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## **Executive Summary**

Beginning with the Europe Against Cancer Action Program in 1985, the European Economic Community (EEC), which was later renamed the European Community (EC) with its incorporation into the new European Union (EU) in 1992, began to seriously consider tobacco product regulation to fight tobacco-related illness on a pan-European scale.

A key element of the EC's policy was a directive intended initially to restrict, and later to end, tobacco advertising and sponsorship in the Community.

The Directive was introduced by the European Commission in 1989, and was adopted nine years later, in 1998.

In 2001, the directive was annulled following litigation brought by the Republic of Germany in the European Court of Justice (ECJ).

Previously secret tobacco industry documents indicate that the tobacco industry lobbied politicians and used third party organizations in an organized attempt to weaken or defeat the Advertising Directive.

The tobacco industry efforts involved figures at the highest levels of European politics, including former German Chancellor Helmut Kohl, former British Secretary of State Kenneth Clarke, and former European Commissioner Martin Bangemann.

A large degree of the industry's effort to influence EC policy focused on lobbying government officials and industrial groups within a number of key EC member states, including Germany, the UK, the Netherlands, and Denmark. The tobacco industry viewed Germany as a strong and consistent ally of the tobacco industry in its attempts to defeat the Advertising Directive within the EC and through litigation at the level of the European Court of Justice.

The tobacco industry engaged in a number of practices to conceal its role, particularly the formulation and introduction of an industry-authored minimum harmonization proposal intended to replace the EC Draft Directive without disclosing the industry's role in preparing the draft.. The documents suggest the involvement of Martin Bangemann and the German delegation to the European Commission in introducing the tobacco industry's proposal without disclosing its source..

The fight for an effective pan-European advertising ban continued with the EC Draft Directive on Advertising and Sponsorship proposed in Spring 2001. The new draft seeks to eliminate provisions that rendered the earlier Advertising Directive inconsistent with EC jurisdiction. A thorough knowledge of previous industry tactics and strategies can help advocates of strong EC public health legislation overcome obstacles that have so far hindered the implementation of an effective EC Tobacco Advertising Directive.



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## 1. Introduction

Tobacco-related illness is the leading cause of preventable deaths worldwide, accounting for about four million deaths annually,<sup>1</sup> including one-half million in Europe<sup>2</sup> every year. Beginning with the Europe Against Cancer Action Program in 1985, the European Economic Community (EEC), which was later renamed the European Community (EC) with its incorporation into the new European Union (EU) in 1992, began to seriously consider tobacco product regulation to fight tobacco-related illness on a pan-European scale.<sup>3</sup> Some elements of the action program against cancer passed and continue to be in force. These elements included directives concerning tobacco labeling<sup>4</sup> and tar maximums for cigarettes.<sup>5</sup> A key element of the European Community's policy,<sup>6</sup> however, was a directive intended initially to restrict, and later to end, tobacco advertising and sponsorship in the Community. Introduced by the European Commission in 1989, the Directive elicited from the tobacco industry and allied sectors what *The Times* of London called "the most ferocious lobbying campaign seen in Europe,"<sup>7</sup> contributing to the delay of the legislation's enactment by the European Community for nine years, until 1998.<sup>8</sup> This victory was only temporary. In October 2001, the Directive was annulled by the European Court of Justice (ECJ) following litigation brought by the Republic of Germany. Thus, despite over a decade of effort by tobacco control advocates, public health advocates have not been able to end tobacco advertising in Europe.

Recent studies using previously secret tobacco industry documents demonstrated the extent and powerful effect of tobacco industry actions to subvert tobacco control efforts in the USA,<sup>9</sup> Switzerland,<sup>10</sup> the World Health Organization (WHO),<sup>11</sup> and scientific research on passive smoking at the International Agency for Research on Cancer (IARC).<sup>12</sup> These efforts have often included lobbying of third parties to carry the tobacco industry's message so that the industry can remain out of the public eye and so that the politicians who support the industry's position do not appear to be simply supporting the multinational tobacco companies. The tobacco industry used these tactics in a concerted and effective – and largely invisible -- effort to derail EC advertising restrictions working through politicians at the highest levels in Europe.

Industry documents show that industry lobbying targeted former German Chancellor Helmut Kohl, former British Secretary of State Kenneth Clarke, and former European Commissioner Martin Bangemann. While the industry attempted to gain influence through a number of EC member states, particularly West Germany, and later the reunified German Republic. The tobacco industry viewed Germany as a consistent ally of the tobacco industry in its attempts to defeat the Advertising Directive within the EC legislation and through litigation at the level of the European Court of Justice.

In addition to efforts to influence EC legislation through national lobbying campaigns, the tobacco industry sought to delay or defeat the EC Advertising Directive through a variety of other means. These included creation of alliances with non-governmental third party groups representing various industries at national or international levels that could promote the industry position without being closely

identified with the tobacco companies. Further, the tobacco industry launched an extensive public relations campaign aimed at turning popular opinion in Europe against the advertising directive. These strategies allowed the tobacco industry to delay the passage of the Advertising Directive and contributed to its ultimate defeat in the ECJ in October 2000.

