



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.02.1998
SEC(1998) 140 final - COD 194

COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT

pursuant to the second subparagraph of Article 189 b (2) of the EC-Treaty

concerning the common position of the Council on the amended proposal for a European Parliament and Council directive on the approximation of Member States' laws, regulations and administrative provisions on advertising for tobacco products.

Commission Communication concerning the common position of the Council on the amended proposal for a European Parliament and Council directive on the approximation of Member States' laws, regulations and administrative provisions on advertising for tobacco products.

1. BACKGROUND

Date on which the proposal was forwarded to the European Parliament and to the Council: 07.4.1989¹ amended by a Commission proposal of 17.5.1991²

European Parliament opinion, first reading: 11 February 1992

Date on which the amended proposal was forwarded following the opinion of Parliament: 30 April 1992

Economic and Social Committee opinion: 23 September 1992

Date of adoption of the common position: 12.02.1998

2. AIM OF THE COMMISSION PROPOSAL

The present proposal is intended to eliminate obstacles to the free movement of goods and services within the internal market by harmonising the rules covering advertising and sponsorship for tobacco products, while leaving Member States the possibility of introducing, under certain conditions, the measures which they consider necessary to guarantee the protection of public health.

The proposal is based on a high level of protection, in accordance with Article 100a (3) of the Treaty, and takes due account of the need to protect public health, in particular the health of young people.

The proposal covers all forms and means of advertising with the exception of television advertising, already covered by Council Directive 89/552/EEC³.

In particular, it covers all forms of indirect advertising and sponsorship, as well as free distribution, given that these produce the same effects as direct advertising. Without prejudice to the fundamental principle of the freedom of expression, the intention is thus to regulate these aspects, including indirect forms of advertising which, while not actually mentioning the tobacco product directly, use brand names, trade marks, emblems or other distinctive features which are used for tobacco products, and sponsorship.

¹ OJ No C 124 of 19.5.1989, p. 5

² OJ No C 167 of 27.6.1991, p. 3

³ OJ No L298 of 17.10.89, p. 3, as most recently amended by Directive 97/36/EC (OJ L202 of 30.7.1997, p. 1)

3. COMMENTS WITH REGARD TO THE COMMON POSITION

3.1 Brief general comments on the common position:

The main amendments made by the Council are intended:

- to complete the legal basis (Article 100A) by citing articles 57(2) and 66 of the Treaty, in order to cover in a more explicit manner not only products carrying advertising, but also services;
- to delimit the field of application, leaving it up to the Member States to regulate certain fields, such as advertising at sales outlets, information addressed solely to professionals involved in the tobacco trade, the presentation of products and their price, and the sale of publications containing advertising for tobacco products which are published and printed in non-member countries, since these publications are not primarily destined for the Community market;
- to take account of the difficulties encountered by certain sectors in implementing the new provisions, particularly in the field of indirect advertising and sponsorship.

3.2 The fate of the European Parliament amendments made on the first reading: 3.2.

Article 3.2 *et seq.* (indirect advertising)

The common position significantly alters the provisions concerning indirect advertising, seeking to make these rules more easily applicable by delimiting their scope more clearly (Article 3.2) and by making it possible for Member States (Article 6.3) to defer their application so that commercial practices can be adjusted.

First of all, the common position permits a name already used in good faith prior to the date of publication of the Directive both for tobacco products and for other products or services to be used to advertise such other products and services. This use of the same name will be permitted solely on condition that it is presented in a form clearly distinct from that used for the tobacco products, without any further distinguishing mark, already used for a tobacco product.

The common position goes on to prohibit the use for any tobacco product of the brand name, trade mark, emblem or any other distinguishing feature of any other product or service, with the exception of tobacco products marketed under this name prior to the entry into force of the Directive (Article 3.3).

Moreover, it prohibits circumvention of the advertising ban through the use, for any product or service placed on the market since the Directive came into force, of brand names, trade marks, etc. already used for a tobacco product.

The other differences between the respective positions of the Council, European Parliament and the Commission are reviewed below:

Article 2

New definition of "sponsorship".

Amended definition of "sales outlets" (to be read in conjunction with the new provisions of Article 3.5, third indent).

Article 3

3(1) Addition of a reference to "sponsorship"

3(2) and 3(3) New provisions concerning indirect advertising (see Paragraph 3.2 above).

3(5) New provision excluding from the scope of the directive:

- communications intended exclusively for professionals in the tobacco trade;
- the presentation of tobacco products offered for sale and the indication of their prices at tobacco sales outlets;
- advertising aimed at the buyer in establishments specialising in the sale of tobacco products and on their shop-fronts or, in the case of establishments selling a variety of articles or services, at locations set aside for the sale of tobacco products and at Greek sales outlets ("periptera");
- the sale of publications containing advertising for tobacco products, where these publications are published and printed in non-member countries and are not primarily destined for the Community market.

These fields are, in consequence, outside the scope of application of the directive and it will be for Member States, if appropriate, to regulate them at national level in order better to take account of the principles of proportionality and subsidiarity.

Article 5

Addition of a reference to "sponsorship"

Article 6

New provisions:

6(1) The provisions of the Directive must be implemented no later than three years after its publication in the O.J.E.C.

6(3)

- the option, in respect of the press, of deferring implementation for one year;
- the option, in respect of sponsorship, of deferring implementation for two years;
- the option whereby Member States can, subject to certain conditions, continue to authorise existing sponsorship of events or activities organised at world level for a further period of three years ending not later than 1 October 2006.

These provisions are designed to allow the adjustment of commercial practices and the search for new means of financing certain sectors, under the most favourable conditions, while respecting the objectives of the measure.

Article 7

New provision

The common position calls for the Commission to submit, not later than three years after the entry into force of the Directive and subsequently every two years, a report on its implementation, with particular reference to the implementation and effects of the provisions concerning indirect advertising and the transitional periods. Where appropriate, the Commission is required to submit proposals for amending the Directive to take account of developments identified in this report but without changing these transitional periods.

4. CONCLUSIONS

As far as the clarification of the scope of the measures is concerned (definitions, exemptions and amended wording), the Commission considers that the measures set out in the common position are more easily applicable than they were beforehand and more transparent in terms of their effect. In particular, these provisions take account of the need to permit, subject to certain conditions, the use of brand names already used both for both tobacco products and for other products, in order to advertise these other products. The provisions set out in the common position with regard to sponsorship are also, in the Commission's opinion, well-balanced and allow for deferred implementation to take account of particular commercial considerations.

Finally, the common position's provisions requiring the Commission to draw up a report, and where appropriate to put forward proposals, are such as to ensure harmonious application of the provisions of the future directive, but to prevent its circumvention.

It should be noted that in a declaration marking the adoption of the common position, the Commission stated that it planned action to examine the updating of directives covering the labelling of tobacco products and on the tar content of cigarettes. In addition, it indicated that further action, for example in the field of tobacco additives, would be considered in the light of requests for information sent to the Member States.