

The Tobacco Products Labelling Bill

[Bill 11 of 1994/95]

Research Paper 95/22

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On 14 December 1994 Mr Terry Lewis, who came fourth in the Ballot for Private Members' Bills, introduced a Bill to establish new minimum standards for the size, colour and shape of the statutory health warnings printed on packets of cigarettes, cigars, and other tobacco products. This paper discusses the background to these proposals, and provides a summary of the Bill's provisions. The Bill is due to have its Second Reading on 17 February 1995; the same day as another Private Members' Bill which deals with smoking is set to have its own Second Reading: *The Tobacco Smoking (Public Places)* [Bill 21 of 1994/95].

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I Introduction

A. Introduction : "A Three Pipe Problem"

The first use of tobacco in this country is vividly described by the author of *A History of Taxation and Taxes in England*, published back in 1884:¹ "The original method of smoking practised in this country, which was to inhale the smoke and blow it out through the nostrils, from which the 'tobacconists', or smokers, were said to drink, that is, swallow the smoke, caused a copious defluxion from the nose which was considered beneficial to health." King James I expressed his opposition to this practice in two ways: writing a learned treatise - *The Counterblaste against Tobacco* - and imposing a special impost on Virginia tobacco importers of 6s. 8d., in addition to the 2d. duty to which it was already liable, as "merchandise not specifically mentioned" in the Book of Rates for the Customs.

One might say that moral concern mixed with fiscal prudence has marked the authorities' response to the consumption of tobacco ever since. In the eighteenth century, the Government's principal worry was the incentive tobacco consumption gave to smuggling and tax evasion, though such concerns seem unimportant in the light of what is now known about the effects smoking has on health. Of course, the tobacco industry has an important role in the UK, not just in terms of tax, but as employer, exporter and investor, and as such, exerts quite separate influences on Government.

Tobacco continues to play quite contradictory roles in national life, and the debate that surrounds its use reflects this in its vehemence and complexity. In short, tobacco is a "three pipe problem", as Sherlock Holmes had it: one to which the literary sleuth was required to devote the most concentrated mental examination. It is beyond the scope of this short paper to cover all of the arguments to which smoking gives rise, even in the context of the Tobacco Products Labelling Bill. In particular, the impact of smoking on health is not discussed in detail; those interested are referred to the Library Research Paper on tobacco advertising issued last year, one part of which summarised the available evidence.²

The Bill was introduced as a Private Members' Bill on 14 December 1994 by Mr. Terry Lewis who came fourth in the Ballot. It proposes new minimum standards for health warnings carried on tobacco packaging - their size, colour, and shape, as well as their position on the packet - so that both smokers and those considering taking up smoking are in no doubts about the possible consequences for their health. The wording used in health warnings is to remain the same. Manufacturers are required to use a series of statements in rotation, set out in the *Tobacco Products Labelling (Safety) Amendment Regulations 1993* (this is discussed in more detail in the second section of this paper).

¹*A History of Taxation and Taxes in England Volume 4* Stephen Dowell London 1884; pp.267-9.

²*The Tobacco Advertising Bill* Research Paper 94/22 7 February 1994.

It would seem unlikely that questions of packaging and labelling should rekindle arguments about cancer, heart disease and the addictive qualities of tobacco. Even so, anti-smoking organisations have all argued, in their responses to the Bill, that the evidence of smoking's dangers is so telling, that any measure, however minor, that might reduce the numbers of smokers should be supported.

For example, the Imperial Cancer Research Fund (ICRF) has highlighted two studies published last autumn. *Mortality from Smoking in Developed Countries 1950-2000*,³ combines evidence from the American Cancer Society and the World Health Organisation, and estimates 2 million deaths per year in developed countries are attributable to smoking. It is notable that the report points out that there exists a substantial time lag between the adoption of smoking, usually in one's teenage years, and the fatal illnesses consequent on smoking, which generally occur in one's middle age.

The importance of recognising this gap is underlined by the second study cited by the ICRF, a forty year study of the causes of death in a group of 34,000 male British doctors.⁴ The study concludes: "Results from the first 20 years of this study, and of other studies at that time, substantially underestimated the hazards of long term use of tobacco. It now seems that about half of all regular cigarette smokers will eventually be killed by their habit."

Opponents of the Bill have also brought up arguments relating to health, though more subtly. In their formal response, the lobby group FOREST (Freedom Organisation for the Right to Enjoy Smoking Tobacco), claim "it is quite absurd to argue that people are not aware that there are health hazards associated with smoking", but go on to counter this by suggesting that health warnings currently displayed on tobacco products do not reflect scientific fact, but an unproven medical hypothesis: "the slogans that already infest cigarette packets are not objective information. They rest upon an interpretation of epidemiological evidence - medical statistics - that are at best ambiguous, and, in our view, at worst fraudulent science."⁵

The FOREST paper does not discuss any particular research. Instead, it suggests that since medical science is not infallible, political decisions should not be influenced by current research findings: "adding the academic politics of science to the murky politics of real politics is not the best way of guaranteeing objectivity." It seems impossible to match this quasi-philosophical argument with the empirical stance - if one could call it that - taken by the ICRF and the British Medical Association. And yet both types of argument were employed when the possibility of an advertising ban on tobacco products was raised last year.