## **2. Methods**

We examined tobacco industry documents published on the Internet subsequent to the 1998 Master Settlement Agreement (MSA) between 46 U.S. state attorneys general and the tobacco industry. Among its many provisions, the MSA requires that the four major tobacco companies operating in the U.S. make available, through internet archives, millions of previously secret internal industry documents.<sup>13</sup> Most of our document sources came from the Philip Morris (PM) documents site ([www.pmdocs.com](http://www.pmdocs.com)). We also found important documents on the RJ Reynolds (RJR) documents site ([www.rjrdocs.com](http://www.rjrdocs.com)). British American Tobacco (BAT), based in the UK, is a third major player in European and international tobacco politics. While BAT was required to make several million pages of documents available to researchers as part of the settlement of litigation brought by the state of Minnesota, these documents are inaccessible online and available only under severe restrictions at a depository in Guildford, England.<sup>14</sup>

Approximately 10,000 documents from Guildford have been made available on the internet at the University of California San Francisco Tobacco Control Archive web site as the British American Tobacco (BAT) Documents Archive (<http://www.library.ucsf.edu/tobacco/batco/>). An additional 15,000 pages were requested based on a search of the index to the Guildford Depository and acquired from the BAT Guildford Depository in hard copy format.

Our document searches proceeded from general terms, such as “Europe” and “advertising,” to more complex Boolean searches using operative words such as “AND,” “OR,” and “NOT” as specific terms and names of people and organizations became available from the initial documents we located. Our searches focused on EC member states mentioned in industry documents. Documents used were written in English, French, and German. Additional information was collected using Lexis-Nexis Academic Universe, Medline, general internet search engines such as [google.com](http://google.com), and informal correspondence with tobacco control experts in Europe.

Our searches focused on EC member states mentioned in strategic industry documents. Thus, while all member states were involved in the debates surrounding the Directive, our analysis includes only those nations highlighted in industry documents as targets of industry interventions against the Directive. We have the most complete picture of industry activities from 1989, when the Draft Directive was introduced, to 1994, the most recent date for most available documents on the internet (most of the discovery in the US litigation that led to these documents occurred by 1994). While detailed industry document evidence was not generally available beyond 1994, publicly available sources and news reports allowed us to detail elements of the industry plan, such as litigation, that

were ongoing beyond 1994. The vast majority of the material used to prepare this paper was written in English, although documents written originally in French and German were also used.

### **3. Background on the European Union and Advertising Restrictions in Europe**

#### **A. Political Structure and Competence of the EU and EC**

The European Union (EU), headquartered in Brussels, Belgium, encompasses three bodies: the European Community (EC), the European Coal and Steel Community, and Euratom. The EEC was initially established under the Treaty of Rome in 1957, and was modified under the Single European Act of 1986 and the Maastricht Treaty of 1992, when the EEC was renamed the European Community (EC). The EC represents the policy-making body responsible for the Advertising Directive, and includes four major institutions:

*-The European Commission* charged primarily with introducing new EC legislation and overseeing specific policy areas through Directorates General (DG's).

*-The Council of Ministers*, which accepts or rejects proposed EC legislation. Includes a General Council comprised of Member State Foreign Ministers and subcommittees that deal with particular policy areas, such as health. Additionally, the Council includes a Committee of Permanent Representatives (COREPER) which prepares work for the Council and carries out tasks specified by the Council.

*-The European Parliament*, which modifies EC legislation and contributes to the acceptance or rejection of proposed bills.

*-The European Court of Justice*, which creates European case law and reviews the legality of EC legislation according to the founding treaties.

The competence of the EC is based on its goal of achieving an open internal market among all EC Member States. In this context, the EC is additionally mandated to pursue a high degree of public health protection. Article 95(3) of the Maastricht Treaty states that “the Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection, and consumer protection, will take as a base a high level of protection...” Proposals concerning such protection of public health must focus primarily on the establishment of the internal market.<sup>2</sup> While the European Community has an evolving responsibility in the realm of public health, the extent of this responsibility is defined by, and subordinate to, the Community's principal function, the creation of a single European market.

Further complicating the EC's role in tobacco control is the EC's extensive program of agricultural subsidies to tobacco farmers. In the early 1990's, the Community spent about 1000 million ECU (roughly equivalent to 883.3 million US dollars) on subsidies to tobacco producers but only about 1.5 million on smoking prevention.<sup>15</sup> While this program was reformed in 1992 to limit production and establish a quota above which subsidies would not be paid, expenditures for the program remain high<sup>15</sup> and the European Commission's Agriculture Directorate, which politically supports the program, has been suspected as an influential opponent of EC tobacco control measures.<sup>16</sup>

The membership of the European Union has enlarged since the establishment of the European Economic Community in 1957; by 1986 it included Belgium, France, West Germany, Italy, Luxembourg, the Netherlands, the United Kingdom, Denmark, Ireland, Greece, Spain, and Portugal. In 1995, Austria, Finland, and Sweden joined the EEC. As of 2001 Switzerland, Norway, and Iceland are the only non-EU West European countries.<sup>17</sup>

## **B. EU Tobacco-Related Directives**

The European Community has experience in regulating tobacco consumption and distribution, as demonstrated in a variety of legislation currently in effect. These regulations include four directives, EC measures that are binding in terms of the goal to be achieved of member states, but that do not specify the means to achieve this goal..

Tobacco advertising and sponsorship on television was completely ended by a directive passed in 1989, Council Directive 89/552/EEC. The Directive states that all forms of television advertising of tobacco products are prohibited, and that television programs may not be sponsored by tobacco manufacturers.<sup>2</sup> This directive did not include restrictions on radio programming.

A directive concerning the labeling of tobacco products, Council Directive 89/622/EEC of November 13, 1989, sought the harmonization, or standardization between nations, of tobacco product labeling in the European Community. Council Directive 92/41/EEC of May 15, 1992 amended the prior directive concerning the labeling of tobacco products and prohibited the marketing of certain types of tobacco for oral use. Together, these directives establish standard criteria that cigarette packages must meet to be marketed legally in the EU.

