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Banning tobacco promotion: ethical and civil liberties issues

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Any state intervention in the communications between individuals or organisations raises civil liberties questions. The Government has decided to ban tobacco advertising, sponsorship and promotion of tobacco products. The tobacco industry has traditionally argued that smoking is a private pastime, in which people knowingly assume risks in return for pleasure and that the state should have no role in regulating this activity or its promotion. In particular, tobacco companies argue that it would be wrong to ban direct mail promotions of tobacco because these are communications between tobacco companies and consenting smokers over 18. This final view represents a 'line in the sand' - a last ditch attempt to retain some marketing mechanisms in the face of a general ban on tobacco advertising.

In general ASH argues that tobacco is a highly unusual special case, with very serious health implications. This justifies intervention to control the marketing of the product, and if a Government receives a mandate to act, we as a society have expressed a collective wish to see the tobacco industry restrained. We do not argue for a ban on smoking. Even if it was desirable to do it, there are too many smokers addicted to nicotine and 12 million 'cold turkeys' would make any attempt to ban the product untenable at this stage. The civil liberties arguments in favour of a comprehensive ban on tobacco promotion can be grouped under the following headings:

- **The right to be told the truth and the inherent deception in tobacco promotion**
- **Harm to others, especially children and non-smokers**
- **Addiction as an assault on the freedom to choose not to smoke**
- **Precedent and the unique status of tobacco**

The right to truth

- **The right to know the truth.** Most individuals, even now, do not make smoking decisions based on the full facts. Few smokers have full information on the consequences of smoking over the long term, nor do they know how hard it will be to stop unless they have already tried. The tobacco companies do little to convey accurate information about their products, and a great deal to obfuscate and undermine the testimony of others, as recent controversy over passive smoking has shown. In fact, through documents released in the US and through litigation, we know tobacco companies have known of the cancer, heart disease and addictiveness associated with tobacco for many years but have consistently denied its harmful effects. Smokers and potential smokers have a right to be told the truth and then to decide. This right is more important than the right of tobacco companies to promote their

products in a favourable light. It would be impossible or unrealistic to provide a balancing view with all tobacco promotion - the warnings are certainly inadequate. When US regulators required tobacco companies to purchase matching TV airtime for anti-smoking promotion, TV advertising of tobacco dried up.

- **Inherent deception of tobacco promotion.** A further point is that the promotion of tobacco in a favourable light is inherently deceptive as it stresses a life affirming role for tobacco. It is not simply one side of a balanced but polarised argument. For this reason, even providing a balancing view would not be an adequate approach to fulfilling people's right to be told the truth.
- **Public spending.** The current and previous governments held public policy objectives to reduce smoking. To this end public money has been spent on health education, cessation support and targeted campaigns. The aim of these expenditures has been to persuade smokers to make different personal choices - not only to protect non-smokers or children. The value of this expenditure is diminished if substantial sums are spent on encouraging or consolidating the opposite behaviour. Banning tobacco promotion avoids an 'arms race' between publicly funded anti-tobacco spending and commercial pro-tobacco spending and therefore represents prudent use of public funds.

Harm to others

- **Harm to non-smokers.** Tobacco marketing aims to retain smokers and consolidate the market. Every smoker has an impact on the people around them and it is impossible to prevent the promotion of smoking to individuals having an effect on others. There are three ways in which tobacco promotion through direct marketing may affect non-smokers, particularly children.
 1. **Access to pro-smoking materials.** Though the mailing will be sent directly to a smoker, it may enter a household in which children will see the material or younger siblings will share material with older siblings. Given that 55% of children live in households with at least one smoker, there is a significant chance the material will reach children. Given that smoking has been marketed as aspirational rite of passage into adulthood, it should be expected that children would seek out such material.
 2. **Smokers as role models.** The behaviour of adults and parents has a significant impact on children's attitudes to smoking - see the Office for National Statistics: Smoking among secondary school children in 1996 (England) chapter 4. Direct marketing has two effects in developing role models. Firstly, it helps to keep the adult smoking and therefore continues the presence of the smoking role model in the home. Secondly, it helps to shape the role model by offering merchandise and access to an affirmative smoking culture, while coaching the smoker in pro-tobacco arguments. These role model effects represent a transmission of the direct marketing through the adult to the child.
 3. **Direct harm through passive smoking.** The argument that passive smoking causes harm such as lung cancer, asthma, respiratory and heart disease to non-smokers is now widely accepted - though still denied by the tobacco industry. The harmful effects of smoke apply particularly to children growing up in a smoking household, where risks of respiratory disease, asthma and cot death are significantly increased by parental smoking. These innocent people deserve some protection, and one of the very few options open to change smoking behaviour inside the home is to ban the promotion of tobacco products.
- **Systematic abuse.** Granting the right to promote tobacco to over 18 year-old consenting smokers will open the way for systematic abuse, drawing in young people and