³*Mortality from Smoking in Developed Countries 1950-2000* Richard Peto and others Oxford University Press 1994.

⁴"Mortality in relation to smoking: 40 years' observations on male British doctors" Richard Doll and others *British Medical Journal* Volume 309 8 October 1994; pp.901-918.

⁵*Against Increased Size - Or Any - 'Health' Warnings on Cigarettes* FOREST January 1995.

B. Advertising Tobacco

In December 1993, Keith Barron presented a Private Member's Bill to ban tobacco advertising⁶, which received a Second Reading on 11 February 1994.⁷ Unsurprisingly, the debate was both serious and spirited, with proponents arguing that banning advertising would have a significant impact on the health of the nation, while opponents suggested that any such ban represented an attack on the right of free speech. The then Minister for Health, Dr Brian Mawhinney, steered between these positions, arguing that it was best to employ a variety of methods to achieve those targets for tobacco consumption, set out in the Government's White Paper *The Health of the Nation*.⁸ "Because we recognise the need for continuing action, the plan sets out the key elements of what we believe to be a strategic and comprehensive approach to achieve the targets ... Controls on tobacco advertising are one element of that strategy, but they are only one element."⁹ Notably, Dr Mawhinney pinpointed smoking in the 11 to 15 age group as of particular concern to the Government, since the target that the Department of Health had set itself - to cut smoking prevalence from 8% in 1988 to less than 6% by 1994 - had not been achieved. Both Terry Lewis and Action for Smoking and Health (ASH) have argued that changing tobacco labelling is an effective way to persuade more teenagers not to take up smoking (this is discussed in more detail below).

Although Dr Mawhinney referred to the importance of advertising, scientific research, education and parental guidance, he suggested that the single most effective influence on tobacco consumption was price: "we are taking action on price because we know that there is good, solid evidence that price influences consumption ... every 10 per cent increase in price produces about a 3 per cent to 6 per cent decrease in consumption."¹⁰ By contrast, he argued, the evidence that banning advertising would dramatically cut consumption was, at best, disputable. At another point in the same debate, Mr Tim Rathbone suggested that "the most serious, strongest and successful determinant in deterring people from smoking cigarettes [was] putting up their price."¹¹ Though the introduction of advertising bans in both New Zealand and Canada had been associated with falls in consumption, both Governments had also imposed radically large increases in excise duty (ie, duty rate increases of the order of 50 per cent or more).

During the Report Stage in May that year, when the Bill was talked out, the Parliamentary Under Secretary for Health, Tom Sackville, announced that the Government and the tobacco

⁶*The Tobacco Advertising Bill [Bill 12 of 1993/94]*.

⁷HC Deb 11.2.94 cc.566-632.

⁸Cm 1986 1992.

⁹HC Deb 11.2.94 c.611.

¹⁰HC Deb 11.2.94 c.611; c.617.

¹¹HC Deb 11.2.94 cc.594-5.

industry had agreed on the main elements of a new, stricter, voluntary code.¹² The voluntary agreement on tobacco products advertising and sponsorship, drawn up between the Government and representatives from the tobacco industry, dates back to 1975. The code includes a series of provisions covering matters such as not having advertising or promotion in cinemas or targeted at those under 18; preventing the location of billboard and retail advertising close to schools; gradually reducing shopfront advertising over time; restricting advertisements in women's magazines; and, employing the health warnings companies are required to use on packaging in related advertising. The code does not cover packaging or package design.

Mr Sackville stated that stricter controls were to be placed on the location, content and distribution of cigarette advertising. When challenged as to why he opposed an outright ban, he explained,¹³ "we take the view that to seek to ban the advertising of a substance that is itself legal is wrong. We seek, therefore, to take action that is in proportion to the available evidence of the impact of advertising. That is what controls our entire policy." As mentioned above, the voluntary agreement forms just one part of the Government's strategy; tobacco taxation is another.

C. Taxing Tobacco

In his November 1993 Budget, the Chancellor made the commitment to increase tobacco duties on average by at least 3 per cent a year in real terms in future Budgets, as part of the Government's wider strategy to reduce smoking.¹⁴ Tobacco duty represents a substantial proportion of the price of tobacco products, though since 1985, the total tax share of cigarette prices has not risen that dramatically: from 74.6 per cent, to 76.4 per cent in 1994.¹⁵ Generally the duty charged on tobacco is charged as a fixed sum per kilogram, regardless of tar content or price. In the case of cigarettes, the duty charged has two components: a "specific duty" which is a flat rate charge on each cigarette; and, an "ad valorem" duty, which is based on a fixed proportion of the cigarette's price.