The labeling directives only require that two warnings be printed on all cigarette packages covering only between 4% and 8% of each large surface. One of these warnings must be the phrase "Tobacco seriously damages health." The second warning must be taken from a list of other warnings specified in the directive. In addition, nicotine and tar content information is to be printed on the side panel of each pack. These labeling requirements are weak by international standards.

The tobacco industry lobbied effectively to reduce impact and scope of the labeling directive. The Phillip Morris Corporate Affairs Department 1992 Review, dated February 27, 1990, describes PM's success in achieving their desired result:

*Considerable success was achieved* with regard to the size of the warnings compared to the original Commission's draft directive which required a minimum print size of 3 mm and would have occupied up to 50% of the large surfaces.

Implementation will now take place in the 12 member states through national legislation. The industry will be intervening at national levels in accordance with guidelines that closely follow the above.<sup>18</sup> [emphasis added]

Council Directive 90/239/EEC of May 17, 1990 prohibited the sale of cigarettes with a high tar content.<sup>19</sup> By December 31, 1997, cigarettes with a tar content above 12 mg were outlawed for sale in European Union-member countries. Greece was given an extension until 2006 to comply with these standards. A series of Council Directives set minimum tax levels for cigarettes and tobacco. These include two Directives passed in 1992, Directive 92/78/EEC and Directive 92/80/EEC, and Directive 95/59/EC, passed in 1995. A Commission proposal of 2001, COM(2001), 133, is intended to amend these directives.<sup>19</sup>

Recent research casts doubt upon the public health value of the EC tar ceiling directives. Bialous and Yach<sup>20</sup> report that the tobacco industry plays "a major role in determining the scientific evidence and suggesting the standards that are eventually adopted as international standards for tobacco and tobacco products in several areas, including the measurement of cigarette tar and nicotine yield." This allowed the tobacco industry to circumvent EEC tar maximums by altering the methods of measurement rather than the actual tar content of their products.

Finally, a non-binding resolution was adopted by the EEC in 1989 on smoking in public places. This resolution did not establish new European law, but invited member states to adopt measures banning smoking in public places and on all forms of transport.<sup>21</sup> This resolution has had little practical effect in creating smoke free environments in Europe.

### **C. Tobacco Advertising Restrictions in the EC**

As it has with the health effects of active and passive smoking, the tobacco industry has generated significant debate around the issues of whether tobacco advertising increases consumption of tobacco products, and whether an advertising ban would reduce consumption. The tobacco industry and its allies have argued consistently that advertising does not increase overall tobacco sales or consumption, but primarily encourages brand switching or loyalty. Public health and tobacco control advocates as well as a large body of evidence refute this contention.

A 1991 meta-analysis of 48 econometric studies regarding tobacco advertising found that advertising significantly increased overall tobacco sales.<sup>22</sup> Subsequent reviews by the United States Institute of Medicine,<sup>23</sup> the United States Department of Health and Human Services,<sup>24</sup> and the World Health Organization<sup>25</sup> reached the same conclusions. Research has been conducted within countries before and after the passage

of tobacco advertising bans. While this type of research is complicated by difficulties in implementation of the ban and data collection, the overall results indicate that a complete ban on advertising contributes to a reduction in smoking prevalence.<sup>26,27</sup>

A 1999 World Bank report, *Curbing the Epidemic: Governments and the Economics of Tobacco Control*, reviewed the evidence regarding tobacco advertising and concluded that overall data indicates that cigarette advertising “almost certainly” increases consumption.<sup>28</sup> In addition, the key conclusion in their review of the issue was that advertising bans are effective in reducing cigarette consumption provided that they are comprehensive, covering all media and uses of brand names and logos.<sup>28</sup> They found that data from countries with only partial advertising bans show little or no effect on cigarette consumption, which tended to obscure conclusions when aggregated with data from countries with comprehensive bans. Applying the results of this analysis to the entire European Union, the authors concluded that the comprehensive advertising ban passed in the 1998 EC Draft Directive would have reduced cigarette consumption within the European Union by nearly seven percent.<sup>28</sup>

In 1975, Norway passed a complete ban on tobacco advertising and sponsorship, along with required health warnings and sales age limits. It produced a long-term absolute reduction of smoking prevalence by 9%.<sup>29</sup> Furthermore, an analysis of yearly consumption statistics obtained from the Norwegian Directorate for Customs and Excise shows a 26 percent drop in total adult per capita consumption of cigarettes to 1553 cigarettes per person per year between the introduction of the ban in 1975 and 1996.<sup>27</sup> By comparison, the WHO estimated per capita annual consumption of cigarettes in Europe in 1995 to be 2080 cigarettes per person per year.<sup>30</sup> In addition, absolute smoking prevalence among 16 to 19 year old youths decreased from 37.6% to 22.3% over the same time period.<sup>30</sup>

A similar Finnish advertising ban implemented in 1977 in conjunction with a public information campaign consisting of health warnings and anti-tobacco messages has been credited with reducing adult per capita cigarette consumption by an estimated 37% between to 1350 cigarettes per person per year between 1977 and 1996.<sup>30</sup> The 1990 New Zealand advertising ban, also coupled with price increases, reduced overall tobacco sales by 7.5%, of which 5.5% was attributed to the advertising ban.<sup>31</sup> Finally, the 1991 French advertising ban, the *Loi Evin*, reduced relative adult smoking prevalence by 7% between 1991 and 1993,<sup>32</sup> and decreased absolute adult per capita cigarette consumption by 14% to 1834 cigarettes per person per year between 1992 and 1996.<sup>27</sup>

