

Response to DTI consultation on the European Commission proposal for a sales promotion regulation CCP 001/02

Action on Smoking and Health

October 2002

We would like to thank the authors of the consultation document for a clear explanation of the issues.

Summary

The proposed European Union regulation, [COM\(2001\) 546 Final](#), aims to improve the functioning of the single market and economic efficiency of the European Union by harmonising and liberalising regulations related to sales promotions. However, the positive benefits that are usually used to justify such liberalisation for most sectors – greater competition, lower prices, consumer choice, greater consumption etc. – become disbenefits when the promoted product itself is harmful and addictive, such as tobacco. We take a similar stance on all aspects of trade liberalisation: there may well be benefits in general, but in the case of tobacco and other harmful products, these benefits are inverted and become problems.

In summary, from ASH's perspective the main problem with the draft regulation is that highlighted in the government's consultation document: that it would require member states to accept tobacco promotions originating from other member states under the mutual recognition process (Article 3.2). We believe the most watertight way to tackle this is to include an explicit ban on all tobacco promotions in the regulation – an approach that is conceptually similar to the ban on TV advertising of tobacco included in the "Television without frontiers" directive. As a second-best, we would like to see explicit authorisation for national bans on tobacco promotion as proposed by the government. We would also like more reassurance and clarity that the regulation could not be used to challenge domestic legislation that bans tobacco promotions – i.e. that it applies only to general prohibitions, not sectoral prohibitions.

Background

The Government's public health policy is to prohibit all forms of tobacco advertising, sponsorship and promotion. The evidence base for this is clear and the government has calculated that 3,000 avoidable tobacco-related deaths per year will be prevented in the long run as a result of its Tobacco Advertising and Promotion Bill, which has a manifesto commitment since 1997. This approximates to numbers that die each year in road accidents.

The evidence suggests that for tobacco advertising prohibitions to be effective, they need to be comprehensive or the promotional budgets simply shift from the banned to the not-banned media and promotional techniques. For example, the most recent and authoritative review of the literature (Saffer & Chaloupka) concluded^[1]:

That comprehensive advertising bans can reduce tobacco consumption, but that a limited set of advertising bans will have little or no effect. A limited set of advertising

bans will not reduce the total level of advertising expenditure but will simply result in substitution to the remaining non-banned media.

If the regulation permitted sales promotions to be launched from other EU member states under mutual recognition, it would create a loophole that would be heavily exploited and would undermine government policy on tobacco promotion.

Reliance on the proposed tobacco advertising directive

The first paragraph on page 12 of the consultation document suggests that the Commission's proposal for a directive that would tackle cross-border tobacco promotion in the EU ([COM\(2001\)283 Final](#)) would leave just direct mail and in-pack promotions subject to mutual recognition. It is implied that this directive may be effective in controlling cross border promotions under mutual recognition, but we do not believe this to be likely in practice. Several points should be made about this:

1. Direct mail and in-pack promotions could become very substantial and are in themselves sufficient reason not to rely on the proposed directive to control cross-border tobacco promotion within the EU.
2. The directive does not actually ban all forms of cross border tobacco promotion except direct mail or in-pack promotions. It prohibits four types of cross border promotion: Internet, international sponsorship, radio broadcasts and printed publications. We would rather the proposed directive specified a blanket ban and tightly defined exemptions where necessary for reasons of practicality and proportionality. As currently drafted there may be other forms of promotion that would not be covered by the directive, and therefore would be admissible in the UK under mutual recognition.
3. The most serious weakness in the Commission proposal for a new tobacco advertising directive is that it has been widely interpreted (including by the UK government) as not applying to 'indirect' advertising and promotion – the promotion of tobacco through advertising non-tobacco products with tobacco brands. This follows an excessively cautious interpretation of the October 2000 ECJ ruling ([Case C-376/98](#)) annulling an earlier tobacco-advertising directive ([98/43/EC](#)). The ruling circumscribed the Community competence to regulate tobacco promotion – though did not eliminate it. This is a loophole so serious that it could render the proposed directive ineffective as tobacco companies could easily promote their brands using non-tobacco products like clothing, boots, fashion accessories, watches, adventure holidays and many other forms of 'brand-stretching'.
4. The directive is still subject to amendment in the European parliament or Health Council under the co-decision process. It may be further weakened or may not actually become legislation. The Legal Affairs committee of the European Parliament has recently endorsed a set of amendments that would render the directive ineffective if supported by the Parliament and Council.