In the March 1993 Budget, the specific duty was increased by 10 per cent, while the ad valorem duty was cut from 21% of the retail price to 20%. The effect was a proportionately bigger tax increase on cheaper cigarettes. The then Chancellor's stated intention was to discourage imports (many cheaper brands of cigarette are produced outside the UK) while maintaining the real value of taxation on tobacco products.¹⁶ In the November 1994 Budget,

¹²"New voluntary agreement to control tobacco advertising" *Department of Health press notice* 13 May 1994.

¹³HC Deb 13.5.94 c.520.

¹⁴HC Deb 30.11.93 c.937.

¹⁵"Statistics on excise duties" from, *Customs & Excise Annual Report 1994*; pp.78-88.

¹⁶HC Deb 16.3.93 c.176.

the total duty on cigarettes was increased by 5.5% per cent (taking into account the freezing of the ad valorem duty at 20%). The rate of duty on cigars was increased by 6.4%; the rate of duty on hand rolling tobacco by 5.0%. A second tranche of duty rate increases were announced on 8 December as a consequence of the Government's cancelling the second stage of VAT on fuel and power.¹⁷ This has resulted in the total duty on cigarettes, and the duty on cigars, rising by a further 3.7%; the duty rate on hand rolling tobacco was not increased any further. The British Medical Association criticised the first set of duty increases as insufficient to dissuade children from taking up smoking.¹⁸

One consequence of the Government's policy on tobacco taxation is that excise duty rates in the UK are considerably higher than those elsewhere in Europe.¹⁹ Clearly the resulting differences in tobacco prices have encouraged people to buy tobacco on the Continent rather than in the UK. The other major impetus has been the abolition of travellers allowances. Previous to 1 January 1993, individuals could only import a limited amount of **tax-paid** goods (goods liable to excise duty and/or VAT) for their own use. Now when travellers buy any goods in the EU, they pay all the duty and VAT due in the Community country where they bought them. Provided the goods are not for commercial use, travellers do not need to pay any further tax, or go through any customs formalities at the frontier.

The advent of the Single Market has also led to some individuals making duty-paid purchases on the Continent, reselling the goods in the UK secretly, and not paying the UK excise duty which would normally be charged. Customs & Excise have published details on these Single Market excise offences, showing that there were 1,560 cases from 1 January 1993 to 31 July 1994 where tobacco has formed the main part of the cache, which is just under two thirds of all detected cases.²⁰ The total revenue involved in these seizures of smuggled tobacco products was just over £2.5 million. From a written answer given in October 1993, it would appear that hand rolling tobacco is the single most smuggled tobacco product, though no reliable estimates are given of the extent of its illegal reselling.²¹ The Government's strategy to reduce this type of criminal activity was summarised by Sir John Cope, then Paymaster General, in answer to a PQ in June 1994:²²

"The law prescribes severe penalties of up to seven years' imprisonment and unlimited fines for smuggling. Customs and Excise have deployed specially assigned staff and intelligence directed checks are used to seek out illicit

¹⁷HC Deb 8.12.94 cc.473-488.

¹⁸"BMA response to Budget announcement" *BMA press notice* 29 November 1994.

¹⁹ PQ on tobacco taxes across EU [HC Deb 27.10.94 cc.756-8W].

²⁰*National summary of Single Market Excise Offences since 1 January 1993* HM Customs & Excise September 1994.

²¹PQ on tobacco [HC Deb 28.10.93 c.748-9W].

²²HC Deb 30.6.94 c.676.

goods. When cases are detected, the contraband is seized and in some cases the vehicle too. Prosecutions have resulted in fines and custodial sentences."

During the Committee Stage of the Finance Bill 1994 - when the then-current rates of tobacco duty were debated - the then Chief Secretary to the Treasury, Michael Portillo, explained the reasoning behind Government policy in more detail. He had been criticised for not aligning UK excise duty rates more closely with those charged in other EU Member States, and thereby encouraging smuggling. Mr Portillo argued that to cut UK rates to achieve this would have significant implications for tax revenues, and would be contrary to the Government's health strategy:²³

"The Committee must face the fact that if we reduce rates to the levels that prevail in other European Community countries, we shall suffer a substantial loss of revenue and will have to find it somewhere else ... The hon. Gentleman [Eric Illsley, who suggested excise duty differentials should be decreased] must remember that if it led to an increase in revenue it would call into question our social objectives, our health objectives and our objectives for drunk driving and therefore for public safety ... As the Committee knows, there are different tax philosophies in different European countries. Our tax philosophy is to tax alcohol and tobacco at quite a high rate. That position has been shared across the parties over the years. In return, we do not extend our value added tax base as broadly as many other countries. We do not tax food, newspapers or tea, which is taxed in Belgium."

