans, are currently being looked into.

In the other Member States (i.e. other than the above three), the broad lines of current regulations are as follows:

Germany: Ban on radio advertising for cigarettes and similar products and restrictions on advertising content for other authorized forms of advertising.

Belgium: There is a ban on advertising in cinemas and on radio. Bans also apply to the distribution or handing-out of propaganda material at home or in public, to the distribution of free samples, to advertising in publications for children and to the use of ships or aeroplanes for advertising tobacco products.

Authorized advertising in the press or on posters is subject to restrictions and has to carry a health warning.

Denmark: Outside sales outlets, advertising is allowed only in the press, albeit with a ban on advertising in publications designed for children and in those parts of newspapers devoted to sport or matters concerning young people. Content is severely restricted and there has to be a health warning.

(1) OJ No L298, 17.10.1989, p.23.

Spain: There are limits on the amount of advertising allowed in the press and on radio, with restrictions on advertising content and compulsory health warning notices.

Greece: Radio advertising is prohibited. For other forms of direct advertising, health warnings are compulsory.

Ireland: All forms of advertising are banned apart from in the press (with the exception of publications intended for young people below 18 years of age) and advertising in sales outlets. There are strict restrictions on advertising content and alternating health warnings are compulsory.

Luxembourg: Advertising is subject to severe restrictions. Outside sales outlets, advertising is allowed only in the press and - subject to certain conditions - on posters. There are restrictions on advertising content and health warnings are compulsory.

Netherlands: Radio advertising is prohibited. Restrictions on the advertising content.

United Kingdom: Ban on cigarette advertising in cinemas and on videos, and in the sections of the press intended mainly for minors and women. Restrictions on advertising content. Quantitative restrictions and regulated advertising on posters. Free distribution of tobacco products subject to restrictive conditions. Alternating health warnings are also provided for.

- 1.2. A first proposal for harmonizing national legislation on advertising for tobacco products was presented by the Commission on 7 April 1989⁽²⁾. This proposal dealt with the advertising of tobacco products in the press and by means of bills and posters in the Member States which still allow such advertising.

At the time this first proposal was drawn up, advertising of tobacco products was still allowed in ten of the Member States. Italy and Portugal had already adopted a total ban. Television advertising was covered by another Commission proposal, which has since been adopted as Directive 89/522/ECC of 3 October 1989.

The Commission's aim, then, was initially to harmonize the provisions in force in the Member States on advertising for tobacco products in the press and by means of bills and posters.

Since the Commission presented its proposal of 7 April 1989, the situation in the Member States has steadily moved towards more restrictions. A total ban has been adopted in France, and laws in Belgium and Greece were strengthened.

(2) OJ No C124, 19.5.1989, p.5.

In addition, the European Parliament, consulted under the cooperation procedure on the proposal for a directive of April 1989, came out in its opinion of 14 March 1990 by a very large majority in favour of a total ban on advertising for tobacco products⁽³⁾. Following the opinion of the European Parliament, the Commission adopted a modified proposal⁽⁴⁾.

As it was stated in the modified proposal, the Commission considered this Directive to be a first step towards a complete harmonisation which should guarantee free circulation of advertising media and products after 1993 in the context of the internal market.

In the Council of 3 December 1990, no qualified majority emerged for this proposal. Hence, the successive steps approach recommended by the Commission becomes now inapplicable because of the tight time limits.

Discussions in the Council of Health Ministers on 17 May 1990 and 3 December 1990 brought out the fact that a number of Member States were in favour of full harmonization on the advertising issue, since restricting the harmonization drive to authorized advertising would not resolve all the problems caused by divergent national legislation and would no guarantee of the smooth operation of the internal market.

The Commission therefore announced a modified proposal aimed at a complete harmonization of provisions on the advertising of tobacco products.

II. BASIS OF COMMUNITY ACTION

II.1. The ways and means of circulating information in the twelve Member States are increasingly of a trans-frontier nature. As a result, people in one Member State are increasingly coming into contact with other Member States' media, be it in the form of radio, television, in film projections, the written press or posters. Advertising for tobacco products is following this trend, particularly because of its centralized nature and the fact that the multinational producers use themes which have a Community-wide - not to say international - appeal.