In 1992, the United Kingdom Department of Health reviewed the existing evidence for the effectiveness of advertising bans on reducing consumption and concluded that the banning of advertising in Norway, Finland, Canada and New Zealand was followed by a fall in smoking which could not be reasonably attributed to other factors.<sup>31</sup> This so-called Smee Report has been aggressively criticized by the tobacco industry, which commissioned a report from an allied company, Henley Marketing Dynamics International, to refute the Smee Report’s contentions regarding the effectiveness of advertising bans.<sup>33</sup> In fact, John Luik, the editor of the Henley report,

was a strong industry ally who had previously submitted anti-tobacco control articles to reputable journals. In two of these submissions, Luik failed to disclose financial support from the industry<sup>34</sup> or the industry's editorial control over the content in his publications.<sup>35</sup> Luik has also been dismissed from the faculty of two universities in Canada for falsifying his academic qualifications and adding unpublished or non-existent books to his publication resume.<sup>36</sup>

The bulk of credible scientific evidence demonstrates the effectiveness of comprehensive advertising bans in reducing tobacco consumption and smoking prevalence.

All EC Member States have adopted their own laws to regulate tobacco advertising and sponsorship. All EC Member States abide by European Community Directive 89/552/EEC which prohibits television advertising of tobacco products.<sup>2</sup> The scope of the national legislation varies greatly. It is also difficult to gauge the degree to which national advertising restrictions are enforced and the degree to which the tobacco industry has been able to circumvent national restrictions in each of the Europe Community Member States.

#### ***i. Total Bans on Tobacco Advertising***

According to the European Commission, four Member States have total bans on tobacco advertising, including direct and indirect advertising of tobacco products.<sup>2</sup>

- In France, Act No 91-32 of January 1, 1991 on control of tobacco abuse and alcohol abuse (so-called *Loi Evin*) bans all tobacco advertising, except for some point-of-sale advertising.
- In Italy, Act No 52 of February 22, 1983 and D. M. No 425 of November 30, 1991, prohibits all forms of direct or indirect advertising of tobacco products. However, Italy does not regulate tobacco sponsorship of events.
- In Portugal, Decree No 421/80 of September 30, 1980, Decree No 226/83 of May 23, 1983, amended by Decree No 330/90 of October 23, 1990 (Advertising Rule) and by Decree No 275/98 of September 9, 1998 ban on all forms of advertising of tobacco products. Portugal also prohibits sponsorship of TV programs by tobacco manufacturers.
- Finland's Act on Measures to reduce tobacco smoking, 693/1976 (amendments since 1976) bans all advertising of tobacco, tobacco products, tobacco imitations and smoking accessories. Finland does not regulate advertisements in foreign printed publications whose main purpose is not the advertising of tobacco.
- In Denmark, Bill No L 134, introduced on December 13, 2000 and effective as of January 1, 2002, prohibits all forms of advertising of tobacco products. Exceptions exist for advertising in publications intended for specialists within the

industry, some advertising at points of sale, and publications from other countries not intended primarily for Denmark. The Bill prohibits tobacco sponsorship of events as well as most indirect advertising of tobacco products.

- In Belgium, the Act of December 10, 1997 on tobacco advertising prohibits direct and indirect tobacco sponsorship and advertising. Exceptions exist for advertising in sales outlets and in and publications printed outside Belgium and not intended principally to be marketed in Belgium. Belgium's judicial Cour d'arbitrage (Decision No 102/99 of September 30, 1999) annulled the provisions of the act related to sponsorship of international events and to indirect advertising.

## *ii. Limited Restrictions on Tobacco Advertising*

According to the European Commission, six EC member states have limited restrictions on tobacco advertising.<sup>2</sup>

- Luxembourg's Act of March 24, 1989 on restriction of tobacco advertising and prohibition of smoking in certain places and Règlement grand-ducal d'exécution of March 6, 1995, limits tobacco advertising to sales outlets, in press and under certain conditions on posters.
- Sweden's Tobacco Act (1993:581), issued in Stockholm, June 3, 1993, mandates that all forms of tobacco products marketing must be moderate, banning advertisements outdoors in public places, or in indoor places attended mostly by people under 20 years of age. There is a limited prohibition on tobacco advertising in press, TV, and radio, and no restrictions on indirect advertising.
- In Spain, Act No 34/1988 on advertising, Act No 25/1994 prohibit tobacco advertising only on TV and in places where tobacco sale or consumption are prohibited, such as in hospitals. Some local areas have stricter provisions on advertising.
- In Greece, two Ministerial Decisions of May 29, 1989 prohibit direct or indirect tobacco advertising on TV and radio, but allow advertising in cinemas or press if it carries a health warning. Tobacco product advertising is forbidden in health care services, educational establishments, youth centers and athletic facilities.
- Germany's Act of September 9, 1997, modified on July 20, 2000 prohibits tobacco advertising on TV and on radio, and restricts the content of advertisements in other media, outlawing efforts to market tobacco to youth and forbidding claims that tobacco products promote health or are natural.
- Austria's Tobacco Act (BGBl. 431/1995) prohibits tobacco advertising in TV and radio, on films accessible to young people, within the vicinities of schools and youth centers, and outlaws advertising specially addressed to the youth. Additional restrictions prohibit indirect advertising intended to circumvent these

laws. Tobacco sponsorship is allowed when in compliance with the above mentioned restrictions.

