

Consultation on the Tobacco Advertising and Promotion regulations
Response by Action on Smoking and Health
November 2002

Summary

This is a response from ASH to the government's [consultation on draft regulations](#) implementing the provisions of the Tobacco Advertising and Promotion Act (2002) related to sponsorship, point of sale promotion and brandsharing. We very warmly welcome the government's efforts to ban tobacco advertising. We recognise the importance of this measure in reducing heart and lung disease, cancer, tackling health inequalities and in improving health and welfare of non-smokers, including children. It is reasonable and cautious to expect the ban to save around 3,000 lives per year in the long run (about the same as the total that die on the roads). The predictable complaints and pleas from the tobacco advertisers should be viewed in that context. However, ASH is concerned that there remains sufficient scope for loopholes in the legislation and regulations to seriously weaken the impact on public health. It is important therefore that the government puts health first and is proactive and aggressive in enforcing the regulations. The government must keep the effectiveness of its policy under review with a commitment to amend and strengthen the legislation as necessary.

Sponsorship

- There is no case for extending the phase out of global sponsorships until 2006, and this policy is based on a fallacy about the market for sports sponsorship.
- We believe that the voluntary agreement governing sports sponsorships should be incorporated in the regulations because the government will be in a weak negotiating position if it seeks a new voluntary agreement, and tobacco promoters will have no incentive to abide by the existing agreement.
- Tobacco sponsors should report on their compliance with the regulations and the right to extra time be withdrawn in the case of non-compliance.

Point of sale promotion

- There is no case for allowing any point of sale advertising beyond a minimal price list, and no logic is offered for the government's idea of permitting a tobacco advertisement simply because it is affixed to a display gantry (often in shops where children go to buy sweets).
- Experience from New Zealand and elsewhere shows that it is a mistake not to regulate display of tobacco products as displays can easily become point of sale promotional vehicles. ASH believes that tobacco should become an 'under-the-counter' product.

Brandsharing

- There is a very high evidential burden on a prosecution to demonstrate the purpose or effect is to promote tobacco. This is likely to be a considerable barrier

to enforcing the regulations, and ASH believes that the right to advertise should have been granted on an exception basis subject to the advertiser satisfying the authorities that the non-tobacco branding does not have the purpose of effect of promoting tobacco.

- There is no case for exempting a brand simply because it was initially a non-tobacco brand. What matters is whether the branding promotes tobacco today. If the branding is sufficiently distinct then there should be no need for a special exception.
- There is no case for a later, 18-month, phase out of brandsharing and related promotion. The policy has been clear since 1998 and advertisers have had plenty of time to adjust already.

Overall comments

Precautionary approach. The case for any concessions, delays, or giving the benefit of doubt to tobacco advertisers is extremely weak, given that the government accepts that tobacco advertising increases consumption and causes loss of life. We urge the government to resolve any contested issues on the side of caution.

Monitoring and improvement of the legislation. Without exception worldwide, tobacco advertising legislation has had to be improved to respond to developments in marketing techniques and to exploitation of unanticipated loopholes. The use of regulations to address sponsorship, point-of-sale and brandsharing gives the flexibility to respond to such developments. We think it is important that the effectiveness of the regulations and the primary legislation is monitored independently for the government and that a review of effectiveness, with recommendations for new legislation or regulations, is scheduled every three years.

Precedents. In the early stages of implementation, it is likely that tobacco companies and their associates will test these regulations and the legislation to its limit, seeking to create permissive precedents. For example by making minimal changes to the appearance of tobacco branding on non-tobacco products, by redefining a 'gantry', by claiming that there was no intent to promote a tobacco product through brandsharing. It is important that firm action is taken from the outset to establish guidance for trading standards officers (TSOs) and that the government takes on the most difficult precedent-setting cases.

Enforcement. The legislation - section 13(3-6) - envisages an important role for ministers. It will be especially important that Ministers take on the first precedent-setting difficult cases, rather than hope that TSOs will take on this responsibility.