Advertising is an important economic activity which stems from the most fundamental rights. However, legislators in the 12 Member States felt the necessity to restrict the exercise of these rights in order to protect public interest and especially to protect health. These restrictions which often reach a total ban, concern in particular advertising for certain products no matter whether their sale is legal or not. Such restrictions exist in Member States for drugs, guns, pharmaceuticals, detergents, toys, etc.

These differences in the regulations of the 12 Member States, as indicated above, create barriers for the circulation of the advertising media and products. These barriers are not just potential but real ones. In this context, the Commission has already received claims from Member States and decided not to treat them because Article 36 of the Treaty provides that, by way of derogation to the Article 30 of the Treaty, Member States may without any discriminations restrict circulation of products when such such restrictions are justified, among others, by protection of health requirements.

(3) OJ No 3 (Annex) - 388, p.78.

(4) OJ No C 116, 11.5.1990, p.7.

The elimination by 1992 of all barriers to trade requires the harmonization of national provisions on advertising for tobacco products in all information media.

Article 100a(3) of the Single European Act states that: "The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection". The only way of ensuring such full harmonization is to base it on authorization for advertising limited to the inside of tobacco products sale outlets. Such advertising has no effect on the operation of the internal market, nor does it prevent the application of national provisions, such as voluntary agreements.

Health protection requirements are clearly stated in the provisions of Article 100A of the Treaty which concerns the establishment of the internal market. Therefore, neither the Commission which has the power of initiative nor the European legislator can ignore the requirements of health protection which directly affect the establishment and the operation of the internal market.

On the other hand, it is important, in terms of public health requirements within the meaning of the EEC Treaty, to ensure the free movement of products, means of support for this advertising, and the free provision of services in this area and to prevent the emergence of barriers to trade for non-compliance with national provisions regarding advertising for tobacco products.

In other words, given the current state of Member States' legislation and bearing in mind the likely future developments, full harmonization can only be based on banning advertising for tobacco products outside sales outlets.

Indeed, such future developments seem very likely to be in the sense of more and more stringent advertising restrictions. Eventually, even in the absence of any Community action, a natural evolution in this area seems to lead legislations of individual EC Member States to the direction of a total ban of any tobacco advertising. Therefore, in this area, no other measure than a total ban can secure the free circulation without any barriers of the advertising means and products. Member States who already have such a total ban, would otherwise be forced to see that no media bearing any tobacco advertising cross their frontiers.

Indeed, given the interdependent nature of advertising media, written, radio and television broadcast and cinema, and in order to avoid any risk of distorting competition and allowing the rules and regulations to be circumvented, this ban must cover all forms of advertising apart from television advertising, which is already prohibited under the above mentioned Directive 89/552/EEC⁽⁵⁾. This Directive which aims at ensuring the free provision of services within the Community does not cover the broadcasts to the EC Member States from third countries nor does it cover the case of national broadcasts which are not designed to be exported to other Member States. In this respect, the present proposal completes this Directive in order to avoid any distortions of competition between the different advertising means.

(5) OJ No L 298, 17.10.1989, p.23.

Tobacco is a freely available product and as such is subject to the laws of the market and the laws of competition. This means that consumers must have access to information and there must be product distribution arrangements. However, the advertising was never originally accompanied by information on the harmfulness of tobacco products. Indeed, warnings on the harmfulness of these products have always been introduced by law or by voluntary agreements concluded under the threat of forthcoming legal restrictions. Nevertheless, it is appropriate to ensure for those concerned all the information they might need on different existing products as well as on their yield of harmful substances which may vary from one product to another.

To this effect, advertising must be authorized only in establishments selling tobacco and with indoor premises specially designed to serve the customer. This way, advertising fully plays its information role towards those concerned by these products, i.e. consumers of tobacco products.

Open sales outlets for tobacco products on public thoroughfares, such as kiosks or stands, and supermarkets or shopping centres, do not give the level of protection - particularly for young people - required by the industry and by the health authorities.

Thus, by retaining scope for advertising within tobacco retailing premises, advertising can be allowed to play its essential role of enabling consumers to compare the various types and brands of tobacco available, while at the same time shielding the other sections of the population.

As a result, advertising at the point of sale can remain subject to each Member State's public health protection requirements.