### ***iii. Legislative Proposals as of 2001***

According to the European Commission, legislative change under consideration regarding tobacco advertising restrictions in the five remaining five EC Member states.<sup>2</sup>

- In the United Kingdom, the proposed Tobacco Advertising and Promotion Bill, December 14, 2000 (Bill 6) would ban advertising and sponsorship whose purpose or effect is to promote a tobacco product. Main exemptions concern advertising at points of sale; communications made for the purposes of the tobacco trade made to persons involved in that trade; advertising in publications whose principal market is not the UK.
- In Ireland, the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Act, 1978 (No 27 of 1978), amended by Statutory Instruments in 1991, 1996 and 2000 places a limited ban on tobacco advertising in electronic and print media is banned, and bans some event sponsorship by tobacco companies. A new legislative proposal would ban all direct and indirect forms of advertising of tobacco products, including point of sale advertising. The proposal would also ban all tobacco event sponsorship, and provide for strong means of enforcement for the legislation.
- The Netherlands bans tobacco advertising on radio and television through the Tobacco Act and the Media Act. A tobacco industry code of self-regulation pertains to all other forms of tobacco advertising. The code restricts tobacco commercials in cinemas and proscribes advertising at youth. A new, governmental, amendment to the current law proposes to strengthen the Tobacco Act (Kamerstukken II, 1998-1999, 26 472, nrs. 1-7), banning all forms of direct and indirect tobacco marketing, advertising, promotion and sponsorship, except for limited forms of advertising at points of sale.

It is not known which, if any, of these proposals will be enacted into law.

### **D. The EC Directive on Advertising of Tobacco Products**

Council Directive 98/43/EC sought to approximate, or standardize, the laws and regulations of EC member states governing the advertising and sponsorship of tobacco products. The directive was a binding measure to be implemented by all EC member states by October 1, 2006. It intended to create a total ban on tobacco advertising, sponsorship, and promotion in the European Community (Table 1).<sup>8</sup>

The Directive passed in 1998 following a long process of negotiation and amendment starting with the directive's initial proposal by the European Commission in 1989. A brief timeline of the directive's history appears below. All European law must

have a treaty basis, and the Tobacco Advertising Directive, was adopted on the basis of Article 57(2) (renamed Article 47(2), following the Maastricht Treaty), Article 66 (now Article 55), and Article 100a (now Article 95) of the EC Treaty. Articles 57(2) and 66 concern the freedom of establishment and the freedom to provide services. Article 100a allows the EC to pass harmonizing measures to establish a single market without internal trade barriers.<sup>8</sup>

In its final form, the ban applied to all forms of commercial communication or sponsorship directly or indirectly promoting a tobacco product, including the use of symbols without a product name. Exemptions were made communications intended exclusively for professionals in the tobacco trade, for display, pricing, and advertising of tobacco products at point of sale, and for publications produced outside the EC and not principally intended for the EC market.<sup>8</sup>

***i. A Brief Timeline of the EC Advertising Ban Directive***

The legislative and legal history of the advertising ban in the European Union is long and complicated.<sup>37</sup> On April 7, 1989, the European Commission adopted EC 5684/89, a draft directive banning the advertising of tobacco products through billboards and posters, as well as in publications intended for people under the age of eighteen. The European

<b>Table 1: Comparison of two European Community Measures to Approximate the Rules Governing Advertising and Sponsorship of Tobacco Products</b>	
Directive 98/43/EC <sup>8</sup>	Commission Proposal 283 final <sup>2</sup>
Passed July 6, 1998 Annulled October 5, 2000	Proposed May 30, 2001
<ul style="list-style-type: none"> <li>• Bans all forms of direct and indirect tobacco advertising in the Community.</li> <li>• Bans all tobacco industry sponsorship of events in the European Community.</li> <li>• Exceptions to the advertising ban exist for: communications intended exclusively for professionals in the tobacco trade, publications not intended principally for the EC market, and point-of sale advertisements.</li> </ul>	<ul style="list-style-type: none"> <li>• Bans direct Tobacco Advertising in media that have cross-border impact: printed publications, information society services, and radio programming</li> <li>• Bans tobacco industry sponsorship of events taking place in several Member States or otherwise having cross-border effects.</li> <li>• Exceptions to the advertising ban exist for publications intended exclusively for professionals in the tobacco trade and printed publications not intended principally for the EC market</li> </ul>

Parliament amended this proposal on March 14, 1990, calling for a stricter ban that would limit tobacco advertisements to tobacco package surfaces only in addition to maintaining a ban on direct advertising.<sup>38</sup> The EP also called for bans of sponsorships and brand-licensed products.

Partially in response to the European Parliament's encouragement, Vasso Papandreou of Greece, the European Commissioner in charge of Social Affairs and author of the proposed partial advertising ban, withdrew the Directive and proposed to return with a draft directive for a total ban on advertising tobacco in Europe. On May 15, 1991, the European Commission adopted this proposal for a total ban on tobacco advertising except for specialized retail outlets.<sup>39</sup> The proposal was introduced on the basis of Article 100a of the EC Treaty, which aims to remove barriers to the completion of the internal single market.<sup>38</sup>

On February 11, 1992, the European Parliament narrowly voted in favor of the modified Directive. The Directive next moved to the Health Council of Ministers, a subcommittee of the Council of Ministers charged with accepting or refusing the proposal. Through qualified majority voting (QMV, described below in "Attempts to Block the Ad Ban"), the voting procedure under which the directive was considered in the Council, passage of a proposal could be prevented by the assembly of sufficient minority of votes against the bill, creating a "blocking minority."

