



RESEARCH PAPER 02/20  
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# *The Tobacco Advertising and Promotion Bill [HL]*

**Bill 112 of 2001-02**

The *Tobacco Advertising and Promotion Bill* was introduced in the House of Lords on 11 July 2001, by Lord Clement-Jones. This Private Members' Bill is almost identical to the Government Bill of last Session, which received broad support but fell on dissolution. The main aim of the Bill is to control the advertising and promotion (including sponsorship) of tobacco products in the UK. On completing its passage through the Lords on 15 March 2002, the Bill was adopted as a Government Bill. It was originally due to have its Second Reading in the House of Commons on 9 April 2002.

This Paper should be read in conjunction with Research Paper 00/97. This outlines in greater detail the current regulation of tobacco advertising and promotion in the UK and previous attempts to introduce a ban both in the European Community and in the UK.

Lorraine Conway

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## Summary of main points

Council Directive 98/43/EC, the ‘Tobacco Advertising Directive’, was adopted on 6 July 1998.<sup>1</sup> The Directive intended to impose a staged abolition of tobacco advertising, sponsorship and promotion, resulting in a total ban on all tobacco advertising in the European Community by the year 2006.

The UK Labour Government had made a commitment in its 1997 manifesto to impose comprehensive restrictions on the advertising of tobacco products. In its December 1998 White Paper, *Smoking Kills*, the Government pledged to implement the Tobacco Advertising Directive more quickly than was required under Article 6(1).<sup>2</sup> Draft *Tobacco (Prohibition of Advertising and Promotion) Regulations 1999* were subsequently published for consultation on 17 June 1999 with the intention of bringing a general ban on tobacco advertising into force in the UK on 10 December 1999.

However, following a number of legal challenges, the Directive was annulled by the European Court of Justice (ECJ) on 5 October 2000.<sup>3</sup> The ECJ ruled that the legal base used for the Directive (Article 100a of the EC Treaty, which deals with internal market issues) was inappropriate.

As a result of the Directive’s annulment, in December 2000 the UK Government introduced the *Tobacco Advertising and Promotion Bill*. The main aim of this Bill was to ban advertising and promotion (including sponsorship) of tobacco products, subject to certain limited exceptions. The Bill completed all its stages in the Commons and was given a Second Reading in the Lords but fell on dissolution of Parliament in May 2001. The 2001 Labour Party manifesto contained a pledge to reintroduce the Bill. A new tobacco advertising Bill was not included in the Queen’s Speech on 20 June 2001.

On 11 July 2001, Lord Clement-Jones introduced as a Private Members’ Bill the *Tobacco Advertising and Promotion Bill* [HL].<sup>4</sup> The Bill is almost identical to the Government Bill of last session. On completing its progress through the Lords, on 18 March 2002, it has been adopted as a Government Bill. It was originally due to have its Second Reading in the Commons on 9 April 2002.

If passed, the Bill will come into force on a date or dates to be appointed by the Secretary of State, or, in relation to Scotland, the Scottish Ministers. The Bill will apply to England and Wales, Scotland and Northern Ireland. The Minister for Health, Alan Milburn has made a statement that the Bill is, in his view, compatible with the Convention on Human Rights.<sup>5</sup>

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<sup>1</sup> OJ 1998 L 213

<sup>2</sup> Department of Health, *Smoking Kills – A White Paper on Tobacco*, Cm 4177, December 1998

<sup>3</sup> Case c-376/98 of 5 October 2000, *Germany v Parliament and Council*

<sup>4</sup> HL Bill 7 of 2001/02

<sup>5</sup> Mr Secretary Milburn made the statement under section 19 (1)(a) of the *Human Rights Act 1998*

In the UK there have already been two public consultations on proposals to ban tobacco advertising, promotion and sponsorship. The first consultation document, which comprised a draft Regulatory Impact Assessment (RIA), was published in December 1998 at the same time as the White Paper 'Smoking Kills'. A second draft RIA was published in 17 June 1999 alongside draft regulations. Both these RIAs were published in the context of the UK's obligation to implement Directive 98/43/EC. In addition a RIA was published in December 2000 in connection with the Government's Bill, the *Tobacco Advertising and Promotion Bill*.

Tobacco advertising is a wide-ranging issue. However, this Paper is concerned only with the background to, and the main provisions of, the *Tobacco Advertising and Promotion Bill*. It does not attempt to value the benefits to health afforded by a ban on tobacco advertising and promotion. Neither does it attempt to quantify the cost to business of implementing a ban.<sup>6</sup>

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<sup>6</sup> The Department of Health Explanatory Notes to the *Tobacco Advertising and Promotion Bill* (Bill 6 EN) estimate that the proposed ban on tobacco advertising and promotion would eventually reduce consumption of tobacco products by approximately 2.5%. Assuming this estimate is accurate, the turnover of the UK tobacco industry could be expected to fall by around £300m per annum



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# **I Current self-regulation of tobacco advertising in the UK**

## **A. Background**

In the UK, Governments have operated voluntary agreements with the tobacco industry. These voluntary agreements currently regulate tobacco advertising and sponsorship and will remain in place until, and if, the *Tobacco Advertising and Promotion Bill* [HL] is brought into force.

Restrictions on tobacco advertising were first imposed in 1964, following the publication two years earlier of *Smoking and Health* by the Royal College of Physicians. As a result, manufacturers stopped advertising on television before 9pm, and a year later a total ban on television (cigarette) advertising was adopted. In 1971, the tobacco industry set up a voluntary code of advertising, to prevent cigarettes being over-glamorised, although it was not until 1975 that control of this code was transferred to an independent body, the Advertising Standards Authority [the ASA]. Radio tobacco advertising was banned following the development of commercial radio in the early 1970s. Health warnings on cigarette packets were introduced in 1971, and included information about the tar content of the particular brand after 1974. The scope and extent of tobacco advertising continued to be gradually restricted under this voluntary system for the next decade.

A new voluntary agreement on advertising and promotion was published on 9 September 1991 and revised on 1 January 1992 to reflect the requirements of the EC Directive on tobacco products labelling. The agreement was replaced in November 1992 by a new agreement in identical terms, save for an additional clause designed to ensure compliance with the *Restrictive Trade Practices Act 1976*. In May 1994, the Government and the tobacco industry agreed a new package of measures on advertising and promotion, and these formed the basis of a new voluntary agreement which was published in December 1994 and which came into effect on 1 January 1995.

## **B. Regulation by voluntary agreements**

### **1. Voluntary Agreement on Tobacco Advertising and Promotion**

The current voluntary agreement covers two main areas:

- (i) the content of cigarette advertisements;
- (ii) the placement of tobacco advertisements, limits on expenditure, promotional activities, the use of health warnings, and related matters.

#### **Content of cigarette advertisements**

- No advertisement should incite people to start smoking or, if they are already smokers, to increase their consumption.

- Advertisements should never suggest that smoking is safe, healthy, natural, necessary for relaxation or concentration, or popular.
- Smoking should not be associated with social, sexual, romantic or business success.
- Advertisements should not employ any approach, which is more likely to attract the attention or sympathy of those under 18.
- Humour is acceptable provided it is used with care and is not likely to have a particular appeal to the young.
- Advertisements should not associate smoking with sport or with active or outdoor games. Advertisements for sporting events sponsored by UK tobacco companies are governed separately by the voluntary agreement on sports sponsorship.

### **Placement of advertisements**

The main rules that apply to the placement of advertisements are:

- No cigarette or hand-rolling tobacco brand advertising should be placed on posters which are smaller than a 48 sheet (120" by 240").
- No cigarette or hand-rolling tobacco advertising should be placed on the exterior of any public or private vehicles.
- No posters advertising any tobacco products should be placed within 200 metres of the front entrance of schools and other places of education for young people under 18 years of age. In addition, no poster advertising cigarettes or hand-rolling tobacco should be clearly visible from and clearly identifiable from within such establishments.
- All permanent shop-front advertising material, for all tobacco products, was to be removed by 31 December 1996. The industry should not replace this permanent material with non-permanent material that is similar in terms of its impact, its extent or coverage, or the materials used.
- No advertisements should appear in any publication aimed wholly or mainly at a readership under eighteen years of age, nor should they appear in magazines where 25 % or more of the adult readerships (aged fifteen or over) are young women between the ages of fifteen and twenty-four.
- Advertising cigarette brands or hand-rolling tobacco at cinemas or on rental or retail video cassettes is not allowed.
- Tobacco advertising is not allowed on computer games or on any other computer equipment or software.

## Promotional activities

Promotional offers should be confined to adult smokers aged 18 or over. Companies will adhere to the 'Cigarette Promotion Code' and the 'Cigarette Sampling Code' which include the following:

- Companies should avoid using promotional material which will appeal more particularly to young people than to the public at large.
- All promotional letters and leaflets containing offers should bear a prominent statement that the offer is restricted to smokers aged 18 and over, and all application forms for promotional offers should require the applicant to sign a statement that he or she is a smoker aged 18 or over.
- Special care should be taken to avoid offering free samples of cigarettes or hand-rolling tobacco to non-smokers or anyone aged under 18. Where a company wishes to offer samples at an organised event, it should establish in advance that at least 70% of those expected to attend will be adults aged 18 or over.

As with other aspects of the tobacco industry's voluntary agreement, tobacco promotions are monitored by the Committee for Monitoring Agreements on Tobacco Advertising and Sponsorship (COMATAS), under an independent chair.

## Health warnings

All new press and poster advertisements and shop advertising material for all tobacco products should carry a health warning. The main rules on the use of health warnings are:

- Press and poster advertisements for all tobacco products should carry the health warnings which are required by law to appear by rotation on packets. The warnings shall also be used in rotation in advertisements.
- The area of press and poster advertisements used for the health warning should be 20% for cigarette and hand-rolling tobacco brands and 10% for cigar and pipe tobacco brands.
- The presentation of warnings on cigarette and hand-rolling tobacco advertisements should be evenly rotated between white lettering on a black background and black lettering on a white background.
- New permanent promotional material (ashtrays, jugs, ice buckets and beer mats) for cigarettes and hand-rolling tobacco should also carry a general health warning.
- Advertising material in duty-free areas, airline and shipping line magazines and newspapers or magazines with more than 80% of the circulation overseas are excluded from the agreement.