11.2. In an attempt to circumvent the restrictions imposed on direct advertising and to create or strengthen brand images, the tobacco industry has turned to indirect advertising, for example, chewing gum West, Marlboro clothes, Camel boots, Barclay matches etc. It is certainly not by chance that the budget for the advertising of these products is disproportionate in relation with the importance of the relative market.

Studies of advertising have shown that the great majority of young people see "brand-stretching" advertising of this type as advertising for the associated tobacco products. Young consumers do not see the difference. Looking at things from a normal point of view, it is quite obvious that, given the very high level of recognition of the tobacco brands, this kind of advertising, ostensibly for something else entirely, is in fact perceived as being for the tobacco products, and by its nature constitutes pressure to consume the tobacco, and not the other, products.(6)

(6) Aitken PP et al. "Brand-stretching" advertisements for cigarettes: the impact on children. Health Education Journal (1985) 44; 201-202.

This proposal bans completely indirect advertising. Such a ban of indirect is a necessary condition in order to ensure the effective implementation of the general ban rule. As a matter of fact, the ban of indirect advertising in a complementary requirement to guarantee the distortion-free implementation of any rules do not provide for a total ban. In this respect, it should be reminded that the previous proposals on the advertising of tobacco products adopted by the Commission in spite of the fact that they were not based on a ban, provided also for the ban of any form of indirect advertising.

More recently, the tobacco industry has started to develop a different type of advertising campaign to attract young people. This takes the form of using a product which is already well established on the market and which is well known among young people to launch a new tobacco product under the same brand name. Recently, the case of utilisation of some very popular clothes among youngsters in one Member State has been largely reported in the press.

This has the effect of implanting the existing product's positive image and advertising message on the new product to achieve maximum psychological effect on young people.

This new approach too must be banned if it is not to circumvent the ban on advertising for tobacco products. What is more, by exploiting a positive image created with a different product, this practice could distort competition conditions between tobacco products or prompt competing brands to resort to similar practices in a bid to circumvent the ban.

These provisions do not prevent the diversification of the industry. Indeed, usually the diversification of the industry towards other sectors of activity is made using other brand names and it rarely occurs that the brand whose reputation is mainly associated with a tobacco product is also used in other fields of activity. So, this ban concerns only advertising which is made through other products but which aims at promoting a tobacco product, because the brand and the other distinctive signs are primarily associated with tobacco. However, the ban does not concern the cases of brands associated with different products including tobacco products but whose reputation is not mainly due or associated with tobacco products. Besides, when an industry abandons the production of tobacco, it can freely use its brands for advertising other products, even when in the past the same brand was mainly associated with tobacco products.

Finally, it should also be reminded that limitations provided for by the proposal of Directive comply with the Paris Convention (Stockholm, 14 July 1967), the Council Directive relating to trade marks (89/104/EEC)⁽⁷⁾ as well as the precedents of the above mentioned Directive 89/552/EEC concerning television broadcasting. All those legal instruments lay down restrictions on the exercise of trade marks such as unfair competition, civil liability and consumer protection. Directive 89/104/EEC in its article 3 paragraph 2 provides that Member States can even refuse registration or cancel validity of an existing trade mark on the basis of a legislation other than the one on trade mark.

(7) OJ No L40, 11.2.1989, p.1.

On the contrary, and without prejudice of the provisions of the Directive 89/552/EEC on the television broadcast, particularly the provisions of Articles 13 and 17(2) thereof, the present proposal does not affect the right for the industry to sponsor sportive, cultural or other events. The industry may not however take advantage of those events to advertise tobacco products through advertising means and products using brands, emblems or other distinctive signs associated with tobacco products. To this effect, it is appropriate to make the distinction between presentation of information and advertising. Advertising made in order to publicize the sponsoring of an event which uses such distinctive signs falls within the scope of the ban. However, the presentation to the public on behalf of the industry of an information of an event, sponsored by it, can, when it is totally deprived of any emblems or distinctive signs associating such a presentation to a tobacco brand, not to be concerned by the ban.