Such a Council minority blocked passage of the ban from May 1992 until December 1997. This minority consisted of Germany, UK, and the Netherlands for the entire period. Denmark and Greece also periodically contributed to the blocking minority over this period. The blocking minority, led by the German delegation, actively prevented any further progress on the directive between 1992 and 1997.

The situation changed with the inclusion of pro-ban Finland and Sweden into the EU in 1995, weakening the blocking minority.<sup>38</sup> With the UK election of the Labor Government in 1997, the blocking minority finally crumbled as the UK changed its position to pro-ban. On December 4, 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 15 EU countries, with Germany and Austria opposed and Spain and Denmark abstaining.<sup>38</sup> The European Parliament approved the directive without amendment on May 13, 1998, stipulating a total advertising and sponsorship ban by 2006 in Europe. On July 30, 1998, Directive 98/43/EC was officially adopted by the European Council of Ministers and published in the Official Journal.<sup>8</sup>

Following legal challenges by the German government, European tobacco companies, and allied sectors, the European Court of Justice annulled the Directive on October 5, 2000. While the Court affirmed some EC jurisdiction in the field of public health, it found Article 95, which is concerned with the establishment of an open internal European market, to be an insufficient basis for the present Directive to be implemented. As the Directive sought to limit all advertising in the European Community, including

advertising that had no clear relation to the establishment of an open market, the Court found it to be inconsistent with its treaty basis in Article 95.<sup>37</sup>

On May 30, 2001, the European Commission proposed a new Directive “on the approximation of the laws, regulations, and administrative provisions of the [EU] Member States relation to the advertising of tobacco products and related sponsorship.” The directive is “intended to replace Directive 98/43/EC,”<sup>2</sup> the Tobacco Advertising Directive repealed in October 2000 by the European Court of Justice. While the treaty basis of the new draft in Articles 47(2), 55, and 95, is identical to the basis of the prior directive, the current proposal “has taken due account of the above-mentioned ruling of the European Court of Justice.” Thus, the new proposal is more restrained in its provisions, exclusively limiting advertising in media that cross borders between European Community Member States.

For a comparison of Directive 98/43/EC and the Commission Proposal of May 30, see Table 1.

#### **4. An Overview of Tobacco Industry Activities to Oppose the Ad Ban**

Industry tactics were highly coordinated in their efforts to delay and ultimately defeat the passage of the Tobacco Advertising Directive. These tactics focused on three main areas of intervention: blocking the passage of the proposal through the EC legislative process, substituting industry-sponsored directives or voluntary codes of practice for the original bill, and contingency planning for litigation in the event of the passage of the ban.

Tobacco industry lobbying took place at the highest levels of government in Europe, involving lobbying efforts focused on German Chancellor Helmut Kohl, European Commissioner Martin Bangemann, and Kenneth Clarke, a current British Parliamentarian and former Secretary of State for Education and Science. Many industry tactics relied upon activities designed to mask the industry’s role in mobilizing opposition to the ban. These efforts included the covert production of a legislative proposal to be introduced to the European Commission with no mention of its true authorship by the tobacco industry. At the same time, the industry orchestrated an effective lobbying campaign through its many European political and business contacts.

The PM EEC Corporate Affairs Agenda for 1991 presents PM’s overall objective regarding the European Community Directive on tobacco advertising and sponsorship:

Have the directive completely abandoned or alternatively converted into a non-legally binding resolution; a fallback objective would be to have a definitive fully harmonized directive that permits continued advertising in any member state that chooses to authorize it.<sup>40</sup>

To achieve their objective, PM and other European tobacco manufacturers acted in three main areas. They sought to “have the directive completely abandoned”<sup>40</sup> through direct lobbying campaigns in EC member states. These campaigns aimed to block the

passage of the ban within the EC legislature. Through extensive public information campaigns, PM worked with other European tobacco manufacturers and allied sectors to produce public advertisements intended to encourage popular European opposition to the advertising directive. Through actions at the level of third parties, such as advertising agencies, PM and other European tobacco companies sought to reinforce the effect of their direct lobbying campaigns, while at the same time minimizing or obscuring the industry's involvement.

As a member of the Confederation of European Community Cigarette Manufacturers (CECCM), PM sought to create industry-friendly alternatives to the directive. These alternatives were “a non-legally binding” industry code of conduct regarding advertising and “a definitive fully harmonized directive” designed by the industry and submitted covertly to the European Commission.<sup>41</sup>

Finally, through a variety of legal strategies, PM prepared to combat the implementation of the Directive in the event that it was to be adopted by the EC through court challenges at national and pan-European levels. Ultimately, with the annulment of the ban in the European Court of Justice during October of 2000, it was just such a legal challenge that finally defeated the Directive on Tobacco Advertising and Sponsorship.

## **5. Attempts to Block the Ad Ban**

PM's attempts to block the ban sought to use to PM's advantage key elements of EC legislative politics. Central to PM's plan was the establishment of a minority body of legislators within the Council of Ministers that would continuously block the passage of the Directive, under EU rules that allowed a minority to block any action. In a memorandum dated March 31, 1989, Douglas Herbison, a PM lobbyist in Brussels, described the European Commission's

Proposal of the harmonization of advertising of tobacco products in the press and by means of bills and posters....It should be noted that this proposal comes under Article 100a of the EEC Treaty which involves the use of qualified majority voting<sup>42</sup>

Qualified Majority Voting (QMV) is one of two methods, the other being consensus voting, by which the Council of Ministers can ratify or reject proposed directives. Under QMV, each EC nation controls a set number of votes out of a total of 76 votes. 54 votes are needed to pass a directive, making 23 votes a minority capable of blocking the ban. From 1986 to 1995, for example, votes allotted each member state were:

10 for Germany, the United Kingdom, Italy, and France  
8 for Spain  
5 for the Netherlands, Greece, Belgium, and Portugal  
3 for Denmark and Ireland  
2 for Luxembourg<sup>39</sup>

The voting allotments changed in 1995 with the enlargement of the Community. Still, the above scheme shows how EEC's system of Qualified Majority Voting made possible the

formation of a blocking minority in the Council of Ministers through alliances among a few powerful states such as Germany, the UK, and the Netherlands.