Sir John Cope endorsed this approach when the rate of duty on tobacco products was discussed, though he also noted that hand rolling tobacco posed a particular problem in terms of cross border shopping:²⁴

"The remedies for it are the same in principle as those that my right hon. Friend the Chief Secretary mentioned ... We do our best, and will continue to do so, to persuade our European Community colleagues to raise their taxes on tobacco to somewhere near our levels. As regards illegal imports and resale of hand rolling tobacco, we are making vigorous efforts ... to clamp down as much as we can on the illegal trade in tobacco and alcohol."

Indeed, one argument made by Mr Lewis in support of the Tobacco Products Labelling Bill is that the use of distinctive UK health warnings would help Customs detect the re-sale of any smuggled brands purchased on the Continent. Of course, one could argue that larger warnings on tobacco products sold in the UK might encourage legal cross border shopping, should smokers find the relatively small warnings on French or German cigarettes more to their taste.

²³Standing Committee A 24.2.94 c.379, c.382.

²⁴Standing Committee A 24.2.94 c.386.

II The Background to the Bill

A. The Current Regulatory Structure

All tobacco products manufactured in the European Community are required to carry health warnings of a minimum size, under two Council directives. The first Council directive on the labelling of tobacco products (89/622/EEC) was adopted in November 1989, and came into force on 1 January 1992. All unit packages of tobacco products must show the general warning "**Tobacco seriously damages health**" on their most visible surface; cigarette packets must show a specific warning chosen from a list attached to the Directive. In the case of cigarettes the warning had to cover at least 4% of the surface on which it was printed. This directive was amended in May 1992 by a second (92/41/EEC), which extended the list of specific warnings to all other tobacco products. Rolling tobacco, other smoking tobacco products and smokeless tobacco products were all required to carry health warnings to cover at least 1% of the packet. Tobacco products could be imported into the EC provided they complied with the directive, and that the health warnings, along with notice of tar and nicotine yields, appeared in the relevant language. The deadline for implementing this amending legislation was 1 January 1994. Last year, the Commission started infringement proceedings against Germany, Spain and the Netherlands for failing to transpose these provisions into national legislation.²⁵

Both directives have been implemented by the UK, and in both cases, the minimum standards for health warnings are greater than those required under EC legislation. In both cases, the Secretary of State made these regulations under section 11 of the *Consumer Protection Act 1987*, which confers the power to make safety regulations subject to the negative resolution procedure. Under section 11(2)(i), such regulations may contain provision "for requiring a mark, warning or instruction or any other information relating to goods to be put on or to accompany the goods or to be used or provided in some other manner in relation to the goods, and for securing that inappropriate information is not given in relation to goods either by means of misleading marks or otherwise." Section 11(5) obliges the Secretary of State to consult those substantially affected, and any other persons he considers appropriate. Under section 11(7), these provisions apply to all goods except certain specified exceptions.

In July 1991, the Government laid the *Tobacco Products Labelling (Safety) Regulations 1991* (SI No.1530), which implemented the first Council directive on tobacco labelling (89/622/EEC), and which came into effect on 1 January 1992. Under these, all cigarette packets had to carry health warnings on both the front and back of the packet, taking up 6% of the surface on which they are printed (rather than the EC mandatory 4%). The six specified warnings were stark and personal: "**Smoking Kills**", and, "**Smoking When Pregnant**

²⁵ Report for the Commission on the execution of the Europe against Cancer programme from 1 January 1993 to 31 March 1994 European Commission 12036/94 12 December 1994; p.5.

Harms Your Baby", are two examples.²⁶ Companies are required to change the warning regularly, rotating through the list of six, to make it less likely that the warning is not noticed. Notice of tar and nicotine yields had to be printed on the side of the packet (the same 6% minimum applies). These stricter regulations also applied to any tobacco products imported into the UK from outside the European Community.²⁷

In announcing the regulations, the then Secretary of State for Health, Mr William Waldegrave, said:²⁸ "The evidence from many of the representations put to us during the consultation period suggested that the warnings would be more effective if we increased the size, and removed the attribution to the Health Departments' Chief Medical Officers. I believe that the new system of labelling will make a real contribution to achieving the smoking prevalence targets proposed in our recent consultation document 'The Health of the Nation'." The Health Education Authority was one organisation that had argued that the 4% minimum size of warnings was inadequate. At the time, the HEA's chief executive was quoted as saying, "the impact of cigarette pack warnings is likely to be marginal if they are difficult for many to read and comparatively easy to ignore." Indeed, the HEA suggested that the minimum size should be 33% of the packet surface.²⁹

In July 1993 the Government laid the *Tobacco Products Labelling (Safety) Amendment Regulations 1993* (SI No.1947), to implement the second EC directive (92/41/EEC); the regulations came into effect on 1 January 1994. Hand rolling tobacco must now carry the same list of six warnings as cigarettes; cigars, cigarillos and pipe tobacco use a list of four warnings; smokeless tobacco is required to carry the single warning: "**Causes cancer.**" These warnings have to account for at least 1.5% of the **total** surface of the packet, though the minimum set out in the directive is just 1%. At the time, Baroness Cumberlege, Parliamentary Secretary at the Department of Health, said:³⁰ "it is an important part of our strategy to reduce smoking levels in this country that all tobacco products should carry appropriate health warnings." A written answer given in July 1991 gave estimates for the cost of implementing these requirements:³¹ "The industry estimates the total cost of initial implementation to be of the order of £450,000-£500,000 and further manufacturing costs of £100,000 each year thereafter."