- 11.3 In the USA and in Europe tobacco consumption - and more particularly cigarette smoking - became an accepted social habit, acquiring a positive image which was fostered by advertising. However, in the United States as well as in some Northern European countries, this image has already changed and consumption has started to decrease. Tobacco alone has now become one of our major health problems, being the principal cause of death by cancer and a major contributing cause of a variety of other serious diseases, including cardio-vascular disease. Each year, tobacco products are responsible for the deaths of some 430 000 people throughout the European Community. Tobacco accounts for at least 25% of all EEC deaths in middle age (35-69) and for at least 10% in older age. If current trends continue, the WHO predicts that, in the European region encompassing 31 countries, tobacco will, by 2025, have accounted for two million deaths among people aged less than 25 years in 1990⁽⁸⁾.

The Member States are aware of this situation and established the prevention of smoking as one of the priority aims of the "Europe against Cancer" programme launched in 1986.

In this context, advertising would appear to be one of the factors responsible for the expansion of the market for tobacco products. The great flood of words and images seeking to promote the consumption of tobacco products glosses over any hint of the harmfulness of tobacco and incites young people to adopt what appears to be a socially acceptable behaviour pattern.

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- (8) . Dr Richard Peto, University of Oxford, Clinical Trial Service Unit and ICRF Cancer Studies Unit; Chairman of the WHO Consultative Group on statistical aspects of tobacco-related disease.
 . Consultation on the Statistical Aspects of Tobacco-Related Mortality. Convened by the World Health Organization in Geneva in October 1989.
 . Epidemiology: "Tobacco-attributable mortality: global estimates and projections". Tobacco Alert. World Health Organization, January 1991.
 . "It can be done". A World Health Organization report on the first European conference on tobacco policy in Madrid, 7-11 November 1988.

Although it is not universally accepted that advertising has been shown to be uniquely and directly responsible for people trying out smoking or getting addicted to the habit, the fact remains that it does play a fundamental role in promoting tobacco. The smoking habit tends to be acquired in most cases in childhood or adolescence. Some 60% of smokers start smoking at the age of 13, with more than 90% starting before the age of 20. Given that only something like 10% of current smokers actually start smoking as adults, adolescents form the group from whom the largest number of new smokers are recruited⁽⁹⁾.

According to the tobacco industry, the aim of advertising is simply to persuade smokers to change brands, and as such enhances the competition between the various products on the market⁽¹⁰⁾. Any form of advertising by definition seeks to increase the targetted product's share of the market. However, different studies show that smokers are very loyal to their tobacco brand and that cigarettes are among the products which have the highest brand loyalty⁽¹¹⁾.

Furthermore, according again to the industry, the ban of advertising, which in the European Community, is a measure taken until now by Member States of the Southern Europe, is allegedly aiming primarily at protecting the tobacco monopoly or the national cigarette production existing in these Member States. This argument does not take account of the fact that not all of the Member States which belong to this category have chosen to introduce such a ban. In addition, the ban on advertising existing in those Member States has not served so far as a protectionist measure against imports. Besides, there are several EFTA countries of Northern Europe like Island, Norway and Finland who don't have any tobacco production or state monopoly to protect and who nevertheless have chosen to impose a total ban on tobacco advertising to comply with the recommendations of WHO and the international scientific community.

Omnipresent tobacco advertising impinges on the consciousness of all sections of the population, children and adults, smokers and non-smokers, not to mention smokers who might like to kick the habit. In particular, concerning children, a large number of whom make acquaintance with cigarette-smoking at a very early age, it is reasonable to assume that having been educated by advertising to brand-loyalty, they may for that reason alone, become regular smokers? If advertising had no effect on the amount actually consumed there can be no doubt that tobacco consumption would very quickly plummet as a result of demographic trends and the premature demise of smokers afflicted with tobacco-related diseases.

(9) Tye, J.B., Warner, K.E., and Glantz, S.A. "Tobacco advertising and consumption: evidence of a causal relationship". World Smoking and Health. (1988) 6-13.

Royal College of Physicians of London. "Smoking and Health. The third report of the Royal College of Physicians of London". London, Pitman Medical (1987) p.104.

Chapman, S. "Cigarette advertising and Smoking: A review of the evidence". British Medical Association, London (1985).

(10) Tye, J.B., Warner K.E. Glantz, S.A. "Tobacco advertising and consumption: Evidence of a causal relationship". J. Public Health Policy: 492-508, 1987.

(11) Agence FCB/Autres produits. Kapferer et Laurent (1983).