Phillip Morris saw the Council of Ministers as key in determining the final outcome of the legislative process surrounding the ban. This is highlighted in a January 26, 1990 memo from John Dollisson, Vice President for Corporate Affairs at Phillip Morris International to Geoffrey Bible, Executive Vice President for World Wide Tobacco Affairs at Phillip Morris International at its multinational headquarters in New York City, and later PMI's Chief Executive Officer. Dollisson describes as a goal "to gain support in the European Council for a final directive acceptable to the industry. They ultimately decide the makeup of the final directive."<sup>43</sup> A 1993 PM presentation on marketing freedoms states: "maintain the blocking minority against the EC Ad Ban Directive."<sup>44</sup>

According to Dollisson's 1990 memo to Bible, PM sought to establish the blocking minority through lobbying programs aimed at specific EC member states: "so far our efforts have concentrated on seeking support from the U.K., Germany, and the Netherlands. A separate program is being prepared for Denmark."<sup>43</sup> Ultimately, the presence of the blocking minority became a main element of PM's efforts to subvert the advertising ban. A January 1992 memo from Ian Sargeant, Director of Corporate Affairs, Policies and Programs for PM-EEC to Geoffrey Bible reports on the progress of the directive:

The next key event on this issue is really 15<sup>th</sup> May [1992], which is the date of the next health council at which ministers will try to complete the first reading stage (first reading in Council is critical—once an issue has passed that point, it is almost certain to be enacted). As described below, we still expect a blocking minority at that meeting; if the issue is blocked on that occasion, it may be effectively dead depending on the attitude of the commission.<sup>45</sup>

As this memo predicts, the blocking minority did prevent passage of the directive in the mentioned council meeting of May 15, 1992.<sup>39</sup> While not rendering the bill "dead," PM's efforts severely impeded the bill's progress; a 1993 letter from Walter Thoma, a PM Executive, states that:

In 7 consecutive Health Council Meetings, no qualified majority has emerged. The Council has not been able to adopt a common position due to a blocking minority of 5 countries (UK, Germany, Netherlands, Denmark, and Greece.)<sup>46</sup>

Ultimately, the strength of the blocking minority lasted until 1997, when the UK changed government and the new Blair government changed the UK's position and started to support the ban. Only then, with the dismantling of the blocking minority, did the Council pass the Directive.

Another important PM strategy for stopping the passage of the advertising ban involves the concept of subsidiarity, which emerged following the establishment of the modern EU by the Maastricht Treaty in 1992. This strategy is outlined in a November

1992 report written for PM by PRIMA Europe, a London-based public relations consulting firm:

The anti-directive position has been greatly strengthened by the emergence of the principle of subsidiarity (“minimum interference”) as a central issue in the post-Maastricht political debate in Europe... Crucially from the tobacco industry’s point of view, the Commission has committed itself (at the Lisbon European Council in July 1992) to drawing up a list of current and draft EC legislation which might be withdrawn in the interests of subsidiarity.<sup>47</sup>

Subsidiarity is a broad and contentious issue in European politics concerning nations’ efforts to preserve sovereignty within the larger framework of the EU. The principle of subsidiarity pertains to policy areas in which the EC as well as individual member states may both have competence to act. In these areas, the EC may only take action if the proposed objective cannot be sufficiently achieved by member states.<sup>17</sup> As the 1992 report states, the emergence of the subsidiarity debate introduced a new angle from which to attack the Advertising Directive. Industry documents show that PM sought alliances with Germany to have the Directive abandoned on the basis of subsidiarity,<sup>44</sup> and that Germany subsequently argued against the ban on this basis, including the Directive on a list of EC measures to be abandoned due to subsidiarity conflicts.<sup>48</sup>

#### **A. Lobbying Efforts in Individual Nations and Alliances with Third Parties**

The mechanics of lawmaking in the EC provided the tobacco industry with clear opportunities to influence policy. Through lobbying efforts in individual nations, the industry worked to establish a blocking minority, to challenge the ban on the basis of subsidiarity, and to influence voting on the ban in a variety of other contexts. These efforts focused primarily on the nations constituting the blocking minority in the Council of Ministers. The core members of the blocking minority were Germany, the UK, and the Netherlands. Additionally, Denmark and Greece provided occasional support to blocking efforts in the Council.