Following the introduction of the first series of these labelling regulations, the tobacco industry tried to challenge the UK's use of greater minimum sizes for health warnings in the

²⁶The other four are: "Smoking causes cancer"; "Smoking causes heart disease"; "Smoking causes fatal diseases"; and, "Protect children : don't make them breathe your smoke."

²⁷HC Deb 22.7.91 cc.411-2W.

²⁸"Tougher and bigger health warnings on tobacco products to be introduced next year" *Department of Health press notice* 11 July 1991.

²⁹"Cigarette health warnings 'too small'" *Guardian* 7 May 1991.

³⁰"Baroness Cumberlege announces additional health warnings on tobacco products" *Department of Health press notice* 30 July 1993.

³¹HC Deb 24.7.91 c.687W.

European Court of Justice. Gallaher, Imperial Tobacco and Rothmans International UK all appealed to the Court, claiming the 6% minimum required under UK law represented an obstacle to the free movement of tobacco products across the Community. However, in July 1993, when the ECJ heard this case, the Court rejected this line of argument, pointing out that the directive (89/622/EEC) only stipulated minimum sizes, and that although different packaging regulations might result in "unfavourable treatment of domestic products", Member States were quite justified in making stricter packaging rules in the interests of public health. The imposition of a 6% minimum could not, in the Court's view, be taken to be action to "prohibit or restrict" the sale of tobacco, which the directive rules out.³² At this time, the Court also ruled that the Italian authorities could **not** require tobacco producers to place two specific warnings on cigarette packets, since implementation of the directive specified the use of just one warning.³³

B. The Purpose of the Bill

The Bill proposes to change health warnings on tobacco products in three ways. The size of the warning is to be increased considerably, so that it accounts for at least 25% of the surface on which it is printed, or 12 square centimetres, whichever is the greater. The size of the type used is to be increased accordingly, and must either be in black, on a white background, or vice versa. A separate border - of either black or white - must run around the warning, if the packet's colour matches it. Finally, the warning has to be printed at the top of the packet, so that it cannot be hidden simply by being stacked in a display. In his brief on the Bill,³⁴ Terry Lewis argues that these changes will "further enhance public awareness of the hazards of tobacco use by improving the communication of pertinent information to consumers ... to present information at the same time as smoking is being contemplated maximises the message and the salience. This increases the probability that a rational appraisal of that information will influence behaviour as weighed against other factors that normally determine it such as habit, cravings and social pressure."

These changes are in line with new regulations on tobacco health warnings introduced in the past six months in Canada and in Australia.³⁵ Since September 1994, tobacco products in Canada have had to carry health warnings that take up 25% of the "principal display panel" in the same black & white combination as proposed in the Bill. Cigarette packets, which have two main display panels, carry one warning on each panel: one in English and one in French. Warnings have to be surrounded by a border 3-4 millimetres thick, so that as a

³²"Health warning defeat surprises tobacco firms" *Guardian* 23 June 1993.

³³"Tobacco labelling: EC Court of Justice rulings clarify EC directive" *Europe Environment No.413* 6 July 1993.

³⁴"Tobacco Products Labelling Bill" *Terry Lewis & ASH press notice* January 1995.

³⁵*Health Warnings : Canada, Australia, South Africa* ASH February 1995.

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whole, the statement will occupy 30-35% of the pack's surface. The wording used in warnings has to be one of eight statements, used in rotation.

In January 1995, the Australian authorities also introduced regulations requiring cigarette packets to carry health warnings equivalent to a quarter of the front of the pack. In addition, the top third of the back of the pack has to carry detailed health information and the toll-free telephone number of the national helpline service for those wishing to stop smoking. Apparently health ministers in a number of Australian states are to consider new regulations to require all tobacco products to be sold in generic packaging, once a study on the possible impact of this on smoking is completed. Health warnings in both countries use stern language and cover issues that UK health warnings will, at most, allude to: eg, "**Smoking is addictive**", and, "**Tobacco smoke causes fatal lung disease in non-smokers**" (both countries have variants on these). Health warnings of a similar size are to be introduced in South Africa from 31 May 1995: warning statements will take up 15% of the front of the pack; health information will take up 25% of the reverse side.

Neither the proponents nor the opponents of the Tobacco Products Labelling Bill have released any detailed statistics on how these new warnings have affected tobacco consumption in practice. Supporters of the Bill have tended to argue that any reduction in smoking, however small, is a good thing, so that a discussion of the detailed effects of health warnings is rather beside the point.