Highlighting the role of advertising for tobacco products does not mean that there are not other factors contributing to inciting young people to start smoking, including the behaviour of friends, teachers, parents and relations and role-model personalities. It is a fact, though, that tobacco advertising sets out precisely to conjure up an image of congeniality, adventure and the personality-cult - in other words, it appends to the imagination.

- 11.4 In the twelve Member States, the advertising budget for tobacco products does not exceed 3% of the total advertising budget for all products or services.

In Norway, where a total ban on tobacco advertising exists since 1975, eight years before the ban, sales of advertisements - of all kinds - increased by 3,9%, as against a 5,6% increase in the eight year period after the ban. This example of Norway shows that an advertising ban does not worsen the economic situation of the press.

III. COMMENTARY ON THE INDIVIDUAL ARTICLES

Article 1

Sets out the definitions used in this proposal. Such definitions must be interpreted exclusively within the meaning of this Directive.

The definition of the terms "advertising" is the one most currently used.

The term "tobacco products" is that used in all the previous directives dealing with the prevention of smoking.

The term "tobacco sales outlets" covers exclusively such outlets which, under the legislation of the Member States, have as their main activity the sale of tobacco products, and which have indoor premises for the sale of their products.

Article 2

- Paragraph 1: Establishes the general rule banning all advertising for tobacco products in the Community outside tobacco sales outlets.
- Paragraph 2: Points out that the ban in paragraph 1 also covers such cases where advertising for tobacco products does not specifically mention the product, but uses a brand or trade mark whose reputation is primarily associated with a tobacco product. Given the high level of public recognition of brands, emblems and other distinctive signs for tobacco products, any advertising for other products using such devices is perceived as being for the tobacco products. Consequently, this type of advertising also encourages the consumption of tobacco products. The public will recognize the distinctive signs for the tobacco products even where they are used to advertise something else entirely.
- Paragraph 3 : The aim is to guard against a practice which deliberately uses the high level of public recognition of a non-tobacco product to promote a tobacco product. Given the ban imposed in paragraph 1, using this high level of public recognition for a newly-launched tobacco product would constitute a distortion of competition.

These two provisions, which are mutually complementary, are thus designed to deal with the problem of indirect advertising.

- Paragraph 4 : Prohibits the promotion for tobacco products other than in the forms provided for in the previous paragraph, i.e. free distribution. Free distribution seeks to promote the tobacco product in a direct form.

Article 3

Establishes that the ban imposed in Article 2 does not apply to the interior of tobacco sales outlets which have an enclosed indoor space for serving customers.

To enable advertising to play fully its role of informing interested consumers, it is important for the industry to be able to publicize its products in competitive conditions. However, such advertising within tobacco sales outlets will remain subject to any national regulations in the Member States as, by its very nature, it does not affect the rules under which the internal market operates.

To avoid any risk of this rule being circumvented, such advertising must not be visible from the outside.

Therefore, kiosks and other open tobacco sales premises, even those run as a main activity, cannot escape the ban as they cannot offer the requisite guarantees of protection for non-consumers of tobacco products, particularly young people. Likewise, there are no exceptions for shops of whatever size with a variety of products on sale, as any advertising on such shop premises can impinge indiscriminately on the consciousness of both consumers of the product in question and non-consumers, whom this directive is seeking to protect.

Article 4

By analogy with the Directive on misleading advertising⁽¹²⁾ as well as the Proposal of Directive on the advertising of pharmaceuticals⁽¹³⁾, this provision aims to provide persons or organizations with a legitimate interest in the prohibition of advertising for tobacco products with the means to verify that advertising is restricted in accordance with Articles 2 and 3.

Article 5

Enables Member States to adopt other health protection rules with regard to advertising for tobacco products concerning, for example, specialist tobacconists provided they are in line with the rules set out in this Directive.

Articles 6 and 7

Standard Articles.

(12) OJ No L 250, 19.9.1984, p.17.

(13) OJ No C 163, 4.7.1990, p.10.