## **2. Voluntary Agreement on the Sponsorship of Sport by Tobacco Companies**

The principal features of this UK agreement are:

- Tobacco companies shall not sponsor sporting activities where the majority of the participants or of the target audience is under 18.
- The maximum amount tobacco companies can spend on promoting a sponsored event is 15% of their total sponsorship expenditure. In other words at least 85% of tobacco spending on sponsorship must go directly to the events themselves.
- All press and poster advertising for sponsored events has to carry a health warning covering 20% of the total area.
- Static promotional signs at both televised and non-televised sponsored events have to carry health warnings covering 20% of the total area.
- Cinema advertising of tobacco-sponsored events is prohibited.
- Press, poster and shop-front advertisements for sponsored events:
  - must comply as far as practicable with the Cigarette Promotion Code;
  - must seek primarily to direct attention to the event and venue;
  - must not depict a cigarette or a cigarette/hand-rolling tobacco pack, nor echo any elements in the design of a cigarette/hand-rolling tobacco pack/advertisement other than the house or brand name;
  - must not depict any participants in a sport nor anybody smoking.
- Advertisements or promotional signs for tobacco-sponsored events may not be displayed within 200 metres of the front entrances of schools, except where an event is taking place at a venue within that area. In the latter case, advertisements or promotional signs may be displayed during the course of the event or for up to six weeks beforehand.
- Television coverage of sponsored events is subject to Codes of Practice laid down by the BBC and ITC.
- Static promotional signs at sporting events should not be located within camera sightlines for prolonged, uninterrupted periods. Signs which are likely to come within television coverage should carry only the official title of the event and a health warning.
- There are limits on the maximum number and size of signs allowed to appear in television coverage for each type of event.

- Brand names or symbols may not be displayed on participants and officials, nor their vehicles and equipment, if they are likely to come within the television coverage of an activity in the UK.
- The design of the set for small arena sports should not resemble the sponsor's product, except that promotional signs may be printed in the style and colours normally associated with the sponsor's house or brand name.

The industry's adherence to both agreements is monitored by the Committee for Monitoring Agreements on Tobacco Advertising and Sponsorship (COMATAS). The Committee reports annually to the Secretary of State for Health.

## II EU policy on tobacco advertising

Tobacco companies have consistently argued against any ban on tobacco advertising. They argue that advertising has no effect on overall consumption but merely reinforces brand values and encourages existing smokers to switch brands. Notwithstanding these arguments, on 6 July 1998 the Council of Ministers adopted a Directive [98/43/EC] to ban tobacco advertising, including promotion and sponsorship.<sup>7</sup>

Initially the UK Labour Government proposed to fulfil its 1997 manifesto commitment to ban tobacco advertising through implementing this Directive. However, the Directive was declared unlawful by the ECJ on 5 October 2000 on the grounds of an incorrect legal (treaty) base.

The significance of the current *Tobacco Advertising and Promotion Bill* [HL] can only be properly assessed in the context of this failed Directive. This is particularly the case since many of the Bill's provisions are similar in purpose and effect to provisions of the annulled Directive.

### 1. The annulled EU Tobacco Advertising Directive 98/43/EC

The passage of the Directive from its initial proposal by the European Commission in 1989, through to its adoption in July 1998, to its annulment on 5 October 2000 was long and drawn out.

A proposal for a Directive to ban advertising in publications intended for young people under eighteen and to restrict the advertising of tobacco products in the general press was first published by the European Commission on 18 April 1989.<sup>8</sup> The amended proposal

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<sup>7</sup> OJ 1998 L213

<sup>8</sup> EC Draft 5684/89

to limit advertisements to a portrayal of the packaging only, a ban on direct advertising and a standardised list of health warnings failed to proceed because of opposition from Germany, Greece, Denmark, the Netherlands and the then UK Government.<sup>9</sup> The Directive was introduced on the basis of article 100a of the EC Treaty which is directed towards removing barriers to trade and the completion of the single market. The previous UK Government argued that the measure could not be justified on these grounds and maintained that it was related to health and social policy.<sup>10</sup>

Subsequent proposals similarly failed to proceed as the same countries continued to argue that a ban on tobacco advertising was unnecessary for the completion of the internal market. The situation changed in January 1995, because two of the three new states joining the Community, Finland and Sweden, had already implemented bans on tobacco advertising. The UK election in May 1997 of a new Labour Government, sympathetic to an overall ban on tobacco advertising and sponsorship, raised the possibility that the EU draft directive blocked for six years would now be implemented. A switch of vote by the UK would provide the necessary majority for the draft directive to be passed to the European Parliament for a second reading, providing the other countries previously supporting the ban maintained their positions.

In September 1997, the Luxembourg Presidency of the EU produced a compromise document to try to address the concerns of those countries opposing a Directive to ban tobacco advertising. At a meeting of the Council Working Party on Health, the compromise proposals were examined and the UK representative apparently indicated the willingness of the UK Government to accept the compromise text.<sup>11</sup> However, the subsequent announcement by the Government that it wanted to allow the sport of Formula One a permanent exception from the sponsorship ban led to speculation that the Directive would fail.<sup>12</sup> The UK Government confirmed its policy and the reasons behind it in a written answer from Tony Banks, Minister for Sport:

After considering the issue of sponsorship in great depth the Government has proposed excluding Formula One from the scope of the proposed EU Directive on tobacco advertising and sponsorship which is currently being negotiated. We have always made clear that we are pursuing twin objectives of reducing smoking and of safeguarding sport from any effects arising from the loss of tobacco sponsorship. The fact is that a blanket Europe-wide ban on Formula One sponsorship would not only mean fewer Grand Prix in Europe but also perversely, more tobacco advertising on our TV screens beamed in from events outside the European Union.<sup>13</sup>

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<sup>9</sup> EC Draft 5684/89

<sup>10</sup> HC Deb 28 November 1990 c 971-987

<sup>11</sup> *European Report* No. 2250 13 September 1997, Section IV, p. 3

<sup>12</sup> "Tobacco ban strategy spins off the track", *Financial Times* 6 November 1997

<sup>13</sup> HC Deb 11 November 1997 c 467-8W

The UK Government was also concerned about prospective job losses if Formula One moved outside the EU to overcome a ban on tobacco sponsorship.

The press linked the Government's position to a £1 million donation to Labour Party funds from Bernie Ecclestone, Head of Formula One Construction. To avoid any appearance of a conflict of interest, the Labour Party donated the £1 million to charity.<sup>14</sup>

On 4 December 1997, a common position text on a draft Directive to ban tobacco advertising was agreed at the Council of Health Ministers Meeting. The ban was approved by 11 of the 15 EU countries; the narrowest margin possible under qualified majority rules. Germany and Austria opposed the Directive and Spain and Denmark abstained.

On 16 April 1998, the Legal Affairs and Economic & Monetary Committees of the European Parliament announced that the EU's decision to implement a Directive to phase out tobacco advertising had 'no legal base' under the EU constitution. However, on 22 April 1998, the lead committee examining the Directive for the European Parliament, the Environment Committee, supported the advice of its Rapporteur, M. Christian Cabrol, and voted to recommend no amendments to the Council's common position. This formed the basis of the Committee's advice to the plenary session of the Parliament.

When the European Parliament met to consider the Directive there were a total of 65 proposed amendments, which had they been successful, would have triggered the Conciliation Process (a process for resolving disputes between the Parliament and Council of Ministers). However, on 13 May 1998, the European Parliament approved the Directive without amendment. The European Parliament voted to support the common position of the Council. Voting was 314 in support of the Directive, 211 against and 25 abstentions.

Directive 98/43/EC was adopted by the European Union Council of Ministers and was published in the Official Journal on 30 July 1998.<sup>15</sup>

Directive 98/43/EC required all Member States to introduce domestic legislation to phase out tobacco advertising, including promotion and sponsorship. The effect of the Directive would have been a total ban on tobacco advertising and sponsorship by 1 October 2006, (although Member States were entitled to implement any part of the Directive to a faster time scale).

However, on 5 October 2000, following a number of legal challenges, the ECJ ruled that the Directive was unlawful and would be annulled.

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<sup>14</sup> "Labour to give Ecclestone's £1m to cancer charity", *Guardian*, 24 November 1997

<sup>15</sup> OJL 213, 30 July 1998

## 2. Legal challenges to the Directive – the case before the ECJ

Immediately after Directive 98/43/EC was adopted, its legality was challenged before the ECJ by tobacco companies, other trading companies and by the German Government.<sup>16</sup> In the UK, tobacco companies also challenged in the courts the Government's plans to implement the Directive before the ECJ had given its ruling on the validity of the Directive.

All European law has to be grounded in the treaties establishing the EU. The preamble to the Directive states that the Directive was adopted on the basis of Article 57(2) (now, after the Amsterdam Treaty, Article 47(2)), Article 66 (now Article 55) and Article 100a (now Article 95) of the EC Treaty. Articles 57(2) and 66 concern respectively the freedom of establishment and the freedom to provide services. Article 100a allows the European Community to introduce harmonising measures with a view to establishing a single market without internal frontiers.

The companies challenged the Directive on the following grounds:

- The Directive was outside the competence of the Community and had no legal base. The Directive was introduced under Article 100a of the EC Treaty, which covers harmonisation provisions for the single market: Brussels had no authority to make a public health Directive under its powers to harmonise the internal market.<sup>17</sup>
- The Directive was incompatible with the general principle of proportionality, namely it was not necessary to include a complete ban on advertising and promotion; there were less restrictive alternatives.
- The Directive was incompatible with the principle of subsidiarity. The companies claimed that the ban has nothing to do with harmonisation since tobacco marketing does not cross borders in the EU.
- Finally, it was claimed that the Directive infringed the European Convention on Human Rights – in particular, to freedom of expression and the right to property.

In October 1998, Germany brought proceedings for annulment of the Directive pursuant to Article 173 (now Article 230) of the EC Treaty.<sup>18</sup> Germany challenged the adequacy of Articles 57(2), 66 and 100a of the EC Treaty as a legal base. The validity of the Directive

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<sup>16</sup> Germany sought annulment of the Directive in the ECJ under Article 230 (formerly Article 173) of the EC Treaty

<sup>17</sup> It was argued that Article 129 of the Treaty (the Article on health policy) should have been used as the legal base instead. Article 129 is essentially voluntary whereas Article 100a allows mandatory harmonisation.

<sup>18</sup> Case C-376/98



was also being challenged by separate actions brought by Alma Media (Greece), Davidoff (Switzerland) and Una Film (Austria).

In the UK, on 16 December 1998, Imperial Tobacco Ltd, Gallagher Ltd, Rothmans (UK) Ltd and British American Tobacco (investments) Ltd were successful in obtaining a referral by the High Court to the ECJ under Article 177 (now Article 234) of the EC Treaty.<sup>19</sup> In effect, a preliminary ruling as to the validity of the Directive was sought from the ECJ.

On 5 October 2000, the ECJ ruled that Article 100a did not constitute the proper legal base for the Directive and it would be annulled:

The conclusion was that since, in order to adopt the directive on the basis of articles 100a, 57(2) and 66, the Community legislature could not rely on either the need to eliminate obstacles to the free movement of advertising media and the freedom to provide services, or the need to eliminate distortions of competition in the advertising or tobacco products sectors, those articles did not constitute an appropriate legal basis for the directive.