It could also be said that since requirements for new health warnings do not have the similar implications for costs, or matters of free speech, that, say, a ban on tobacco advertising could have, one should not be so concerned with precisely analysing their impact. Warnings may work for some smokers, and not for others, and health warnings have only ever been one method the Government has used to reduce smoking.

Moreover, warnings should perhaps change over time so that they continue to do what they are designed to do: warn consumers. The simple repetition of a form of words is likely to result in most people taking no notice of what is being stated, in whatever circumstances. Of course, this implies that any change in health warnings may lead to a purely short term decline in smoking, and that, as time passes, even larger warnings would be needed to have any effect. That said, the language used in warnings will change, as our knowledge of tobacco changes, and one could argue that the physical appearance of these warnings should go hand in hand with these developments. One example of this phenomenon is the concern about passive smoking, which is something that is a relatively recent development, and which is now covered in one of the six health warnings used in the UK as a consequence of the first Council directive (ie, **Protect children: don't let them breathe your smoke**).

In the absence of any dramatic change in smoking habits, the Tobacco Manufacturers' Association (TMA) have argued that the Canadian health warnings had "failed", and this proves similar measures in this country would have no effect on smoking. In the context of the Government's commitment to deregulation and minimising unnecessary burdens on business, it might seem contradictory to require UK companies to change designs, production

lines, and so forth, in the interest of a policy whose effectiveness is doubtful. That said, should health warnings in the UK be modelled on the Canadian regulations, as the Bill suggests, one result will be undeniable: the appearance of cigarettes and other tobacco products will change, and quite dramatically. The illustration below shows similar brands as they now appear in this country, and in Canada. The next section of this paper discusses whether this change in looks is desirable or not.

CAMEL CIGARETTES

UK

CANADA

BENSON & HEDGES

UK

CANADA

C. Arguments For and Against the Bill

When the Tobacco Products Labelling Bill was first introduced in December last year, Terry Lewis argued that increasing the size of health warnings was the second best way, short of banning all tobacco advertising, to alert young people to the dangers of smoking.³⁶ "I am convinced that young people are not getting a clear warning about the dangers of smoking and, following the disgraceful talking out of Keith Barron's Bill to ban tobacco advertising, I see this as the next best way of warning youngsters not to take up this dangerous habit." The Bill has the support of both the medical establishment, and those charities whose work deals with the illnesses caused by smoking: in particular, heart disease and cancer.

Though neither the British Heart Foundation, nor the Imperial Cancer Research Fund, carry out formal lobbying as part of their activities, spokesmen from both organisations have stated that they are very much in favour of the Bill. In particular, both organisations are committed to supporting measures that cut smoking among children and teenagers, and discourage these groups from taking it up in the first place. Professor J Gordon McVie, Director of the Scientific Department of the Cancer Research Campaign, has argued that increasing the size of health warnings in this fashion is "consistent with government policy on reducing smoking rates among both adults and children, as set out in *The Health of the Nation*." Professor McVie goes on to cite the view of the International Union Against Cancer that warnings should now cover at least 25% of the pack face.³⁷ In its formal response,³⁸ the British Medical Association argues that the Canadian and Australian experience has serious implications for the UK: "health warnings on cigarette packets are only an effective deterrent to smokers if they are substantially increased from their current size in the UK."

A particular concern voiced by all these groups is about young smokers, and children who might take up smoking, given that serious health problems develop for those who smoke consistently through life. One reason for this is that the Government's targets for reducing smoking among this age group, set out in *The Health of the Nation*, seem unlikely to be achieved: that is, to reduce the proportion of 11 to 15 year olds who smoke, from 8% in 1988, to 6% in 1994. In 1993, the proportion was 10%.³⁹ It should be pointed out that in other respects - the prevalence of adult smoking, the proportion of women giving up smoking during their pregnancy, the total consumption of cigarettes - consumption is falling.

The two organisations which strongly oppose the Bill - the TMA and FOREST - argue that people are quite well aware of the dangers of smoking. In FOREST's formal response, it is suggested that the proponents of the Bill "do not believe that 'further enhancement' is necessary or would have any effect on smoking rates in this country." Rather, the Bill is

³⁶"MPs challenge Government to back Private Members' Bills on smoking" *Terry Lewis press notice* 13 December 1994.

³⁷Open letter by Professor J Gordon McVie, Cancer Research Campaign 30 January 1995.

³⁸"BMA promises full backing for Private Members' Bills on smoking" *BMA press notice* 13 December 1994.

³⁹*Tobacco & Health* NHS Executive September 1994. Figures for boys and girls separately are cited in a PQ [HC Deb 27.1.95 c.393W].

aimed at stigmatising the use of tobacco, to improve the likelihood of tobacco being banned outright.⁴⁰ Neither group gives any credence to the idea that children may not be as aware of smoking's dangers as their parents, or that new techniques in illustrating health risks might be called for. Indeed, the FOREST paper argues that if warnings are too dogmatic, children may well be attracted by the allure of something deemed to be dangerous and offensive to the authorities. But the primary argument of both groups is that health warnings do not work.