Modified Proposal for a
COUNCIL DIRECTIVE

on advertising for tobacco products(*)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission(1),

In cooperation with the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3)

Whereas there are differences between the provisions of the Member States on advertising for tobacco products; whereas such advertising transcends the borders of the Member States and whereas such differences are likely to constitute barriers to free circulation of products, means of support for this advertising, and the free provision of services in this area, as well as to distort competition and thus impede the establishment and operation of the internal market;

Whereas obstacles to trade should be eliminated and, to this end, the rules relating to tobacco advertising should be harmonized, leaving to Member States the introduction, under certain conditions, of measures they consider necessary to guarantee public health protection;

Whereas, in conformity with Article 100a(3) of the Treaty, the Commission is obliged, in its proposals under paragraph 1 concerning health, safety, environmental protection and consumer protection, to take a high level of protection as a basis;

Whereas these rules must take due account of public health protection, in particular in relation to young people;

Whereas, given the interdependence between the various forms of advertising, printed, written, oral, by radio and television broadcast and cinema, and to prevent any risk of distorting competition and circumventing the rules and regulations, such harmonization should cover all advertising forms and media apart from television advertising, which is already covered by Council Directive 89/522/EEC(4);

(*) OJ No C 116, 11.5.1990, p. 7.

(1)

(2)

(3)

(4) OJ No L 298, 17.10.1989. p. 23

Whereas the European Council held on 28 and 29 June 1985 in Milan stressed the importance of launching a European action programme against cancer;

Whereas the Council and the representatives of the Governments of the Member States, meeting within the Council, in their resolution of 7 July 1986 on a programme of action of the European Communities against cancer⁽⁵⁾ set for this programme the objective of contributing to an improvement in the health and quality of life of citizens within the Community by reducing the number of illnesses due to cancer and, accordingly, regarded measures to counter the use of tobacco as their prime objective;

Whereas tobacco consumption constitutes a very important death factor each year in the Member States of the European Community;

Whereas advertising plays a fundamental role in promoting smoking, particularly among young people;

Whereas, at the Council of Ministers meeting on 3 December 1990, the Member States came out in favour of full harmonization of advertising for tobacco products;

Whereas, given the current state of Member States' legislation and bearing in mind the likely further development, full harmonization can only take place on the basis of a ban on advertising for tobacco products;

Whereas the tobacco industry must be able to inform consumers of the various types and brands of tobacco products in compliance with market laws and the rules of competition;

Whereas, however, the use of tobacco is extremely damaging to health and such information should therefore be restricted to interested parties only, i.e. the consumers of tobacco products;

Whereas advertising must, to this effect, be authorized only in establishments specializing in the sale of tobacco and with enclosed indoor premises for serving their customers;

Whereas by retaining the possibility for displaying advertising within such outlets, advertising can thus fulfil its essential purpose; whereas it will thus be possible to guarantee the protection of the population in general and of young people in particular;

Whereas all forms of indirect advertising produce the same effects as straight advertising and a ban should therefore be imposed on such indirect forms of advertising which, while not actually mentioning the tobacco product, use trade marks, emblems, symbols or other distinctive elements associated with tobacco products;

Whereas persons or organizations who, under national law, have a legitimate interest in the matter must be given the opportunity to take action against any advertising which does not conform to the rules established by the Member States in application of this Directive,

(5) OJ No C 184, 23.7.1986, p.19.

HAS ADOPTED THIS DIRECTIVE:

Article 1

For the purpose of this Directive, the following definitions shall apply:

- **Advertising:** any form of communication, printed, written, oral, by radio and television broadcast and cinema, with the aim of direct or indirect effects of promoting a tobacco product, including advertising which, while not specifically mentioning the product, tries to circumvent the advertising ban by using brand names, trade marks, emblems or other distinctive features of tobacco products.
- **Tobacco products:** all products intended to be smoked, sniffed, sucked or chewed, inasmuch as they are, even partly, made of tobacco;
- **Tobacco sales outlets:** establishments specializing in the sale of tobacco and with enclosed indoor premises for serving customers. Shops with several counters for a range of different goods on sale are excluded from this definition.

Article 2

1. Without prejudice to Directive 89/552/EEC, all forms of advertising for tobacco products shall be banned in the territory of the Community.
2. Member States shall ensure that brands or trademarks whose reputation is mainly associated with a tobacco product, are not used for advertising in other areas, if this brand or trademark is being used for advertising of a tobacco product.
3. Member States shall ensure that new tobacco products do not make use of the reputation acquired by certain brands or trademarks already used in association with products other than tobacco products.
4. Any free distribution of tobacco products shall be banned.

Article 3

Member States may authorize advertising within tobacco sales outlets, provided that it is not visible from outside the premises.