It had been noted at certain points in the judgment that a directive prohibiting certain limited forms of tobacco advertising or sponsorship could have been adopted on the basis of article 100a, but it was not possible for the court to annul the directive partially as, given the general nature of the prohibition of advertising and sponsorship of tobacco products laid down in it, that would entail amendment by the court of the directive, which was a matter for the Community legislature alone.

Accordingly the directive must be annulled in its entirety.<sup>20</sup>

Whilst overturning the Directive, the ECJ acknowledged that advertising does cross national boundaries (for example, in printed publications), and that legislation prohibiting this type of advertising would be within the scope of the EU. In fact, the European Commission has now drafted revised proposals for a Directive.

### **3. Proposed new EU Directive on advertising and sponsorship of tobacco products**

On 30 May 2001, the European Commission presented a revised proposal for a new Directive on the advertising of tobacco products and related sponsorship.<sup>21</sup> This proposed Directive, intended to replace annulled Directive 98/43/EC, takes into account the ECJ's decision and is narrower in scope than its predecessor.

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<sup>19</sup> Case C-74/99

<sup>20</sup> “*Tobacco advertising ban has no legal basis – Case C-376/98*”, Times Law Report, 10 October 2000

<sup>21</sup> COM(2001) 283 final

If adopted, the proposed Directive would cover forms of tobacco advertising and related sponsorship, which have effects across national frontiers (apart from that on television, already covered by other Community legislation).<sup>22</sup>

The draft Directive proposes to:

- Limit tobacco advertising in the press and other printed media to publications intended exclusively for the tobacco trade.
- Ban tobacco advertising on Information Society Services (ISS). For the purposes of the proposed Directive, ISS are defined as any service normally provided for remuneration, at a distance, by electronic means at the individual request of a recipient of services.<sup>23</sup> (In effect, this provision would catch any website that sells advertising space for tobacco advertisements).
- Ban all forms of radio tobacco advertising and sponsorship of radio programmes by tobacco companies.
- Prohibit sponsorship of events or activities involving or taking place in several Member States or otherwise having cross-border effects as well as the free distribution of tobacco products in the context of such sponsorship. For the purposes of the Directive, sponsorship is defined as “any public or private contribution to any event or activity with the aim or the direct or indirect effect of promoting a tobacco product”.

The proposal requires Member States to introduce legislation to comply with its terms by 31 July 2005, although this clearly depends on if, and when, the Directive is finally adopted.

The European Commission has indicated that the new proposal will be subject to the co-decision procedure between the European Parliament and the Council and anticipates that this procedure will take some 12-18 months. During this procedure Member States and MEPs will be able to propose changes.

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<sup>22</sup> Tobacco advertising and sponsorship on television is completely banned by Council Directive 89/552/EEC, as amended

<sup>23</sup> Information Society Services are defined as services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC

### III UK Government policy on tobacco advertising

The Labour Party had made a commitment in its 1997 election manifesto to take action to ban tobacco advertising:

Smoking is the greatest single cause of preventable illness and premature death in the UK. We will therefore ban tobacco advertising.<sup>24</sup>

To this end, it had announced during the Queen's Speech on 14 May 1997, that a White Paper would be published outlining proposals to reduce tobacco consumption, including legislation to ban tobacco advertising.<sup>25</sup>

Speaking on the day of the Queen's Speech, Tessa Jowell, then Minister of State for Public Health, gave details of the Government's planned approach to reduce the number of tobacco related deaths. She said:

Firstly, let me be completely clear about one thing: the Government is fully committed to banning tobacco advertising. This is an essential first step in building an effective strategy to deal with smoking.

But controlling tobacco consumption requires a much wider range of measures if we are to have a real impact and see a significant and lasting reduction. We need to explore and assess the full range of possible measures which might augment a ban on advertising to reduce tobacco consumption. This is a major exercise which I take very seriously. I am therefore calling together a high level seminar of British and international experts in the field of smoking reduction. The seminar will examine all the avenues which might be of practical value in reducing the number of smokers and the incidence of smoking-related diseases and premature death. The results of the seminar will inform Government policy which will then be set out in a White Paper on our strategy to reduce smoking.

At the same time, we will be drafting legislation to ban tobacco advertising. There are some complex issues here, including the use of sports sponsorship as a way of advertising tobacco brands. We will need to look carefully at how to remove tobacco advertising from sporting events without creating any risk to those events in the UK.<sup>26</sup>

The EU Tobacco Advertising Directive 98/43/EC was adopted on 6 July 1998, requiring Member States to phase out tobacco advertising in its entirety by 1 October 2006. The Government proposed to fulfil its manifesto commitment through implementing this Directive.

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<sup>24</sup> Labour Party Manifesto, *New Labour because Britain deserves better*, 1997

<sup>25</sup> Her Majesty's Most Gracious Speech to Both Houses of Parliament, 14 May 1997, page 2

<sup>26</sup> Department of Health Press Release 97\094, *Government fully committed to banning tobacco advertising - Tessa Jowell*, 14 May 1997

On 10 December 1998, the UK Government outlined its proposals for the implementation of the Directive in *Smoking Kills - A White Paper on Tobacco*. This was followed on 17 June 1999, by the publication by the Department of Health of the *Draft Tobacco (Prohibition of Advertising and Promotion) Regulations 1999* for consultation.<sup>27</sup>

Although under Article 6, Member States were not required to comply with the Directive until 30 July 2001, the draft Regulations sought to implement the Directive much earlier, with effect from 10 December 1999, even though the validity of the Directive was being challenged in the ECJ.

The draft Regulations proposed to ban all general advertising in shops and newsagents from 10 December 1999 and to ban virtually all tobacco sponsorship from 30 July 2003. Exceptional global events with a high dependency on tobacco sponsorship would have an additional 3 years to end tobacco sponsorship, but only if they cut tobacco advertising and sponsorship by at least a fifth in each of those 3 years. In any event, all tobacco sponsorship must end on 1 October 2006.

Formula One motor racing fell within the definition of a global sporting event. The Government explained this decision on the basis that:

...Formula One is a single competition spread across a large number of countries. So legal regulation of it is a much more complex proposal.

Formula One is believed to depend on around £35 million a year from sponsorship in the UK and around £100 million worldwide, a major part of which will be from the tobacco industry. It is simply not realistic to assume that this scale of investment can automatically be replaced for all teams within the general period allowed for sports generally.<sup>28</sup>

However, the UK Government's plan to implement the Directive to a much quicker timetable than was required under Article 6(1), and before the ECJ had given its ruling on the legality of the Directive, was challenged in the British courts.

On 29 October 1999, four tobacco companies were successful in obtaining a High Court injunction against the UK Government.<sup>29</sup> This injunction prevented the Government from laying regulations before Parliament to implement the Directive until the ECJ had ruled

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<sup>27</sup> Department of Health Press Release 1999\0358, *Tobacco advertising to end by December*, 17 June 1999

<sup>28</sup> Department of Health, *Smoking Kills – A White Paper on Tobacco*, Cm 4177, December 1998

<sup>29</sup> The four tobacco companies were Imperial Tobacco Ltd, Gallagher Ltd, Rothmans (UK) Ltd, and British American Tobacco (Investments) Ltd

on its validity.<sup>30</sup> On 16 December 1999, the Court of Appeal over-turned the decision of the High Court by ruling two to one in favour of the Government.<sup>31</sup>

The House of Lords granted the tobacco companies leave to appeal and a full hearing was held in May 2000. However, before the House of Lords could give its formal ruling in this matter, the ECJ ruled on 5 October 2000 that the Directive was adopted on the wrong legal base and should be annulled. The UK Government's response was to immediately announce its intention to introduce primary legislation to deliver its manifesto commitment to ban tobacco advertising.<sup>32</sup>

Commenting on the ECJ ruling, Yvette Cooper, the Public Health Minister, said:

This ruling is a disappointment, but it will not deflect us from implementing our manifesto commitment to ban tobacco advertising. We said at the time of the Advocate General's opinion in June that we would consider primary legislation to ban tobacco advertising and that is what we are doing.

Smoking kills over 120,000 people each year in the UK and the Government is determined to reduce this toll. Seventy percent of smokers say they want to give up. That's why we are providing advice and support to those who give up. We also want to discourage children from starting to smoke. Tobacco advertising promotes a deadly habit and those brands that are advertised the most are smoked the most, especially by children.

We know that a ban would save thousands of lives in the UK each year, and many thousands more across the European Union. We would like to implement a ban at European level because the UK is part of a European market but if that isn't going to be possible then we will implement a ban at UK level. We hope that the European Commission will bring forward new proposals in this area as soon as it possibly can.<sup>33</sup>

During the final session of the previous Parliament the Government introduced the *Tobacco Advertising and Promotion Bill*.<sup>34</sup> The aim of the Bill was to ban tobacco advertising and promotion (including sponsorship), subject to certain limited exceptions. This Government Bill completed all its stages in the House of Commons and was given a Second Reading in the House of Lords but fell on dissolution of the House. The 2001

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<sup>30</sup> *R v (1) Secretary of State for Health (2) Secretary of State for Trade & Industry (3) HM Attorney-General (Respondents), Ex Parte (1) Imperial Tobacco Ltd (2) Gallagher Ltd (3) Rothmans (UK) Ltd (4) British American Tobacco (Investments) Ltd (Applicants)*, QBD Crown Office List (Turner J), 29 October 1999

<sup>31</sup> *Regina v Secretary of State for Health and Others, Ex parte Imperial Tobacco Ltd and others*, 16 December 1999

<sup>32</sup> Department of Health press notice 2000/0559, *Government confirms intention to ban tobacco advertising*, 5 October 2000

<sup>33</sup> Ibid.

<sup>34</sup> Bill 6 of 2000-2001

Labour Party Manifesto contained a pledge to reintroduce the Bill but it was not included in the Queen's Speech on 20 June 2001.<sup>35</sup>

In the press, there appeared articles reporting on the disappointment of various organisations (including the Royal College of Physicians and the British Medical Association) at the Government's decision not to include in the current programme a Bill to ban tobacco advertising and promotion.<sup>36</sup>

On 11 July 2001, Lord Clement-Jones introduced the *Tobacco Advertising and Promotion Bill* [HL].<sup>37</sup> When introduced to the House of Lords, this Private Members' Bill was identical to the Government Bill of last session. Effectively, Lord Clement-Jones sought to reintroduce the Government's own Bill:

I am the frail instrument by which we hope to reintroduce the Bill and ensure that the Government stick to their electoral promises. Clearly, there is strong approval for this action. Yesterday, the Minister answered a written question of mine showing the number of written communications received in support of the current Bill. There were 370 letters between July and October and some 498 pre-printed postcards. This measure has considerable support. It is notable that no letters were received which did not support the introduction of the Bill.<sup>38</sup>

During the Bill's Second Reading in the House of Lords on 2 November 2001, Lord Hunt, Government Spokesperson on Health, stated the Government's position and its support for the Bill:

My party's 2001 manifesto contained a pledge to reintroduce the Bill but we were unable to include it in the Queen's Speech. Inevitably, governments need to take difficult decisions about what is contained in their legislative programme. However, the manifesto pledge is for the lifetime of the Parliament. My right honourable friend the Prime Minister made it clear that Ministers would monitor any developments in the current Parliamentary Session to seek the earliest opportunity to introduce the Bill. The fact that the Bill replicates the words of the government Bill that was introduced during the previous Parliament means that we support its aims and principles, and we wish it well.<sup>39</sup>

After the Bill completed all its stages in the Lords on 15 March 2001, the Government adopted it as a Government Bill.

