

EXPLANATORY MEMORANDUM

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, Bursley 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.⁽¹⁾

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

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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)⁽¹⁾ as well as the precedents of the above mentioned Directive 89/552/EEC concerning television broadcasting. All these 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.

On the contrary, and without prejudice of the provisions of the Directive 89/552/EEC on the television broadcast, particularly the provisions of Art 13 and 17 par 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.

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⁽²⁾. 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⁽³⁾.

COMMENTARY ON THE INDIVIDUAL ARTICLES

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.

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COUNCIL DIRECTIVE

Article 1

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

- Advertising : any form of communication, written, radio and television broadcast and cinema, with the aim or direct or indirect effects of promoting a tobacco product, including advertising which while it 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, in as much 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 a range of different goods on sale are excluded from this definition.

Article 2

1. Without prejudice to the Directive 89/522/EEC of the Council concerning the pursuit of television broadcasting activities, all forms of advertising for tobacco products shall be banned in the territory of the Community.
2. The 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 still being used for advertising of a tobacco product.
3. The Member States shall also ensure that new tobacco products are unable to 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.

TRANSLATION OF OFFICIAL STATEMENT FROM THE COMMISSION

- c) A tobacco trademark, logo or other characteristic sign may not be used to advertise a product other than tobacco, since people perceive this as tobacco advertising.

Indeed, if the tobacco company spends a small fortune on advertising for a product -like matches- for which there is hardly any profit, the real purpose of the exercise must be to promote the tobacco product. Any "indirect" tobacco promotion of this or similar kind will therefore not be allowed. . . .

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Tobacco companies may sponsor all kinds of events in culture, sports etc. and they may inform the public that they do so. They only have to respect one condition : they must not use a tobacco trademark, logo or characteristic signs associated with tobacco, since this is perceived as tobacco advertising.

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