Article 4

Member States shall ensure that there exists appropriate and effective means to control the implementation of the national measures adopted in accordance with this Directive. These means must include provisions ensuring that persons or organizations which, according to the national legislation can justify a legitimate interest in the suppression of advertising which is incompatible with this Directive, may take legal action against such advertising or bring such advertising to the attention of an administrative body competent either to pronounce on complaints or to institute the appropriate legal proceedings.

Article 5

This Directive shall not preclude Member States from introducing measures concerning advertising for tobacco products, in accordance with the Treaty, which they deem necessary to guarantee the health protection of their citizens, provided that such measures comply with this Directive.

Article 6

1. Member States shall adopt and publish by 31 July 1992 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall apply the provisions referred to in paragraph (1) from 1 January 1993.

Article 7

This Directive is addressed to the Member States.

Done at Brussels,

For the Council

The President

IMPACT ASSESSMENT FORM

**THE IMPACT OF THE PROPOSAL OF BUSINESS
with special reference to small and medium size
enterprises (SMEs)**

Title of proposal : Proposal for a Council Directive on the approximation of Member States' laws, regulations and administrative provisions on advertising for tobacco products.

Document reference number :

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims ?

This proposal replaces the amended proposal for a Council Directive relating to the advertising of tobacco products in the press and by means of bills and posters (JO C 116 of 11 May 1990).

In line with the Council of Health Ministers' discussions of 17 May and 3 December 1990 on the above mentioned proposal, the new proposal aims at a full harmonisation of national provisions on the advertising of tobacco products, outside the tobacco sales outlets, in order to eliminate obstacles to the proper functioning of the internal market.

The proposal is also part of the general Community policy for the fight against cancer.

The impact on business

2. Who will be affected by the proposal ?

The types of businesses affected are mainly tobacco manufacturers, advertisers and retailers.

The EC being a net importer, this measure will not have any impact on growing.

It is estimated that, in 1986, the equivalent of 250.000 full-time jobs were engaged in tobacco-related activities in the Community, besides tobacco growing. These jobs are mainly related to tobacco manufacturing and tobacco distribution.

Each Member State manufactures at least 60 % of its tobacco consumption.

Advertisers for tobacco products are mainly large multi-national companies.

3. What will business have to do to comply with the proposal ?

Under the proposal, advertising is strictly limited to the interior of establishments specialised in the sale of tobacco products, which have at their disposal an enclosed inner space for serving clients.

The types of retail outlet used for the distribution of tobacco products vary widely between Member States. Tobacconists are the main outlet in Italy, Greece (100 % in both), and Spain, and represent about a third of distribution in B, L, NL, and the UK. Super-markets are an important outlet in B, L, D, IRL, NL and the UK, with 30 to 40 % of distribution. Other sources of distribution include catering outlets (53 % in F) and vending machines.

In certain Member States, the proposal would oblige retailers to remove build-in advertising on shop fronts which might involve rebuilding and corresponding expenses.

All Member States already have legislation on advertising for tobacco products. A total ban exists in France, Italy and Portugal. The other Member States impose various restrictions.

4. What economic effects is the proposal likely to have ?

This measure, combined with other measures taken in the fight against smoking at European level, such as directive 89/622 on the labelling of tobacco products, may lead to a fall in sales of tobacco products in the medium and long term, with consequences for producers, retailers and advertisers.

The impact on employment will obviously depend on the impact on sales, considering the low labour intensity of tobacco manufacturing and advertising.

There may be a limited negative impact on the economic situation of advertising companies. However, expenditure on the advertising of tobacco products in the European Community does not exceed 2 % of the total budget for advertising. Moreover, overall advertising expenditure has continued to increase in countries which have already introduced a total ban on advertising for tobacco products, such as Portugal and Norway.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms ?

No.

Consultation

6. Organisations which have been consulted about the proposal and outline of their main views :

Advertising agencies and industry, who are closely following the development of this dossier, have had several opportunities to express their opinion which, in most cases, is hostile to the proposal.

However the same measure is highly recommended by the international scientific community, health experts and the WHO. The organisations against cancer and against smoking, consulted within the framework of the Europe against Cancer programme, gave their unconditional support to a total ban on the advertising of tobacco products.

DOCUMENTS

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