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<sup>35</sup> The Bill completed its Committee stages in the House of Commons and passed to the House of Lords on 14 February 2001. At dissolution, the Bill had completed its second reading in the Lords on 28 March 2001 and had been given a provisional Committee date.

<sup>36</sup> "Politicians blamed for death of 5m smokers", *Times*, 8 March 2002 and "Ban on cigarette advertising vital to Labour's credibility", *Guardian*, 8 March 2002

<sup>37</sup> HL Bill 7 of 2001/02

<sup>38</sup> HL Deb 2 November 2001 c1647

<sup>39</sup> HC Deb 2 November 2001 c1702

## IV The Tobacco Advertising and Promotion Bill [HL]

During the Second Reading of the *Tobacco Advertising and Promotion Bill* in the House of Lords, Lord Clement-Jones summarised the significance of his Bill:

This Bill will make a significant contribution to reducing deaths from smoking, perhaps more than the 3,000 or 2.5 per cent estimated by the Department of Health. Estimates published by the World Bank suggest the reduction in consumption may be greater - 7 per cent - almost three times as great and therefore potentially saving thousands more lives.

This Bill, which is identical to the Government's previous Bill, will ban, with limited exceptions, tobacco advertising in the press, on billboards and by electronic means such as faxes and through the Internet. It will ban mail shots advertising tobacco products, except where the customer has expressly requested information. It will ban free distributions of tobacco products and coupon schemes and it will bring to an end sponsorship agreements which promote tobacco products. It will give the Government power to regulate the advertising of tobacco products in places where they are sold and to control brand-sharing or brand-stretching, which is the use of non-tobacco products with a similar brand name to those of tobacco products.

It is of major importance that the Bill covers the whole of the United Kingdom, although it provides that certain regulation-making powers will be exercised by Ministers in the Scottish Executive. On these Benches we believe, as do the Government Benches, both here and in the Scottish Parliament and in the Welsh Assembly, that a single UK-wide Bill is the way forward.<sup>40</sup>

### A. The main provisions of the Bill

As outlined in the Explanatory Notes that accompanies it, the Bill deals with the following matters:

- Clause 1 defines 'tobacco advertising' and the meaning of 'tobacco product'.
- Clause 2 deals with the general prohibition on tobacco advertising.
- Clause 3 deals with the advertising of tobacco products in newspapers, periodicals etc.
- Clause 4 deals with exclusions to the tobacco advertising ban.
- Clause 5 sets out the various possible defences for anyone charged with an offence under clause 2 or 3.

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<sup>40</sup> HL Deb 2 November 2001 c1649

- Clause 6 deals with the treatment of specialist tobacconist shops.
- Clause 7 deals with developments in technology.
- Clause 8 deals with displays.
- Clause 9 bans any free distribution of tobacco products where the purpose or effect is to promote a tobacco product.
- Clause 10 deals with the prohibition on sponsorship.
- Clause 11 is concerned with brandsharing.
- Clause 12 considers the treatment of broadcast advertising (television and radio) of tobacco products.
- Clause 13 deals with enforcement of the Bill, clause 14 deals with powers of entry and clause 15 makes obstructing an officer of an enforcement body an offence.
- Clause 16 sets out the penalties for offences under the Bill.
- Clause 17 deals with defences and the burden of proof.
- Clause 18 deals with offences by corporate bodies and Scottish partnerships.
- Clause 19 sets out further details on regulations and order-making powers.
- Clause 20 deals with transitional provisions: sponsorship.
- Clause 21 and 22 are concerned with interpretation and commencement.

An outline of the main provisions of the Bill is set out below. This outline relies, in part, on the interpretation given to the provisions in the Bill's own Explanatory Notes.<sup>41</sup>

## **1. General prohibition of tobacco advertising**

**Clause 1** defines a 'tobacco advertisement' as an advertisement whose purpose or effect is to promote a tobacco product. It defines a tobacco product as a product consisting partly or wholly of tobacco and intended to be smoked, sniffed, sucked or chewed.

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<sup>41</sup> Bill 112 - EN



The definition of a tobacco advertisement is deliberately wide and would include direct advertising (for example, posters, billboards and press advertising) and indirect marketing and promotion.

New offences are created in relation to tobacco advertising and promotion under clauses 2 and 3 of the Bill.

**Clause 2** prohibits all forms of tobacco advertising in the UK by anyone ‘acting in the course of a business’. Under clauses 2(1) and 2(2) it is an offence to publish (or cause to be published) a tobacco advertisement in the UK:

2(1) A person who in the course of a business publishes a tobacco advertisement, or causes one to be published, in the United Kingdom is guilty of an offence.

(2) A person who in the course of a business prints, devises or distributes in the United Kingdom a tobacco advertisement which is published in the United Kingdom, or causes such a tobacco advertisement to be so printed, devised or distributed, is guilty of an offence.

As well as its general meaning, under clause 2(3), ‘distributing’ a tobacco advertisement includes:

...transmitting it in electronic form, participating in doing so, and providing the means of transmission.

The effect of clause 2 is that each member of the advertising chain is potentially liable to commit an offence, from the tobacco manufacturer who may have commissioned the advertisement to those who design, print or distribute the tobacco advertisement in the UK. However, only a person acting ‘in the course of a business’ can be held liable. The Bill does not make incidental commentary on tobacco products or smoking an offence. Moreover, clause 2(4) specifically exempts persons who do not carry on business in the UK from the offence of publishing (or causing publication) of a tobacco advertisement where they do so via a website which is accessed in the UK. It is recognised that access to a website cannot be controlled by its originator.

A new offence is also caused by **clause 3**, which is specifically concerned with the advertising of tobacco products in newspapers, periodicals and other publications. It states:

3. If a newspaper, periodical or other publication (‘the publication’) containing a tobacco advertisement is in the course of a business published in the United Kingdom-

(a) any proprietor or editor of the publication is guilty of an offence,

(b) any person who (directly or indirectly) procured the inclusion of the advertisement in the publication is guilty of an offence, and

(c) any person who sells the publication, or offers it for sale, or otherwise makes it available to the public, is guilty of an offence.

It is clear from clause 3 that if a tobacco advertisement appears in a newspaper or periodical, anyone in the chain of publication or distribution could be guilty of an offence, but subject to the defences set out in clause 5. This includes the proprietor or editor of the publication, the person who procures the inclusion of the advert and the newsagent who sells the publication.

## **2. Exclusions to the general tobacco advertising ban**

**Clause 4** sets out the following specific exclusions to the total ban on tobacco advertising and promotion in the UK:

4(1) No offence is committed under section 2 or 3 in relation to a tobacco advertisement-

(a) if it is, or is contained in, a communication made in the course of a business which is part of the tobacco trade, and for the purposes of that trade, and directed solely at persons who –

(i) are engaged in, or employed by, a business which is also part of that trade, and

(ii) fall within subsection (2), in their capacity as such persons,

(b) if it is, or is contained in, the communication made in reply to a particular request by an individual for information about a tobacco product, or

(c) if it is contained in a publication (other than an in-flight magazine) whose principal market is not the United Kingdom (or any part of it), or if it is contained in any internet version of such a publication.

Under clause 4(1)(a), no offence is committed if the tobacco advertisement is contained within a communication intended exclusively for persons working in the tobacco trade. The aim of this clause is to prevent the Bill from impeding the tobacco industry from carrying out its legitimate business. However, these trade communications must not reach the wider public.

Clause 4(1)(b) allows a tobacco advertisement to appear in information sent to a consumer who has specifically requested that information. However, this clause does not permit tobacco advertisements to be sent to all consumers on a database (i.e. mail shots); each consumer must individually request that information on each and every occasion. Moreover, a request for information cannot be considered as a request for further information in the future.

Clause 4(1)(c) exempts from the general tobacco advertising ban, publications printed outside the UK whose principal market is not the UK market. Internet versions of foreign publications are also covered by this exemption.

In-flight magazines are captured by the Bill's prohibition on tobacco advertising, an issue discussed in Committee. Amendments were made to the original Bill to ensure that all air carriers, not just UK carriers, would have to comply.<sup>42</sup>

Clause 4(3) gives the appropriate Minister power to make regulations to the effect that no offence is committed under clause 2 in relation to a tobacco advertisement which is in a place or on a website where tobacco products are offered for sale. For instance, in shops, the intention is to allow advertising of tobacco products around the till area or in a kiosk in a supermarket but to ban the tobacco advertising material elsewhere on the premises. There will be consultation on these regulations to ensure that this exemption is not used to widen the scope of permitted advertising. It is intended that the regulations will also clarify how the exemption applies to sales over the Internet.

### 3. Statutory defences

**Clause 5** is particularly important, in that it sets out possible defences for anyone charged with an offence under clause 2 or 3 of the Bill. The defences are quite specific; the aim is to ensure that each person in the publication and distribution chain knows what will be a criminal offence and what will be lawful.

First, clause 5(1) sets out a general defence:

5(1) A person does not commit an offence under section 2 or section 3(a) or (b), in connection with an advertisement whose purpose is to promote a tobacco product, if he did not know, and had no reason to suspect, that the purpose of the advertisement was to promote a tobacco product.

Similarly, a person will have a defence under clause 5(2) in relation to an advertisement whose effect is to promote a tobacco product, if he can prove that he could not reasonably have foreseen that the advertisement would have that effect. The defendant might have a valid defence under clause 5(3) if he can prove that he did not know, and had no reason to suspect, that the tobacco advertisement would be published in UK.

Clause 5(4) of the Bill provides a specific defence for distributors who did not know and had no reason to suspect that what they distributed (or caused to be distributed) infringed the tobacco advertising ban. It applies only to distribution other than by electronic means – the defence for electronic distribution is in clause 5(5).

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<sup>42</sup> HL Deb 7 December 2001 cc 1063-71

Clause 5(5) provides a specific defence for someone involved in the electronic transmission of a tobacco advertisement. It states:

5(5) In relation to a tobacco advertisement which is distributed as mentioned in section 2(3), a person does not commit an offence under section 2(2) of distributing it or causing its distribution if –

(a) he was unaware that what he distributed or caused to be distributed was, or contained, a tobacco advertisement,

(b) having become aware of it, it was not reasonably practicable for him to prevent its further distribution, or

(c) he did not carry on business in the United Kingdom at the relevant time.