Lead times. The intention to ban tobacco advertising and sponsorship has been signalled since 1997 and the government had prepared regulations to implement the European Union directive that was quashed in 2000. Tobacco companies, retailers, sponsored events and others affected have had every opportunity to prepare and

anticipate a ban. If these companies made investments or commitments that mean that they face costs as the ban comes in at short notice, then they were taking political and legislative risk and should accept the consequences. Making concessions in such circumstances sends a very poor signal from the government, and invites tactical behaviour by tobacco companies and others in future. This principle has been generally adopted through the regulations – we hope the government will stick rigorously to it.

Tobacco Advertising and Promotion (Sponsorship) Transitional Regulations

Domestic sponsorships

Timetable is right. The decision to phase out domestic sponsorships to the timetable envisaged in the nullified EU directive is welcome and sound. Sponsored events have been on notice since 1997, and with increasing clarity since then. The terms of the nullified 1998 EU directive allowed for sponsorships to continue for five years from 1998, the date the directive was agreed. This was and remains government policy.

No case for exemptions or special cases. We agree with the government that there is no case for creating a list of exemptions or incorporating them in the definition of ‘global sponsorships’. In our view, the only argument for any accommodation of tobacco-sponsored events beyond July 2003 is that (regrettably) the government previously signalled it to two sports that it defined as ‘global events’.

No case for financial support to replace sponsorships. There is no case for providing any financial relief to events that have failed to find sponsorship. The sponsorship market is like any other, and supply will adjust to meet demand by finding a market-clearing price. This may be lower than currently received from tobacco companies, but that is a reality to which the sponsored events have had time to adjust, or to innovate to recover potential reductions in revenue. Experience from Australia showed that the provision of replacement funding was unnecessary. Those Australian states that provided it simply displaced private sector sponsors and diverted public funds from health into commercial sports.

Support for failing sports or events. If a sport or other event is unable to attract adequate replacement sponsorship, then it should be allowed to contract or even disappear if it does not have commercial viability. The question of whether the public sector should provide support should be addressed through normal channels such as Sport England, the National Lottery, Arts Council and others that fund sport and cultural activity on its merits.

International sponsorships

Fallacy underpinning the government’s policy. In allowing more time for larger sponsored sports to phase out, the government is operating under a misconception about the market for sponsorships. Large sponsorships are large precisely because the sport or event offers high marketing value for the sponsor’s brand. There is no reason

why the sponsorship should not be attractive to replacement sponsors with non-tobacco products. In addition, large scale sponsored events have the advantage of being able to carry the costs of sports marketing consultancy and deal-making services more readily than smaller sports. There is certainly no evidence that supply could not match demand in any sponsored sport (though perhaps without the premium offered by tobacco companies). The rapid change of sponsorship agreements within Formula One team illustrates this point: the title sponsors of F1 teams change from season to season, with an increasing tendency for non-tobacco sponsors to enter. Similar turnover is also evident in Premier League football – though with no tobacco involved.

Case for extension for global events, but only to until 2004. The only justification for allowing extra time for global events lies in earlier errors of government policy. The ‘global events’ have been led to believe they will have a longer time to phase-out than July 2003, whereas domestic sponsorships have been on notice that they have only until 2003. Even for these sports, there is no need to give notice of more than one season and the extension could be limited to July 2004.

Support for reducing expenditure and exposure. The approach of requiring a decrease in coverage and sponsorship expenditure is a good one and should precipitate earlier termination of some sponsorships as reduced visibility may be incompatible with, say, being the main sponsor for an F1 team. The principle of reducing expenditure and coverage was signalled in the directive 98/43/EC, though not quantified. The government is right therefore to insist on the progressive reduction. It should be clarified that the baseline is year 2002-3 and that the first 20% reduction is due in 2003-4.

Capping global sponsorships at 1998 level. The regulations for international sponsorships at section 3(2) do not apply a ‘cap’ to limit the expenditure on sponsorships renewed since 6th July 1998. Section 3(1) of the regulations, dealing with domestic sponsorships does apply such a cap, but 3(2) is drafted to be independent of this. Consideration should be given to clarifying 3(2) to ensure that *increases* in any sponsorship renewed since 1998 do not qualify for the transitional arrangements.

New contracts signed since 1998. Where (if at all) new contracts for ‘global events’ have been signed since 1998 that extend beyond October 2006, no concessions should be made and the sponsorship should stop at the end of the transitional period. Sponsors and events have been on notice since 1998 that it is government policy to end tobacco sponsorship. Any contract of this scale should have *force majeure* clauses to address political risk and allow early termination.