The one major study on the effectiveness of health warnings, cited by Action on Smoking and Health (ASH), was a market research report prepared for the Health Education Authority in December 1990, on the possible impact of the first Council directive on tobacco labelling. Unfortunately, the report is not specific about the numbers interviewed in assessing popular views of tobacco health warnings. Even so, its conclusions do lend strong support to the proponents of the Bill; the most important of these being:⁴¹

- "The impact of the new cigarette pack warnings exposed in this research is likely to be marginal whatever the nature of the message, because of their comparatively small size. At 4% of the pack face, they are difficult for many to read, and comparatively easy to ignore.
- There is a tendency to interpret the smallness of the warnings as evidence of government duplicity. More worryingly, there also seems to be a tendency to equate the size of the warning with the magnitude of the risk.
- To maximise the impact of the new back-of-pack warnings, the optimum strategy would be to increase their size, position them near the top of the pack, rotate them frequently, and ensure maximum colour clash with brand livery."

The other main arguments for and against the Bill might be summarised as follows: the nature of health warnings; the relationship between warnings and trade marks; and, the impact that larger warnings may have on the UK tobacco industry. In the joint brief on the Bill, produced by Terry Lewis and ASH, it is emphasised that individuals have the right to know the effects of what they choose to consume, and that the labelling of the package itself is an effective way of relating this information. The FOREST paper argues that health warnings do not provide information, but are, in fact, exhortation, a form of official advertising that interferes with the individual choice whether to use tobacco or not. As a consequence, the Bill is a threat to "freedom of choice and individual liberty." When taken with the assertion that warnings do not work, it would appear that opponents of the Bill are arguing about the legitimate role of Government; ie, that "the principle of any such statutory warnings" should

⁴⁰*Against Increased Size - Or Any - 'Health' Warnings on Cigarettes* FOREST January 1995; p.1.

⁴¹*Health Warnings on Cigarette and Tobacco Packs : Report on Research to Inform European Standardisation* Health Education Authority December 1990.

be rejected. In short, the provision of statutory warnings is part of a tendency toward paternalism which should be opposed.

Although the Tobacco Manufacturers' Association have not produced an official response to the Bill, they have argued strongly against it. A spokesperson at the TMA gave the two other important arguments against larger health warnings: that these larger health warnings significantly damage the brand identity of tobacco products, established by each company's use of its trade marks and packaging design, and that if imposed unilaterally, they would put UK tobacco manufacturers at a serious competitive disadvantage with their European competitors. The executive director of the TMA has been quoted as saying,⁴² "We have spent years building up pack designs and to have them devalued is an immoral disgrace, amounting to a theft of valuable property." It is less the cost of redesign that concerns the tobacco industry - though the TMA were not able to give an estimate of these costs - than the implications in terms of inter-brand competition.

The value of brand identities and corporate trade marks should not be underestimated. They form one of the most important parts of any company's assets. Customers and retailers rely on brand names, on distinctive packaging and labelling, to tell them what they are buying; companies expend considerable resources to do this effectively. Some idea of the role trade marks play may be gathered from the unanimous and positive response by the business community to the reform in trade marks law effected by the *Trade Marks Act 1994*.⁴³ In short, the Act contained provisions to harmonise trade marks legislation across the EC, to widen the definition of a trade mark, and to afford effective protection against unscrupulous pirating. The value of branding is even recognised in Mr Lewis' brief on the Bill:⁴⁴ "Tobacco companies invest a great deal of money in the design of attractive brand images for their products and the appearance of the pack is an extremely important factor in transferring these images to the consumer. It is, therefore, obvious that tobacco companies are eager to protect their investment."

Moreover, it is the contention of the tobacco industry that brand identity, and tobacco advertising generally, are used to affect the brand of cigarettes smokers choose, rather than to encourage people to take up smoking (certainly this was argued in the context of Keith Barron's Bill to ban advertising, discussed in the first section of this paper). The implication is that individuals take up smoking for the qualities inherent in tobacco, and continue to smoke though aware of the health risks involved.

Notably, the proponents of the Bill do not contest the suggestion that larger warnings on UK packets might lead to some smokers transferring allegiance to European brands. In Mr Lewis'

⁴²"Cigarette design 'attracts young'" *Guardian* 14 December 1994.

⁴³The background to the Act is examined in a Library Research Paper: *The Trade Marks Bill [HL] 1993/94* 94/54 15 April 1994.