The original Bill (HL Bill 7 2001-02) had included a further subsection which referred to the publication of advertisements by Internet service providers. This was deleted during Committee Stage, eliciting the following response from Lord Lucas:

I am very grateful for what the Minister said. I am sure that the Internet service provider industry will be too. This matter reflects a much wider concern among ISPs; that is, that they do not wish to be regarded under any circumstances as a publisher...

...Therefore, although I believe that they understood from the first that the intention of this clause was to provide them with a defence, the very fact that it referred to them as a "publisher" meant that the ensuing problems would outweigh any benefit which would come from the additional protection that they would receive were they ever to be a publisher.<sup>43</sup>

Finally, clause 5(6) provides a specific defence for a seller of a publication where he did not know, and had no reason to suspect, that the publication contained a tobacco advertisement. The purpose of this defence is to protect a seller (such as a newsagent) from having to check all the publications he might sell to ensure that no tobacco advertisements appear.<sup>44</sup>

It might be useful at this stage to point out that the burden of proof imposed on a person wishing to rely on a defence under the Bill is evidential and not legal. **Clause 17** (inserted during the Lords Report Stage,<sup>45</sup> in support of other amendments)<sup>46</sup> states:

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<sup>43</sup> HL Deb 7 December 2001 c 1109

<sup>44</sup> Once the seller's attention has been drawn to the advertisement he must remove the publication from sale

<sup>45</sup> HL Deb 1 March 2002 c 1730

<sup>46</sup> HL Deb 1 March 2002 cc 1671-2

17(1) This section applies where a person charged with an offence under this Act relies on a defence under any of sections 5(1) to (6), 6(1), 9(5), 10(3) and (4) and 15(3).

(3) Where evidence is adduced which is sufficient to raise an issue with respect to that defence, the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

In other words, if the defendant wants to rely on one of the defences then he must submit sufficient evidence to raise an issue with respect to the defence rather than prove his defence on the balance of probabilities.

In certain limited circumstances, **clause 6** provides an additional defence for a person charged with an offence under clause 2 of the Bill, if he is a specialist tobacconist. Clause 6 states:

6(1) A person does not commit an offence under section 2 if the tobacco advertisement -

(a) was in, or fixed to the outside of the premises of, a specialist tobacconist,

(b) was not for cigarettes or hand-rolling tobacco, and

(c) complied with any requirements specified by the appropriate Minister in regulations in relation to tobacco advertisements on the premises of specialist tobacconists.

In effect, specialist tobacconists may continue to advertise non-cigarette and hand-rolling tobacco within, and on the outside, of their shops.<sup>47</sup>

Clause 6(2) of the Bill provides a statutory definition of specialist tobacconists. These are shops selling tobacco products by retail (whether or not they also sell other things), and more than half of whose sales on the premises in question is derived from the sale of cigars, snuff, pipe tobacco and smoking accessories. In other words, the sale of these goods must account for the principal part of the tobacconist's income. Under clause 6(3) sales are to be measured by sale price during:

- the most recent period of twelve months for which accounts are available, or
- during the period for which the shop has been established, if it has not been established long enough for twelve months' accounts to be available.

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<sup>47</sup> The Department of Health justifies the inclusion of this provision on the basis that specialist tobacconists sell products that are generally not bought or used by young people and children

**Clause 7** of the Bill deals with developments in technology. It gives the Secretary of State authority to amend by order any provisions of the Bill after it has become law, if he considers it necessary to do so because of any developments in the technology relating to publishing or distributing of tobacco advertisements by electronic means.

During Committee, Lord Filkin gave the Government's view on this "Henry VIII" clause:

The reason for taking this power is that the pace of technological change makes it very difficult to predict what new means of publishing or distributing may emerge. There are clearly no immediate plans to make an order under the clause...

...We need to ensure that future loopholes can be addressed rapidly.<sup>48</sup>

Lord Lucas questioned the need for this clause, on the grounds that the Bill was already sufficiently broadly drafted:

So it does not really matter what advances there are in technology, tobacco advertisements will be caught by the Bill, by whatever means they are published or distributed.<sup>49</sup>

The Earl of Erroll was concerned that the clause did nothing more than set another precedent for its use in future legislation.<sup>50</sup>

**Clause 8** of the Bill gives Ministers the power to make regulations concerning the way in which tobacco products (or their prices) are displayed in a place or on a website where they are offered for sale. A person acting in the course of a business who contravenes any such regulations is guilty of an offence.

However, it is not an offence under clause 8(1) for a person who does not carry on business in the UK to display or cause to be displayed tobacco products or their prices by means of a website which is accessed in the UK.

#### **4. Prohibition on the free distribution of tobacco products**

**Clause 9** bans any free distribution of a tobacco product or coupon where the purpose or effect is to promote a tobacco product. Specifically, clause 9 states:

9(1) A person is guilty of an offence if in the course of a business he-

(a) gives any product or coupon away to the public in the United Kingdom, or

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<sup>48</sup> HL Deb 18 January 2002 cc 1250-2

<sup>49</sup> HL Deb 18 January 2002 c 1254

<sup>50</sup> HL Deb 18 January 2002 c 1254

(b) causes or permits that to happen,

and the purpose or effect of giving the product or coupon away is to promote a tobacco product.

(2) It does not matter whether the product or coupon accompanies something else, or is given away separately.

However, clause 9(3) of the Bill, amended during Lords Report Stage,<sup>51</sup> does permit products to be given away free to persons in the tobacco trade for the purposes of that trade.

To avoid confusion, clause 9(6) defines a cigarette coupon as a document or other thing which (whether by itself or not) can be redeemed for a product or service or for cash or any other benefit.

Someone accused of committing an offence under clause 9(1), may have a defence under clause 9(5) if he can prove that he either did not know and had no reason to suspect, or could not reasonably have foreseen, that the purpose of the free distribution was to promote a tobacco product.

Clauses 9(7) and 9(8) and 9(9) give the Secretary of State a power to make regulations covering distributions of tobacco products or coupons at a nominal price or at a substantial discount. The aim of this clause is to prevent products (such as branded clothing) from being offered to consumers at nominal sums in order to promote tobacco products and circumvent clause 9.

## 5. Prohibition on tobacco sponsorship

**Clause 10** is an important clause. It effectively prohibits anything from being done pursuant to a sponsorship agreement if the purpose or effect of the agreement is to promote a tobacco product. This prohibition applies to both the sponsor and the recipient. It states:

10(1) A person who is party to a sponsorship agreement is guilty of an offence if the purpose or effect of anything done as a result of the agreement is to promote a tobacco product in the United Kingdom.

(2) A sponsorship agreement is an agreement under which, in the course of a business, a party to it makes a contribution towards something, whether the contribution is in money or takes any other form (for example, the provision of services or of contributions in kind).

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<sup>51</sup> HL Deb 1 March 2002 c 1694

Clause 10 is carefully worded; it deliberately doesn't specify that the sponsorship agreement must relate to a particular event in sports or the arts. This means that an agreement relating to the sponsorship of a building, institution or service would also be prohibited if the direct or indirect result of that sponsorship was to promote a tobacco product.

Clause 10(2) makes it clear that a sponsorship agreement includes any form of promotion, whereby an event receives help (monetary or otherwise) from an individual or organisation in return for advertising and promoting a particular tobacco product. It follows that clause 10 does not prevent a tobacco company from giving money to support a particular event or activity, provided the company's products are not given any promotion in return.

It is a defence under clause 10(3), if the defendant did not know and had no reason to suspect, or could not reasonably have foreseen, that the purpose of what was done as a result of the agreement was to promote a tobacco product.

It might be useful to point out, at this stage, that **Clause 20** of the Bill gives the Secretary of State and Scottish Ministers, powers to make regulations to specify when the ban on sponsorship in Clause 10 is to take effect. However, the Bill also specifies that the effective date may not be later than **1 October 2006**.<sup>52</sup> This date is significant; it is the same date as that given in the Government's own Bill of last session, which in turn was the same date as the deadline originally given in the annulled European Directive 98/43/EC for the ending of tobacco sponsorship.

## **6. Brandsharing**

**Clause 11** of the Bill is concerned with 'brandsharing' (also known as 'brandstretching'). Brandsharing can be explained as taking a name already established for one type of product and using it for a quite different type of product. When this happens, the advertising of each product indirectly promotes the other because they share a brand in common. In the past, non-tobacco products have been used to advertise a tobacco brand.

Clause 11(1) of the Bill gives the Secretary of State power to make regulations concerning the use of brandsharing and tobacco products. It states:

11(1) The Secretary of State may by regulations make provision prohibiting or restricting, in such circumstances and subject to such exceptions as may be specified in the regulations, the use-

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<sup>52</sup> Clause 20(2) of the *Tobacco Advertising and Promotion Bill [HL]*



(a) in connection with any service or product (other than a tobacco product), of any name, emblem or other feature of a description specified in the regulations which is the same as, or similar to, a name, emblem or other feature so specified which is connected with a tobacco product, or

(b) in connection with any tobacco product, of any name, emblem or other feature of a description specified in the regulations which is the same as, or similar to, a name, emblem or other feature so specified which is connected with any service or product other than a tobacco product.

In effect, regulations may be made to prohibit or restrict brandsharing. However, clause 11(2) makes it clear that regulations may be made only in relation to brandsharing where the purpose or effect of the brandsharing is to promote a tobacco product. Clause 11(4) states that a person who contravenes such regulations is guilty of an offence.

Though clause 11 attracted considerable debate during both Committee and Report Stages, it emerged intact. For the Government, Lord Filkin avowed that regulations made under the clause would have to strike a balance between preventing tobacco promotion and "stifling business diversification".<sup>53</sup> Furthermore, the Bill was not designed to apply to companies that happened to share a name with a tobacco brand.<sup>54</sup> During both Committee<sup>55</sup> and Report,<sup>56</sup> Lord Clement-Jones asserted that any supermarkets with own-brands of cigarettes should not be precluded from advertising their non-tobacco products.

## 7. Enforcement

The purpose of **clause 12** is to exclude from the scope of the Bill the broadcasting media. Tobacco advertising is already banned under Codes of Practice issued by the Independent Television Commission and the Radio Authority under the *Broadcasting Act 1990* and the *Broadcasting Act 1996*.<sup>57</sup>

**Clause 13(1)** of the Bill sets out the authorities that will be responsible for enforcing the ban on tobacco advertising in the UK. It states that for England and Wales, a weights and measures authority will be responsible; in Scotland, a local weights and measures authority; and in Northern Ireland, a district council.<sup>58</sup> However, clause 13(3) and 13(4) give Ministers in England and Wales, Scotland and Northern Ireland power to direct that any of the enforcement functions be taken over by them in any particular case or class of cases.