We do not think, therefore, that it will be sufficient to rely on the Commission's proposed tobacco advertising directive to control cross-border tobacco promotion within the EU. For this reason, we believe it would be better to proceed in development of the sales promotion

regulation with the assumption that there are no meaningful controls on tobacco promotion in Community law and that such restrictions are primarily in the competence of member states.

For this reason, to prevent the proposed regulation undermining UK legislation and policy it will be essential to address the problem of mutual recognition for tobacco sales promotions from within the regulation. There are two options to do this:

1. Exempt tobacco from mutual recognition by amending Article 3.2
2. Create an explicit ban on tobacco promotion in the regulation in a new article

We favour the second approach for the reasons given below.

Banning tobacco promotion

We believe an explicit ban on tobacco promotions should be included in the regulation. Although it may be possible to suspend mutual recognition for tobacco promotions from within the regulation, national legislation could still be challenged under the 'Free Movement of Goods' provisions of the treaty establishing the European Community. An explicit ban on tobacco promotions, rather than an exemption for tobacco promotions from mutual recognition, would create a more robust defence against challenges under the treaty.

A Europe-wide ban on sales promotions for tobacco products and brands has supporting precedents. It would be analogous to the ban on television advertising of tobacco products that was incorporated into the 'Television without frontiers' directive ([89/552/EEC - Article 13](#)). In that case, a directive with the purpose of liberalising an entire sector, television, included within it recognition that television is a powerful means of promoting a harmful product like tobacco and so applied a specific prohibition to TV advertising of tobacco. For example, the following text would achieve this:

Article n. All forms of sales promotions for tobacco products, tobacco brands or tobacco use shall be prohibited.

We believe that such an amendment would be within the constraints of the treaty and that sales promotion in Europe is sufficiently international and transboundary to justify harmonisation at Community level.

Explicit protection for national legislation

As a second-best to a complete ban on tobacco sales promotion, we recommend specific authorisation for prohibition on tobacco promotion at member state level. This would be less comprehensive than the preferred outright ban, but would give a clear protection to national legislation. To do this, the regulation could include a definition of sectoral or product-specific promotions, and include an article that explicitly authorises member states to prohibit such promotions as they see fit. For example:

(Definition: Article 2.x) Sectoral prohibition on the use of or commercial communication of a sales promotion: a prohibition that is specific to a particular type of promoted good or service.

(Article 3.x) Member states may impose a sectoral prohibition on the use or commercial communication of a sales promotion for tobacco products, tobacco brands or tobacco use.

We remain concerned that the regulation could be used to challenge a sectoral prohibition in UK law, for example on tobacco promotion. As currently specified, the definition of a general prohibition (Article 2.I) combined with the ban on such prohibitions (Article 3.1) makes it clear that member states could impose prohibitions on promotion on a particular type of good or service, but this is indirectly implied and further amendment could change the meaning.

Removing mutual recognition for tobacco promotions

As a second best alternative to a complete ban on tobacco promotion in the regulation, we recommend amendment of the regulation so that it does not apply the principle of mutual recognition in relation to the communication of any promotion of tobacco products or brands. It is important that any exemption from the principle of mutual recognition is defined broadly enough to capture the many subtle and imaginative ways that have been invented to promote or advertise tobacco. For example:

Article "3.3". Paragraph 2 shall not apply to sales promotions for tobacco products, tobacco brands, or tobacco use.

In addition we suggest amendment of recital 27 to make it clear that under the EU treaty member states are required to pursue the completion of the single market with a high level of health and consumer protection and that the regulation does not therefore prevent member states prohibiting sectoral sales promotions for reasons of public health and consumer protection.

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12 October 2002

[1] Saffer H, Chaloupka F, *The effect of tobacco advertising bans on tobacco consumption* Journal of Health Economics Vol 19 (2000) (6) pp. 1117-1137 (the National Bureau of Economic Research (US))