Incorporation of the voluntary agreement into the regulations. We believe that the terms of the voluntary agreement should be written into the regulations (option (i) in paragraph 26). This should be a simple and uncontroversial process and we do not

understand the objection to doing it raised in paragraph 28. There is nothing to stop the tobacco companies refusing to sign a new voluntary agreement, waiting for the regulations to be finalised and then seeking an even weaker agreement or to ignore its terms. Incorporating the voluntary agreement into regulations also avoid the administrative burden of a negotiation with the tobacco companies and operation of a COMATAS committee. The regulations in themselves offer less protection during the transitional period – for example the voluntary agreement prevents most visible advertising, but the regulations place no limit on the 2002-3 baseline and only halve the amount of advertising by 2006 – that is a weakening of the current standard in the voluntary agreement.

Reporting compliance. The granting of an extension until 2006 for global events should be regarded as a privilege rather than a right. The government should require sponsors permitted to continue beyond 2006 to report annually to demonstrate compliance with the terms of the regulation, and to provide an auditor's statement validating the reduced value of the sponsorship. The continuing sponsorship for these events after July 2003 should be reviewed annually and be subject to compliance with the regulations and the voluntary agreement. The regulations as drafted leave the government with no means of enforcing the terms or verifying compliance.

A less delayed phase-out. At paragraph 21, the government expects tobacco sponsorships to comply with a faster timetable if possible. However, nothing in the regulations requires or encourages this. In the regulations relating to the nullified directive, the sponsor or event had to show that it was necessary to continue the sponsorship due to 'exceptional circumstances'. This test of necessity has been lost but should be reinstated. We believe there is not a single Formula One team that could not replace its tobacco sponsorships by 2004. In fact, it would probably benefit the sport by breaking the stranglehold of Marlboro / Ferrari / Schumacher partnership, which has turned the Grand Prix into a tedious spectacle.

Tobacco Advertising and Promotion (Point of Sale) Regulations

Logic of government position. There is no logic in the government's determination to allow tobacco advertising in the particular situation where it is appended to a gantry. The case made for allowing such advertising (paragraph 40) is completely evidence-free and inconsistent with the stated policy of the government. The government's policy is to ban tobacco advertising, and the White Paper draws particular attention to the importance of cigarette advertising in shops that retail sweets and other products used by children. Paragraph 61 suggests that the regulation will provide information to consumers, but there is no evidence that tobacco advertising provides any information at all, and this justification is absurd. We believe there should be no point of sale advertising above the minimum necessary to describe what is on sale and prices.

Limiting point of sale of advertising. If an advertising logo is to be permitted it

should be no bigger than the size of the pack, for consistency with the other point-of-sale regulations – for example as specified for vending machine at regulation 2(b).

Definition of gantry does not create an effective limit. The regulation opens the way for gantries to be redesigned to be smaller – perhaps for each individual brand – thus allowing multiple advertisements in a shop. If point of sale advertising is to be permitted in limited form it would make more sense to specify how much advertising space can be permitted per establishment, or per square metre of tobacco product display area. ‘Gantry’ is not a defined term and new systems for display could be created which would in effect become tobacco advertisements.

Regulating display. We believe that tobacco products should become an under-the-counter product for sale to those asking for them. Advertisements could be created from product packs specially designed for the purpose and new display devices could easily become advertisements in their own right – as happened in New Zealand, where new regulations had to be introduced to respond to this omission in the original regulations^[1]. In some large retail outlets, such as duty free, the large packaging and extremely large displays constitute a very seductive form of advertising. We hope that the government will amend the regulations to reduce the impact of displays, or at least will keep the issue under review with a view to regulating in future. The Canadian province of Saskatchewan has recently enacted legislation banning ‘powerwalls’ precisely to deal with this problem. Under no circumstances should the government allow ‘display’ to be more broadly defined than physical display of real packets – for example to include ‘display’ of video graphics of cigarette packs on screens – these can too easily become a form of stylish advertising.

Adjustment time for retailers. We do not believe any extra time or exemptions should be offered to retailers to adjust. Where there are advertisements in place, these can be easily covered or painted over, or replaced with a neutral design. Tobacco companies have been on notice since 1998 that the government would be banning most point of sale advertising and could have designed gantries to be adaptable to future changes.