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<sup>53</sup> HL Deb 7 December 2001 c 1079

<sup>54</sup> HL Deb 7 December 2001 c 1080

<sup>55</sup> HL Deb 7 December 2001 c 1086

<sup>56</sup> HL Deb 1 March 2002 c 1699

<sup>57</sup> In fact, there has been a total ban on cigarette advertising on television since 1965 and cigarette advertising on the radio was banned in the early 1970s

<http://www.ash.org.uk/html/advspo/html/adhistory.html>

<sup>58</sup> This means that if the Bill is enacted, it will be enforced by local authority trading standards officers

Clauses 13(5) and (6) give a similar power to the Secretary of State in England and Wales and to the Department of Health, Social Services and Public Safety in Northern Ireland to take over a prosecution under the Bill. In Scotland, the Procurator Fiscal already has the power to decide whether to prosecute (and then deal with any prosecution) once the authority decides that there should be a prosecution.

Under clause 13(7), any Magistrates Court in England and Wales, and Northern Ireland can hear a case brought under this Bill. There is no equivalent provision for Scotland because the enforcement and prosecution functions are separate there.

**Clause 14**, although lengthy, simply sets out the powers of entry which enforcement officers may exercise under this Bill.

It is an offence under **clause 15** of the Bill to obstruct intentionally an officer of an enforcement body, or make false statements to an officer. To this latter charge, there is a defence if the accused can prove he did not know that the information was false and had reasonable grounds to believe it was true. The penalty for obstructing an enforcement officer is a fine not exceeding level 3 on the standard scale.<sup>59</sup>

**Clause 16(2)** of the Bill sets out the penalties for all other offences under the Bill. It states:

16(2) A person guilty of an offence under or by virtue of any provision of this Act is liable-

(a) on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both; or

(b) on conviction on indictment to imprisonment for a term not exceeding 2 years, or a fine, or both.

**Clause 18(1)** provides that if an offence is committed under the Bill, officers of companies as well as the companies themselves are liable to be prosecuted if appropriate. It states:

18(1) If an offence under any provision of this Act committed by a body corporate is proved-

(a) to have been committed with the consent or connivance of an officer, or

(b) to be attributable to any neglect on his part,

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<sup>59</sup> A fine at level 3 is currently £1, 000 and at level 5, £5,000

the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

For the purposes of this Bill, an officer of a company is taken to mean a director, manager, secretary or other similar officer, or a person purporting to act in such a capacity (for example, a shadow director).

Similarly, the Bill provides that in Scottish partnerships individual partners are liable to prosecution under the Bill if appropriate. Clause 18(4) states:

18(4) If an offence under any provision of this Act committed by a partnership in Scotland is proved-

- (a) to have been committed with the consent or connivance of a partner, or
- (b) to be attributable to any neglect on his part,

the partner as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.

Again, for the purposes of this Bill, a ‘partner’ will include a person purporting to act as a partner.

## **8. Regulation and order making powers under the Bill**

**Clause 19** sets out details on the regulation and order-making powers under the Bill. This is complex because, as the Bill’s Explanatory Notes point out, the Bill contains regulation and order-making powers in all of the following areas:

- Advertising at point of sale (clause 4(3))
- Advertising within a specialist tobacconist (clause 6(1)(c))
- Developments in technology (clause 7)
- Display at point of sale (clause 8(1))
- Distributions at nominal amounts or at a substantial discount (clause 9(7))
- Brandsharing (clause 11)
- Sponsorship (clause 20)

In relation to regulation and order-making powers, clause 19 states:

19(1) Powers to make regulations and orders under this Act are exercisable by statutory instrument.

(2) Regulations, and orders under section 7, may make-

- (a) different provision for different cases or circumstances, and
- (b) any supplementary, consequential or transitional provision which the appropriate Minister (or the Secretary of State) considers necessary or desirable.

(3) No statutory instrument containing an order under section 7 or regulations under section 9 or 11 is to be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House of Parliament.

(4) No statutory instrument containing regulations under section 8 is to be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House of Parliament, or laid before the Scottish Parliament and approved by a resolution of that Parliament.

(5) A statutory instrument containing regulations under any other provision of this Act shall be subject to annulment in pursuance of a resolution of either House of Parliament or of the Scottish Parliament.

It is clear from clause 19(3) that the order concerning developments in technology (clause 7 of the Bill) and the regulations on brandsharing (clause 11) and distributions at a nominal cost (clause 9) will be subject to affirmative resolution. This means that they will have to be debated and approved by both the House of Commons and the House of Lords (or, in the case of regulations under clause 8, the Scottish Parliament as appropriate). Other regulations arising from the Bill are subject to the negative resolution process. There is no timetable for implementing these provisions on the face of the Bill.

The Scottish Parliament may make regulations covering advertising at point of sale, display, specialist tobacconists and sponsorship.<sup>60</sup>

The Bill's Explanatory Notes point out that the restrictions on advertising in clauses 2 and 3 may be an interference with the right to freedom of expression in paragraph 1 of Article 10 of the *European Convention on Human Rights* (ECHR). However, they are considered necessary (and proportionate) for the protection of health under paragraph 2. The same view is taken in relation to clause 11 which allows the Secretary of State to make regulations prohibiting or restricting the use of names, emblems or other features which are the same or similar between tobacco and non-tobacco products.

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<sup>60</sup> Clause 19 of the Bill does not permit the Scottish Parliament to exercise jurisdiction outside Scotland or for the Westminster Parliament to override the wishes of the Scottish Parliament where it has been agreed that the Scottish Parliament should pass delegated legislation

According to the Department of Health, clause 10 of the Bill might in some cases operate to put an end to sponsorship contracts that are already in existence at the time of the coming into force of the provision. This might constitute an interference with contractual rights, which are property rights for the purposes of Article 1 of the First Protocol. The Department also recognises that regulations made under clause 11 in relation to brand sharing may also raise issues under Article 1 of the First Protocol, to the extent that they constitute a control on the use of property. However, the Department considers that both provisions are proportionate to the protection of health.<sup>61</sup>

## **9. Commencement**

The Bill will come into force on a day to be appointed by the Secretary of State, or in relation to Scotland, the Scottish Ministers. According to the Department of Health, the intention is that the appointed date will be two months after Royal Assent, except for the following transitional arrangements. A further three months will be allowed for:

- advertising with retail outlets
- in-pack promotion schemes (promotion schemes where coupons inserted into packs, or parts of a pack, are collected by customers who later redeem them for goods)
- direct marketing contracts (but only in relation to contracts which were set up before 8 October 1999).

## **V The debate in the Lords**

The stages were:

First Reading – 11 July 2001

Second Reading - 2 November 2001

Committee consideration – 16 November & 7 December 2001 and 18 January 2002

Report Stage – 1 March 2002

Third Reading - 15 March 2002

During its Second Reading in the Lords, the Bill was debated at some length. In addition to the Bill's promoter, Lord Clement-Jones (Liberal Democrat Spokesperson on Health),

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<sup>61</sup> page 12 of the Bill's Explanatory Notes

a number of Members made substantial contributions including Earl Howe (Opposition Spokesperson on Health) and Lord Addington (Liberal Democrat Spokesperson on Sport). The Government's position was explained by Lord Hunt (the Government Spokesperson on Health).

Topics that provoked some of the liveliest discussions included:

- The effectiveness of an advertising ban
- The effectiveness of the current self-regulatory regime by voluntary agreement
- The removal of freedom of expression and a possible infringement of Article 10 of the European Convention on Human rights
- The compatibility of this Bill with a proposed European Directive to ban tobacco advertising and related sponsorship
- E-commerce issues

The aim of this section is simply to highlight the main issues that arose during the Second Reading in the Lords.

### **1. The effectiveness of an advertising ban**

During its Second Reading there was broad and substantial support for the Bill. Many contributors to the debate highlighted a link between tobacco advertising and levels of consumption, particularly amongst the young, arguing that a ban on tobacco advertising would lead to a fall in consumption. Lord Clement-Jones argued:

Following a detailed review of the evidence, the US Surgeon-General summarised the arguments relating to tobacco marketing and young people in 1994. His conclusions were that young people continue to be a strategically important market for the tobacco industry; young people are currently exposed to cigarette messages through print media and through promotional activities, such as sponsorship of sporting events and public entertainment, point of sale displays and distribution of speciality items. Cigarette advertising uses images rather than information to portray the attractiveness and function of smoking. Human models and cartoon characters in cigarette advertising convey independence, helpfulness, adventure seeking and youthful activities – themes correlated with psychological factors that appeal to young people.

Cigarette advertisements capitalise on the disparity between an ideal and self-image and imply that smoking may close the gap...

...All that is clear evidence of a link between tobacco consumption and advertising.<sup>62</sup>

Lord Clement-Jones also commented that a ban limited to advertising directed at young people would be unworkable, on the basis that it would be impossible to draw a distinction between advertising that is directed at young people and that which is not. In any event, he argued that tobacco consumption by adults is also affected by advertising.<sup>63</sup>

Baroness Finlay strongly supported this case. She argued that there was a significant body of research connecting tobacco advertising with children's smoking, both in predisposing children to start smoking and reinforcing the smoking habit:

The attractive images from cigarette advertisements effectively reach children six years old. A plethora of studies, both from the UK and from the rest of the world, have demonstrated that advertising powerfully influences youth smoking. They start with any cigarettes that are available and affordable.

In Holland, advertising is the strongest and most consistent influence persuading 15 year-olds to start smoking; stronger than peer or home influence. And the Australians have shown that many features of adult-pattern cigarette use are established by the age of 15. In Norway and Finland, the number of young smokers has fallen by more than one third since their advertising bans.<sup>64</sup>

According to Baroness Gale, the tobacco industry were actively seeking to recruit new young smokers in order to ensure its survival. She also commented that increased smoking among young women was a matter of particular concern because of the potential harmful effects during pregnancy:

To ensure that they maintain their sales, the tobacco companies must target their advertising on the youth market; otherwise their business will decline. This is where a ban on tobacco advertising is so important. It is a matter of great concern that so many children smoke. Children will experience greater health problems when they achieve adulthood if they continue to smoke. A worrying trend is that there are now more girls than boys taking up smoking. For example, 14 year-old girls are twice as likely to smoke as boys of the same age. This is a disturbing trend, as the dangers to a girl's future health will be different from a boy's...

...In addition to the problems of conception, women who smoke face a greater danger of miscarriage. Perinatal mortality is increased by about one-third in babies of smokers. That is equivalent to approximately 420 deaths per year in England and Wales.<sup>65</sup>

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<sup>62</sup> HL Deb 2 November 2001 c1648

<sup>63</sup> HL Deb 2 November 2001 c1651

<sup>64</sup> HL Deb 2 November 2001 c1658

<sup>65</sup> HL Deb 2 November 2001 c1661

Viscount Simon was confident that the Bill would work and refuted the claim of tobacco manufacturers that advertising does not recruit new customers:

We know that the Bill will achieve its objectives. If that were not the case, the tobacco industry would not be so vehemently opposed to it. The industry is terrified that it will lose the ability to advertise its products and with it the ability to recruit new smokers to replace the 120,000 people who die because of smoking every year.