⁴⁴"Tobacco Products Labelling Bill" *Terry Lewis & ASH press notice* January 1995.

brief to the Bill, the counter argument is put this way:⁴⁵ "This argument is unacceptable when the health risks associated with the product are considered. The rights of the consumer *must* be given the highest priority. From a trade practices angle, it is unacceptable for an inherently dangerous product to be marketed without providing adequate information concerning the dangers of the product to the consumer." The role of cross border sales of tobacco products was discussed in Part I of this paper, and it would seem likely that one effect of the Bill, if adopted, would be to encourage existing smokers who disliked the new warnings, but wished to go on smoking, to purchase their cigarettes on the Continent. In addition, section 1(5) of the Bill provides for regulations to be made, so that tobacco products imported from other EU Member States should not have to comply with the new health warnings. Clearly, if larger health warnings encouraged brand switching to the degree the TMA fears, European manufacturers could profit from redirecting their marketing efforts to the UK.

III The Bill's provisions

The Bill's purpose is set out in its long title; namely, "a bill to require warnings and information carried on packets containing tobacco products to be displayed more prominently." Its provisions are summarised below.

Clause 1 (1) of the Bill sets out the main requirements for the display of health warnings on packets containing tobacco products. It provides for regulations to be made under section 11 of the *Consumer Protection Act 1987* which enables the Secretary of State to make regulations ensuring that "appropriate information is, and inappropriate information is not, provided in relation to goods to which this section applies." Under clause 1(1), regulations would be made requiring that health warnings on packets containing tobacco products, other than smokeless tobacco products, conform to the following rules:

- The warning must be clearly visible and in such a position that it is unlikely to be damaged when the packet is opened.
- The warning must be printed in the middle of a rectangular "display area" which is surrounded by a border line between 3 and 4 mm in width.
- The border line must be the same colour as the lettering used for the warning.
- The warning must fulfil the type and colour requirements set out in clause 1(2).

⁴⁵op.cit.

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- If the packet is rectangular, the display area must cover either at least 25% of the surface on which the warning is printed, or 12 square centimetres, whichever is the greater.
- If the packet is not rectangular, the display area must be of such a size that it is as conspicuous as the warnings on rectangular packets.
- The top border of the display area must be parallel to the top edge of the surface of the packet on which it is printed and no more than 1 cm away from it.
- Any statements on tar and nicotine yields which are required to be printed on packets must be printed along one side of the packet in the centre of a white rectangular area and must fulfil the type requirements set out in clause 3.

Clause 1(2) sets out the type and colour requirements for health warnings referred to in clause 1(1) as follows:

- The print used for health warnings must be in Helvetica bold type, in either 17 point print size, or a "permitted alternative size" (as defined in clause 1(4)). The warning would therefore look something like this:

Smoking can seriously damage your health

- The lettering must be either black on a white background or white on a black background.
- Producers will not have a completely free hand in the choice of black on white or white on black: no more than 55% (and hence no fewer than 45%) of packets produced over a 12 month period may have warnings printed in each combination. This aims to make it more difficult for producers to design packaging which detracts from the health warnings.
- Where the colour of the border line surrounding the display area is the same as the colour of the packet below the warning, then an additional line of the same colour as the display area must be inserted just below the bottom line of the border. This additional line must be at least 1 mm wide, and the same length as the border. For example if the lettering, and hence the border, is white, and the rest of the packet is also white, then an extra black line would be inserted to separate the white border from the white packet below.

Clause 1(3) sets out the type and colour requirements for statements about tar and nicotine yields. These statements should be in black Helvetica bold type, which is either 10 point print size or a "permitted alternative size" (as defined in clause 1(4)). A statement in 10 point looks rather like this:

12 mg tar 1.2 mg nicotine

Clause 1(4) defines the "permitted alternative print size" for both health warnings and statements about tar and nicotine yields. If the specified print size (ie 17 point for warnings and 10 point for statements on tar and nicotine yields) would entail the lettering covering at least 70% of the display area, then a smaller print size can be used, with the proviso that at least 60% of the display area is still covered. The area covered by lettering should be measured by drawing a "right-angled polygon"(ie a rectangle or other many-sided shape with every angle a right angle) as closely as possible round the lettering. The regulations should set out the way in which this should be done.

Clause 1(5) allows for the regulations to exclude tobacco products imported into the UK from Member States of the European Union for consumption in the UK from the provisions set out in this Bill. As a transitional measure, it also allows for products supplied, or agreed to be supplied, by a specific date to be excluded. The date would be specified in the regulations, but could not be later than 1 January 1998.

Clause 1(6) refers back to the *Tobacco Products Labelling (Safety) Regulations 1991* (SI 1991/1530) for the definition of expressions used in clause 1. Definitions can also be set out in further regulations made under section 11 of the *Consumer Protection Act 1987*.

Clause 2 gives the short title ("Tobacco Products Labelling Act 1995") and the commencement date (1 January 1997). If passed, the Act would extend to Northern Ireland.

Recent papers on related subjects have been:

Health Services & Medicine

92/81 Health of the Nation 12 October 1992

94/22 The Tobacco Advertising Bill 7 February 1994

Economic Policy & Taxation

92/102 Fiscal Harmonisation 23 November 1992