non-smokers or marginal smokers. It has been practice to gather names for tobacco mailing lists in night-clubs in return for free CDs or other gifts. In this case, the right to market to over-18 smokers will in practice enable indiscriminate promotion of tobacco to a more vulnerable group. While discussing rights of over-18 consenting smokers in the abstract, it is also important to understand how a direct marketing operation will work in practice. Tobacco companies will inevitably use direct mail to establish an 'insider' feel to tobacco marketing and create an aspirational culture for teenagers, who in turn will seek to join and avoid any checks or rules. The whole process will be designed to encourage its own abuse.

Addiction as an assault on individual liberty

- **Addiction.** Addiction complicates and confounds civil liberties arguments in favour of tobacco promotion. Addiction denies the user free choice by creating a chemically-based compulsion to continue and increase consumption of nicotine after the original decision to smoke was made. The physical difficulty of stopping has manifested itself in a widespread desire among smokers to quit but low rates of cessation: 69% of smokers say they would like to quit but most find the effort too great to sustain. The danger of tobacco promotion is that it can encourage or support a decision to smoke that is made voluntarily but through addiction becomes irrevocable without great effort. It is possible to argue that people can take decisions that surrender or diminish their right to change their mind later. However, they would have to do this in the full knowledge that tobacco was addictive. There have never been addictiveness warnings on tobacco products in the UK, and tobacco companies still publicly deny that nicotine is addictive. Decisions to smoke may be made by people when they are children and too immature to make irrevocable decisions about smoking.
- **Smokers trying to quit.** It should be understood that most smokers do want to quit and that tobacco promotional offers may be designed to weaken their will and to retain them as smokers. The battle to overcome nicotine addiction can be very difficult and require continued effort - many smokers quit and then relapse. ASH briefed an advertising agency (AMV-BBDO) to give insights into how tobacco marketing may evolve in future. In the notes of the meeting, the following statement was made:

Direct marketing is expensive (minimum of 80-90p per contact) and will be used in a targeted manner. Its primary role would be *consolidation* and *activation* rather than *recruitment*. DM might be used at the points when the industry may lose smokers: for example immediately after New Year or No Smoking Day the companies would offer special discount deals and free gifts to *break the will of those that have tried to quit*. It may be used to undermine health promotion campaigns.

- **Supporting the individual struggle for freedom.** In this view, the smoker is engaged in a struggle with addiction, craving and tobacco industry marketing pressure on one side and his or her will-power and support from external agencies on the other. Having consented at a night-club or other event to receive these materials, they will arrive at unknown times in the future, possibly at times when the smoker is doing most to try to stop. The case for banning tobacco promotion is to assist the individual in a struggle against tobacco.

Precedent and unique status of tobacco

- **Comparison with pharmaceuticals.** There is not a universal right to promote any legal product. Valium, for example, is a powerful tranquilliser, addictive and potentially lethal. Though it causes far fewer deaths than tobacco, it cannot be promoted directly to the public. Though Valium is a licensed drug, and therefore not a perfect analogue for tobacco, it has many characteristics in common with tobacco. One might imagine a campaign for Valium suggesting that the drug may offer a 'laid-back' lifestyle: this would be equivalent to tobacco

companies marketing their products as rugged and individualistic. In the case of Valium, public safety is placed before the rights of companies to undertake unrestricted marketing of dangerous products - this is the principle that we seek to apply to tobacco. The fact that tobacco is not licensed is an anomaly rooted in history, rather than in rational choices that would be made today. In terms of its health danger and pharmacological effects, tobacco is clearly equivalent to or more dangerous than the vast majority of pharmaceuticals. Proposals to ban tobacco advertising could still allow advertising within the distribution chain. This is similar for Valium, where drug companies can advertise to doctors and pharmacists. A further argument based on precedent is that there are already restrictions on marketing tobacco products even where these restrictions would affect only consenting individuals - for example, the warnings on packs.