If, as it claims, the Bill will be ineffective, the industry would be happy to let it pass into law. It would save all the money it currently spends on marketing and would not lose out on sales. But no, the Bill will work. It will cut consumption, disease and the number of deaths. The tobacco industry does not oppose the Bill because it is a staunch believer in free speech, nor because it fears this will be the thin end of the wedge with bans on coffee and fatty foods to follow. It does not oppose it because it is worried that without sponsorship money sport will suffer. It uses these arguments but they are not the real reason for tobacco industry opposition. It opposes the Bill because it is bad for the bottom line.

There is nothing inherently wrong with an industry opposing something which is bad for business. That is a natural reaction, although I wish it was more truthful about its real motives. It is the job of Parliament, however, to see the bigger picture, which includes the cost, both human and financial, of allowing the industry to continue to market its products.<sup>66</sup>

This point was endorsed by Baroness Jay, who dismissed the tobacco industry's suggestion that the effect of advertising is negligible and, in so far as it has an effect, only 'helps' consumers to change or choose brands. She said:

My initial response to that assertion remains the same as it always has been – it is a point that has been made today – particularly in view of the quoted figure of £130 million a year being spent by the tobacco companies on advertising. My response is that if these successful commercial organisations do this in the knowledge that its effect is negligible in their understanding, then they are extremely misguided in their business decisions. It is quite extraordinary that they should be so profligate with their shareholders' money if they regard spending £130 million as a business failure.<sup>67</sup>

Many Members commented that public health would benefit from the comprehensive ban that is proposed in the Bill. For example, Lord Faulkner said:

As we have heard, the Government's own estimate is that banning tobacco advertising and sponsorship will reduce consumption by 2.5 per cent. Other

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<sup>66</sup> HL Deb 2 November 2001 c1652

<sup>67</sup> HL Deb 2 November 2001 c1692



estimates are rather higher. For example, the World Bank stated that if the European Union Directive 98/43/EC on which the government Bill and this Bill have been based had been implemented across the Union, cigarette consumption within the EU would have fallen by 7 per cent.

Advertising bans in Norway, Finland, New Zealand and France have led to substantial reductions in the per capita consumption of cigarettes, ranging from 34 per cent in Finland, where a ban was introduced in 1978, to 15 per cent in France, where a ban has been in force for eight years. In Norway, the percentage of the entire adult population who reportedly smoked regularly was reduced from approximately 45 per cent in 1954 and 40 per cent in 1975, the year when the ban on tobacco advertising was introduced, to around 32 per cent in 1999. I am indebted to officials at the Norwegian Embassy who, in a note accompanying the figures, told me:

*The ban on tobacco advertising in 1975 contributed significantly to a subsequent decrease in smoking.*

The lesson to be drawn is that the longer a ban has been in force, the greater the reduction in consumption. That is because the ban helps to reduce the number of new consumers among the young as the older smokers die off.<sup>68</sup>

Whilst Lord Addington commented that the link between tobacco advertising and sport sponsorship should end:

I have always believed that the suggestion that tobacco advertising and sponsorship are an important part of our society and are acceptable is absurd. It is ridiculous to suggest that elite athletes at the peak of their game would be enhanced by ingesting chemical-laden smoke. The fact that that has occurred in certain sports makes us cry, 'Foul'. However, certain sports have not done a bad job in replacing their sponsors and there has been considerable movement in that direction. One or two will be left behind, but if a few sportsmen and sporting structures – and I speak as one who holds a brief on sport – suffer a short or even a long-term inconvenience that is considerably outweighed by the decline in the damage to people's health.

The Bill should go forward in its entirety. It addresses an activity which we all know is wrong. In no other situation would we allow such a dangerous chemical on to the market or to be advertised for consumption. Let us finally close a chapter on our social history which says that ingesting this dangerous chemical is acceptable.<sup>69</sup>

Lord Faulkner also picked up this point, he argued that a valuable effect of the Bill would be to make a significant change in the culture surrounding cigarette smoking:

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<sup>68</sup> HL Deb 2 November 2001 cc1667-68

<sup>69</sup> HL Deb 2 November 2001 c1657

By breaking the link with glamour, speed, sport, recreation and sex, which the promotion of tobacco has sought to hang on to with its sponsorship of Formula 1 motor-racing, cricket, Rugby League and snooker, and advertising campaigns which appeal to young people, there is a chance that children, teenagers and young adults will be less pressured by their peers to start smoking.<sup>70</sup>

Though figures are not kept for individual sports, the total value of tobacco sponsorship of sport in the UK for 1999-2000 was £8,815,000.<sup>71</sup> This figure is rather higher than in recent years: £8,139,000 for 1998-99; £7,516,000 for 1997-98; £8,053,000 for 1996-97.<sup>72</sup>

In addition to the second reading comments already summarised, there were some strong arguments against the progress of the Bill.

Lord Naseby saw the Bill as draconian, pointing out that the word ‘prohibition’ features throughout. He argued that the Bill was unprecedented in its scale of interference in a legitimate commercial cause:

This House must face up to the fact that it is not against the law to sell tobacco products, except to children. The noble Baroness, Lady Finlay, in making her maiden speech and the noble Baroness, Lady Gale, made the point that the sale of tobacco products to children under 16 is banned. Maybe it should be 18. But the noble Baroness, Lady Gale, asked the right question: how is it that young people obtain supplies of tobacco? Maybe the Act that is already on the Statute book [*Children and Young Persons (Protection from Tobacco) act 1991*] should be enforced more rigorously rather than trying to add one that will not work.

This Bill seeks to ban all possible means of bringing a tobacco product to the attention of the public. That is what is draconian and unprecedented. In my experience, as someone who used to be in the communications industry, it will not work.<sup>73</sup>

Lord Skelmersdale argued that a bill that imposes a comprehensive ban on tobacco advertising, promotion and sponsorship was too wide and complex for a Private Members’ Bill. The Viscount of Oxfuird also expressed concerns about the Bill, and refuted any definite link between tobacco advertising and levels of consumption:

There is no academic, scientific or economic evidence that provides any acceptable degree of certainty as to the likely outcome of an advertising and sponsorship ban in this country. The truth of the matter is that the real world outcome of this Bill is just as likely to be increased tobacco consumption and

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<sup>70</sup> HL Deb 2 November 2001 c1668

<sup>71</sup> HC Deb 5 December 2001 c 297W

<sup>72</sup> HC Deb 11 December 2000 c 38W

<sup>73</sup> HL Deb 2 November 2001 c1663

take-up of smoking as it is to have a negative or zero effect. This is not a basis on which we should proceed with such a major measure.<sup>74</sup>

The Earl of Liverpool argued that the passage of this Bill would change radically the whole market environment for tobacco products without any certainty that it would achieve the objectives of reducing tobacco consumption or the take-up of the products, especially by young people. He also argued that if the Bill were enacted, it would create a precedent to be followed in respect of other products at some time in the future. Furthermore, the Bill would give rise to extensive secondary legislation:

It includes at least six regulation-making powers as well as Clause 7, the Henry VIII clause. These are wide-ranging powers and we shall need to look carefully at them at later stages.

I conclude by reiterating what I said in this House some seven months ago. I believe that the Bill before us today is misconceived and also presents a dangerous precedent. Whatever one's views about smoking, I believe it unfair for an industry going about its lawful and legal business to be discriminated against in such a way.<sup>75</sup>

Lord Haskel also highlighted the fact that the Bill could lead to an increase in red tape, but in contrast to the Earl of Liverpool, his suggested solution would be to introduce a complete ban on tobacco advertising:

Banning some advertising but regulating others must mean more red tape. Would not a complete ban be far simpler? ... Perhaps the Bill's promoters are trying to be evenhanded and reasonable. That is understandable, but misguided. They will get no thanks for it. Regulations resulting from the Bill can be thrown back at them and at the Government as proof of yet more red tape burdening British industry.<sup>76</sup>

Lord Hunt commented that the regulations in the Bill provide a balanced and proportionate approach, as business requires.<sup>77</sup>

Earl Howe, questioning the reliability of evidence that suggested that advertising was a significant influence on smoking uptake among the young, raised the suggestion of sunset clauses:

We are left with the nagging feeling that the apparently self-evident causal relationship between advertising and teenage smoking is more an article of faith than a matter of strict proof.

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<sup>74</sup> HL Deb 2 November 2001 c1675

<sup>75</sup> HL Deb 2 November 2001 c1687

<sup>76</sup> HL Deb 2 November 2001 c1678

<sup>77</sup> HL Deb 2 November 2001 c1703

I do not necessarily mind articles of faith, but I am not sure that they are the best possible basis for making new law. I prefer hard numerical evidence. But even by the Government's own admission, hard numerical evidence is difficult to come by. When the Bill was before us previously, I told the Minister that at least we should build in a sunset clause so that we could see, after a number of years, whether the Bill has achieved the desired effect of reducing smoking prevalence. 'Oh no', came the answer, 'with the best will in the world, it would be impossible to determine the effect of an advertising ban as distinct from the effect of other influences, which may be positive or negative', if that is so, we need to question whether any of the previous studies into these matters has been able to give us a reliable idea of what tobacco advertising, or the absence of it, actually achieves.<sup>78</sup>

Answering this particular point, Lord Clement-Jones said:

I turn to the sunset clause argument, which is that the evidence is so unclear that we ought to experiment a little in the Bill and include a sunset clause of three years, five years, or whatever. I agree with the weight of the argument in today's debate, which is that the burden of proof lies squarely on the Bill's opponents, in view of the achievable public health benefits. The evidence is that those benefits will accrue after some years. One uses a sunset clause only in the most extreme circumstances when there is considerable doubt about the benefits of a Bill.<sup>79</sup>

The Earl of Liverpool, Lord Monson and Earl Howe all made the point that if tobacco advertising is banned one consequence may be that the tobacco manufacturers will be forced to compete on price. Lord Monson commented:

If tobacco manufacturers cannot compete on quality, presentation and, in relative terms, safety - competition that must be backed up by advertising to be effective – they will compete on price, which needs no advertising. Cheap – again, using the word in a relative sense – cigarettes are likely to contain coarse, higher tar tobacco, more loosely packed, and so burning hotter, and the filters are likely to be cruder and less effective. In a nutshell, they are likely to constitute a higher health risk than the better quality cigarettes that they will displace. In other words, rather than a health gain, there will be the opposite; while, as the noble Baroness, Lady Gibson of Market Rasen, so effectively pointed out, jobs in Britain will be lost.<sup>80</sup>

Earl Howe commented that competition by price is generally considered to be a far more powerful lever on consumption than advertising.<sup>81</sup>

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<sup>78</sup> HL Deb 2 November 2001 c1699