Price notices. The Government should specify details for price lists rather than leave this potential loophole. Alternatively it should make it clear that price lists that incorporate advertising are not permitted. Price information on packets is already made to have promotional impact and this could easily be extended to cover price notices – especially if other forms of point of sale advertising are not permitted. Price lists should be given a maximum size and black and white print specified, as with the new health warnings in 2001/37/EC. Experience suggests that anything not specified precisely or prohibited unambiguously will become a vehicle for effective tobacco promotion.

Responsible person. The main problem with point of sale advertising will be the existing base of promotional material and signage already distributed to retailers by

tobacco companies. As far as possible the tobacco companies should be held responsible for the removal of the advertising. The tobacco companies own the relevant trademarks and should be able to control their use so that they are not used illegally. If they do not do this, the government should investigate if they could be prosecuted as person that “causes to be displayed” products that do not conform to the regulations. This would help to ensure compliance and reduce costs and disruption to retailers.

Tobacco Advertising and Promotion (Brandsharing) Regulations

The brandsharing legislation and regulations are potentially a fatal weakness in the government’s efforts to ban tobacco advertising.

General prohibition of brandsharing. We agree that it is essential to ban brandsharing. However, we are concerned that the high burden of proof and ambiguities in the exemptions to regulations will potentially make the legislation ineffective or unenforceable.

Use of names. Paragraph 86 states “there is no intention to ban the use by non-tobacco brands of names used by tobacco companies”. This is perverse – the aim should be to prevent use of tobacco brand names, except where the word is used in a sense that is entirely distinct – for example Embassy Cleaners or Kent Cricket Club. However, it is important that ‘name’ is recognised as the defining and unifying characteristic of the tobacco brand. Thus for the purpose of this regulation, a branding design that includes the word ‘Marlboro’ should be understood to be sufficiently similar to one that includes the ‘Marlboro’ in a different colour or typeface.

Proof of intent to promote tobacco is a serious obstacle. There is no doubt that brandsharing has evolved as a strategy to enable tobacco brands to be marketed in situations where tobacco advertising is notionally banned – and the consultation document makes that case convincingly. However, the government has left itself some steep evidential hurdles in having to “prove beyond reasonable doubt that a company or individual was using brandsharing with the purpose [or effect] of promoting a tobacco product” (Para 84). The problem facing a prosecution is precisely the ambiguity in purpose that brandsharing deliberately creates. It would have been better to identify circumstances where such branding is deemed to be more likely than not to be promoting tobacco, and to make it illegal. We believe it was a mistake to require proof of intent and that this obstacle should be kept under review and the Act amended if necessary.

Exceptions – person had no reason to suspect purpose. For consistency with Regulation 3(b), the defence in 4(1)a ought to only apply if the person had no reason to suspect that the purpose or effect was to promote a tobacco product. This narrows the exemption and lightens the burden of proof by removing the need to prove intent.

Unnecessary exception where the branding was used first on a non-tobacco product. We agree that there are cases where the essence of the brand is a non-tobacco product. However, the decision to allow non-tobacco products to continue to use tobacco branding if the non-tobacco product came first is arbitrary, as the relative importance of the tobacco and non-tobacco products may have changed over time. What matters is whether the advertising has the purpose or effect of promoting tobacco and this concept is already specified in the regulation. If the non-tobacco branding is sufficiently distinct, then no special treatment is needed and the clause is unnecessary. It is difficult to gauge how broad this exemption is and the regulatory impact assessment should attempt to give some estimate. We believe that Regulation 4(2) is unnecessary and should be deleted.

Timing. There is no case for delaying introducing brandsharing regulations for 18 months. This simply delays the date at which the regulations become effective in tackling tobacco advertising and means that more people will die: each month of delay equates to an additional 250 deaths – a medium-sized plane crash. The advertisers have been on notice since 1998 and have had plenty of time to adjust. To give extra time for brandsharing is inconsistent with the philosophy adopted elsewhere in the regulations.

[1] Frazer T. Phasing out of point-of-sale tobacco advertising in New Zealand *Tobacco Control* 1998;7:82–84