- **Unique status of tobacco.** The unique nature of tobacco was stressed in a resolution of the 10th World Conference on Tobacco or Health held in Beijing in August 1997. This was a conference of 1,500 public health experts, officials, academics and advocates devoted to reducing the health damage caused by tobacco.

Resolution 7: Denormalisation and regulation of tobacco as a harmful substance:

This conference recommends:

- i. All governments recognise that tobacco is uniquely dangerous and cannot be treated like a normal product because it is the only substance which is both extremely harmful and powerfully addictive when used as intended by its manufacturers, while remaining legal and in widespread use.
- ii. All governments subject the contents of tobacco products and smoke, and all aspects of the tobacco business to strict and legally binding regulatory control.

- **'Twilight' legal status of tobacco.** The tobacco companies argue that the fact that tobacco is legal means that they should be largely free of restrictions. In fact, all the legal standing of tobacco justifies its continued sale without the arrest of tobacco company personnel. The legality of a product cannot be assumed to 'pre-empt' other forms of control or restriction. As a consumer product, tobacco is a bizarre and extreme anomaly. By any comparative food and drug safety standards, or any other criteria, the product would be banned outright. It would certainly be impossible to introduce a product with similar characteristics of addictiveness and danger to health today. Notably, a new range of chewing tobacco (Skoal Bandits) was banned for sale in the UK, even though this was likely to be less dangerous than cigarettes. Other products that are also legal (such as Cornflakes) could be introduced without problems today. This implies that when looked at philosophically or ethically, the legal status of tobacco is somewhat different from ordinary consumer products - it is tolerated rather than accepted. In addition to this subtle difference in the legal status of tobacco, there is also considerable litigation facing tobacco companies suggesting there has been wrong-doing in civil law in the past. Given this unique and special status in which tobacco inhabits a legal twilight, society has the right to demand restrictions on its promotion and other aspects of the tobacco business. This is a 'social contract' with tobacco, in which the product remains legal in return for restrictions on its promotion and marketing.
- **Not a precedent for wider restriction.** A ban on the promotion of tobacco is occasionally portrayed as the harbinger of wider restrictions and an authoritarian 'nanny state'. Often this is made into a *reductio ad absurdem* argument in which the government is portrayed as regulating everything. This is false: the case for action against tobacco is based on its unique characteristics and enormous toll of death and disease even when used as intended. No other product comes close to matching this.
- **Collective responsibility and action.** We do not as a rule want to take every decision relating to our welfare. For example, we entrust regulators with safety of appliances,

quality of drinking water, cleanliness of food, security at airports, use of pesticides, emissions from power stations, damp-proof and insulation of buildings etc. In theory, we could take all these decisions individually based on information at our disposal and choices available to us in the marketplace. We just do not want to do this. Instead of spending all our time making these decisions, we collectively elect a Government that we (more or less) trust, and then expect them to appoint regulators and establish guidelines.

- **The 'nanny state'**. The Labour Government was elected on 1st May 1997 on a platform of constructive intervention in society. As a result of initiatives taken immediately after the election, some commentators have suggested that Labour has authoritarian tendencies and have accused it of establishing a 'nanny state'. This completely misunderstands the new Government's mandate from the electorate. Mrs. Thatcher had famously argued that "there is no such thing as society, only individuals and families". The election shows that people believe there is a role for Government in shaping society and acting at a level at which individuals or families feel powerless. People also generally favour a preventative approach to illness - it is sensible on both cost and welfare grounds. Because the preventative approach necessarily involves changing the behaviour of those that are not yet sick, it will always intervene in what is assumed to be 'normal life'. But normal life is no more than an accumulation of historical actions, historical inaction, accidents, failures and so on. To seek to change this *status quo* is the quintessential role of government and a ban on tobacco promotion would be an enormously positive improvement in what is regarded as normal life.

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