<sup>79</sup> HL Deb 2 November 2002 c1710

<sup>80</sup> HL Deb 2 November 2001 c1690

<sup>81</sup> HL Deb 2 November 2001 c1700

## 2. The effectiveness of the current self regulatory regime by voluntary agreements

Lord Mitchell, who supported the Bill, argued that self-regulation of the tobacco industry in respect of advertising seemed naïve:

There are those who advocate that the tobacco industry should continue to use self-regulation and codes as a method of regulation. I am no fan of voluntary controls. Somehow the concept of an industry or a profession regulating itself has always struck me as naïve. Who polices it? Usually it is the industry or the profession itself. What happens if you transgress? Usually it is a case of a slap on the wrist, combined with an arm around the shoulder and a reassuring wink. You cannot police yourself. The conflict of interest between maximising profits and conforming to a code is simply too great.<sup>82</sup>

Baroness Jay also expressed concerns about the effectiveness of voluntary agreements:

I am well aware that the tobacco manufacturers have talked about offering voluntary self-denial through restricting their advertising aimed at young people. Several noble Lords have outlined the lack of success of policies of self-imposed restraint and voluntary codes. I must say that I too am entirely sceptical about this approach, based largely on my parental experience. A ban on smoking promotion which seeks to exclude one age group suggests almost an anti-marketing campaign which I should have thought would be likely to make susceptible teenagers even more excited. By its nature, they would wish to become involved in something exclusive rather than the other way round.<sup>83</sup>

Lord Faulkner stated that in his view the voluntary agreements were no longer a route to go down. He drew attention to the conclusion reached by the Commons Health Select Committee:

...Voluntary Agreements have served the industry well and the public badly. Regulations have been seen by tobacco companies as hurdles to be overcome or side-stepped...<sup>84</sup>

He went on to argue that voluntary agreements made the tobacco industry look responsible without it having to do anything which actually harms its ability to market cigarettes.<sup>85</sup>

Lord Hunt gave the Government's position as to why it supported a Bill to control tobacco advertising and promotion by legislation rather than by voluntary agreement:

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<sup>82</sup> HL Deb 2 November 2001 c1674

<sup>83</sup> HL Deb 2 November 2001 c1694

<sup>84</sup> HL Deb 2 November 2001 c1670

<sup>85</sup> Ibid

...in respect of the statement by the three largest tobacco companies, that voluntarily adopting worldwide standards that make it clear that tobacco advertisements should not be aimed at youth or suggest that smoking enhances sporting, social, sexual or professional success will be ineffective. Apart from the fact, already mentioned by a number of noble Lords, that young people are attracted to advertising not meant for them, it is not realistic to try to set up Chinese walls for under and over-18s. For instance, it was suggested that tobacco companies only use billboards not less than 100 metres from a school. But the fact is that teenagers go further than 100 metres from a school. There was also the proposal only to sponsor events where adults are likely to comprise more than 75 per cent of the audience. At a large event the remaining 25 per cent could contain several thousand young people. When we analyse the voluntary options before us, we realise that that they are simply not tenable.<sup>86</sup>

Conversely, the Viscount of Oxfuird argued that the voluntary agreements had helped deliver a reduction in tobacco consumption in this country, and advocated the continued use of this regime:

What we are effectively being asked now is to replace the voluntary agreement system, which has helped to deliver a reduction in tobacco consumption in this country of around 38 per cent up to 1997, with a Bill the effect of which is speculated by its promoters to produce a reduction of 2.5 per cent in the long term. I believe quite frankly that the comparison of 38 per cent and 2.5 per cent is most telling as to the appropriateness of the Bill.<sup>87</sup>

The Earl of Liverpool commented that the voluntary agreements had, until recently, achieved a year-on-year reduction in levels of smoking:

The voluntary agreements in place between the industry and government worked well and achieved a year-on-year reduction in consumption until, ironically, the recent draconian tax increases. They have had the perverse effect of increasing consumption since 1997. I believe that the reason for that was the rapid growth of a flourishing illegal billion-pound business, tobacco smuggling, referred to by my noble friend Lord Oxfuird.<sup>88</sup>

### **3. The removal of freedom and a possible conflict with Article 10 of the European Convention on Human rights**

Lord Naseby, the Earl of Liverpool and Lord Monson all made the case that the Bill was too draconian and too interventionist; that it interferes too much with legitimate commercial activity.

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<sup>86</sup> HL Deb 2 November 2001 cc 1703-4

<sup>87</sup> HL Deb 2 November 2001 c1675

Lord Naseby made the point that the Bill amounts to an infringement of some fundamental freedoms, such as the right of freedom of expression and to impart and receive information, the right to privacy of correspondence and the right to peaceful enjoyment of possessions. He argued that the provisions of the Bill need to be subjected to scrutiny as rigorous as that afforded to any other piece of intrusive legislation. In support of his case, he cited the example of Article 10 of the European Convention on Human Rights:

...I believe that this Bill violates article 10 of the European Convention on Human Rights, and Article 8. I remind your Lordships that Article 10 states:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”.

It is well-established that this freedom includes commercial free speech. The commercial world is not excluded from the convention. It is irrelevant if the aim pursued is profit making from, for example, an advertisement.

The same philosophical considerations which support freedom of expression in politics, religion and the arts support freedom of commercial expression. They are not two categorically different things, subject to different standards and having different justifications. They are exactly the same freedoms exercised in different contexts with the same justifications.<sup>89</sup>

Acknowledging that the intention behind the Bill is to reduce tobacco consumption and, in particular, the taking up of smoking by young children, Lord Naseby argued that it was by no means certain that the Bill would have this effect:

Article 10.2 of the European Convention on Human Rights allows for the restriction of the right of expression if necessary in a democratic society, in pursuit of one of a number of legitimate aims, including the protection of health. However, the need for any such restriction must be ‘convincingly established’ and, in particular, must be proportionate to the legitimate aim pursued. I do not believe that either of those requirements are met by what has been said in support of the Bill. There is no certainty whatever that the Bill will have the effect that its promoters intend or anticipate.<sup>90</sup>

Lord Rennard argued against this view by stating that society must balance rights and responsibilities, liberties and justice.

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<sup>88</sup> HL Deb 2 November 2001 cc1687-88

<sup>89</sup> HL Deb 2 November 2001 c1665

<sup>90</sup> HL Deb 2 November 2001 c1666

#### **4. The compatibility of this Bill with the proposed EC Directive**

The issue of how the Bill would link up with a proposed EU Directive to ban tobacco advertising and promotion throughout the European Community was referred to by, amongst others, Lord Skelmersdale.<sup>91</sup> In reply, Lord Clement-Jones replied that the UK has to deal with its own domestic situation:

The draft Directive deals with cross-border matters and it does so precisely because of the legal action taken in the European Court of Justice. We have to deal with our own domestic situation. It is not a matter of the time being unripe. It is great to have available the excuse that something else is going through some other forum. But that does not apply in this case. The legislation contemplated here will be totally complementary to the European directive when it is available. I am afraid that is the situation.<sup>92</sup>

#### **5. E-Commerce issues**

Lord Skelmersdale explained that it was not the health aspects of the Bill that caused him concern but the Bill's approach to the Internet. In his view, the Bill, in the provisions that it makes regarding the Internet, is both too simplistic and confusing:

I believe that the Bill does not recognise sufficiently well that the Internet and the publication, distribution, transmission and the like of information by electronic means is of an entirely different nature from that of the conventional media of print or television advertising...

...I accept that under the e-Commerce Directive, Internet service providers cannot be required to monitor content. Given the advance of technology and particularly sophisticated software, perhaps there should be an urgent review of that directive...Consideration of the provisions of the Bill, as they relate to the Internet, and the prohibitions and offences they create cannot be undertaken in isolation of other concerns and desires containing Internet content. Tobacco advertising may be the least of these concerns, but there needs to be an overall consistency of approach as to the liability of prohibited material via the Internet.

Control of Internet website content is a serious and growing issue. If the Internet provisions of the Bill are considered as if they were to be applied to pornography, offensive material or the incitement of racial or religious hatred rather than tobacco advertising, I believe they will be more clearly seen as unsatisfactory.<sup>93</sup>

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<sup>91</sup> HL Deb 2 November 2001 c1654

<sup>92</sup> HL Deb 2 November 2002 c1708

<sup>93</sup> HL Deb 2 November 2001 c1654-5



However, Lord Mitchell countered this view by arguing that Internet service providers must play their part in implementing the Bill:

As the Bill implies, it is very hard to make this legislation apply to traditional international publications that are sold in this country. Clearly, overseas publishers may not be subject to the same restrictions as we hope will apply in this country. If that is true of print and broadcasting media, then it is even more true when applied to the Internet.

The very nature of the Internet is its unfettered global reach. From our desks today, or from our mobile phones in the very near future, we shall all be able to access any publication in any country throughout the world. The tobacco companies know this, and they are already planning international websites specifically targeted at the young. Not surprisingly, they will use such media to advertise their products.

Although it s hard to police such activities – I know that this area will be accepted in the Bill – we must do our best to make sure that the Internet service providers are subject to the same restrictions as any other distributor. I say to the House: please do not listen to the whinging and whining of the ISP industry. It, too, must play its part.<sup>94</sup>

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<sup>94</sup> HL Deb 2 November 2001 c1674

## VI Further reading

Health Committee, *The European Commission's Proposed Directive on the Advertising of Tobacco Products*, 14 December 1992, HC 221 1992-93

Health Committee, *Tobacco Advertising and the Proposed EC Directive*, 26 November 1997, HC 373 1997-98

Department of Health, *Smoking Kills – A White Paper on Tobacco*, Cm 4177, December 1998

The World Bank, *Curbing the Epidemic – Governments and the Economics of Tobacco Control*, 1999

Health Committee, *The Tobacco Industry and the Health Risks of Smoking*, 14 June 2000, HC 27 volumes I & II 1999-2000

Tobacco advertising is a wide-ranging issue and this Paper does not seek to value the benefits to health afforded by a ban on tobacco advertising and promotion. Nor does it seek to quantify the cost to business of implementing a ban. However, for those interested in such issues the following Internet sites may be helpful:

<http://www.the-tma.org.uk/>

This is the address of the Tobacco Manufacturers' Association (TMA), a trade association for those companies which manufacture tobacco products in the UK. According to the TMA, it does not promote smoking in general, but it does defend the freedom of adults to smoke if they so choose. The TMA has estimated that as many as one third of cigarette smokers change brands in the course of a year and many smoke more than one brand. According to the TMA, the main purpose of cigarette advertising is to promote competition by bringing the availability of brands to the attention of the smoker.

<http://www.ash.org.uk/>

This is the address of Action on Smoking and Health (ASH). ASH describes itself as a non-profit making legal action and education organisation. Its aim is to bring about institutional change to stop people smoking. ASH has estimated that about 12.1 million adults in the UK smoke cigarettes. It has also estimated that every year, around 120,000 smokers in the UK die as a result of their habit.