After the Advertising Directive passed a first reading at the European Parliament in 1990, the PM EEC Corporate Affairs Agenda For 1991 states that PM’s primary objective was to “have the directive completely abandoned.”<sup>40</sup> The same document goes on to note that “major political interventions and lobbying [that] have taken place during the first reading stage of the European Parliament ... the EP called for a total ban but with a smaller majority than previously anticipated. The focus since March [1990] has become the Council of Ministers and Health Working Groups of the Council.”<sup>40</sup>

A 1993 Marketing Freedoms presentation delineates the subsequent lobbying strategy regarding the advertising ban:

Objective: Preserve major marketing freedoms in Europe

Strategy:

- Maintain the blocking minority against the EC ad ban directive

- Use the European summit subsidiarity process to weaken or kill the ban
- Secure agreement on a minimum harmonization directive, voluntary code or another acceptable compromise...<sup>44</sup>

### *i. Germany*

The tobacco industry viewed Germany as the strongest and most consistent supporter of the industry's position against the advertising ban. At the outset of the debate over the ban in 1990, Douglas Herbison, a PM lobbyist in Brussels stated that

the Federal government of West Germany has again stated its opposition to EC plans for a complete ban on tobacco advertising...[it] fears a violation of the German Constitution because the tobacco industry could be affected in its right to free expression of opinion and of protection of brands.<sup>42</sup>

Industry documents suggest that the German tobacco industry viewed former German Chancellor Helmut Kohl as a close ally from as early as 1978. Kohl, then head of the Christian Democratic Union/Christian Social Union faction of the German Bundestag, mailed an unsolicited packet containing Bundestag proceedings to the Verband der Cigaretteindustrie (VdC), the German tobacco manufacturers' association.<sup>49</sup> In response to Kohl's mailing, Dieter von Specht, chief executive of both the Verband and BAT Germany, wrote:

*Allerdings erschöpft sich die Bedeutung Ihres Schreibens für uns nicht nur in dem bloßen Akt der Informationsvermittlung. Es ist unseres Wissens das erste Mal, daß sich ein Fraktionsvorsitzender in dieser Form persönlich an die Wirtschaft gewandt hat. [The importance of your letter to us, in our opinion, is not limited to the sheer act of forwarding information. To our knowledge, this is the first time that a faction head has turned personally in this form to the German [tobacco] industry.]*<sup>50</sup>

The attempts of the tobacco industry to gain access to the German government are clear in a 1993 Philip Morris marketing freedoms presentation. This document, written during a period of intense debate over the advertising ban within the Council of Ministers,<sup>39</sup> shows the lengths to which industry lobbying went to achieve their goals of having the Directive abandoned.

Use all possible German influence to prevent a weakening of the blocking minority. *Work with Chancellor Kohl to put ad ban directive on commission subsidiarity list.*<sup>44</sup> [emphasis added]

Inclusion of the Directive on the commission subsidiarity list would constitute an attempt on the part of Germany to effectively veto the ban as infringing on national sovereignty.<sup>47</sup> While the advertising ban was not ultimately abandoned on the subsidiarity principle, PM had some initial success in achieving industry goals. This fact is highlighted in a 1993 memo from David Greenberg, a Corporate Affairs executive with PM-EEC and later PMI's Senior Vice President for Corporate Affairs:

There is movement in the commission and member states ... to re-examine some EC legislative proposals on the basis of “Subsidiarity”.... The German Government has included the EC ad ban in its list of directives to be dropped out under the subsidiarity principle.<sup>48</sup>

These documents suggest a that PM may have had a high level of access to the German government, and that PM’s lobbying tactics may have directly influenced German policy.

Another governmental supporter of the German pro-industry position was Dr. Werner Chory, the German Secretary of State in the Federal Ministry for Youth, Family, Women, and Health in 1990. According to Douglas Herbison, a PM lobbyist in Brussels, Chory was “in favour of a system of voluntary self-regulation” (that the tobacco industry supported) and opposed to any plans in the EC for a complete ban on tobacco advertising.<sup>42</sup>

While the industry’s plans for other nations involved the use of a public relations “action kit” developed by the advertising firm Leo Burnett, the action kit was not used in the German campaign. Rather, actions in Germany were based upon close interpersonal connections to German industry and government:

Strategy base[d] upon inter-personal contacts of PMG [PM-Germany]: action kit not used. LB [Leo Burnett] in good contact with local management, and with ZAW [Federal Advertising Organization].<sup>40</sup>

A plan prepared for PM in 1992 by Burson-Marsteller, the international public relations firm employed by PM worldwide, demonstrates the strength of the industry’s existing personal ties to the German government. The plan urges PM to maintain the status quo with respect to Germany, even though industry efforts against growing support for the ban had intensified throughout Europe:

Objective: Secure status quo both at national and European level; prevent “localization” of German anti-advertising sentiment via municipal ordinances against cigarette ad posters, etc.

Strategy: Continue current strategy and continue to feed legislators with solid “proofs” on the constitutional, legal, economic and philosophical basis of German position. Ensure that industry self-regulates promptly if public and political opinion seems to be turning against one form of marketing (e.g. aggressive sampling, cinema ads, posters near educational facilities, etc.)<sup>51</sup>

Following standard tobacco industry arguments, the German arguments against the ban in EC legislative debates were couched in terms of both marketing freedoms and questioning whether advertising bans would reduce consumption. In 1991, Douglas Herbison, PM lobbyist in Brussels, reported that:

[German European Parliament Member] Ursula Schleicher argued that a ban on advertising was not the most effective way to achieve a decrease in tobacco consumption.

She questioned whether the Commission had carried out studies which indicated that this was not the case. She opposed the ban on the advertising of a legally available product.<sup>52</sup>

The industry also planned to have Germany introduce an industry-friendly proposal designed to replace the advertising ban. Thus, PM encouraged the Germans to introduce an industry-supported compromise proposal (see “The Industry Directive on Harmonization of Advertising Restrictions” below) By 1994, the German government’s endorsement of a compromise proposal with support from British and German tobacco industry groups became central to the Industry’s strategy against the ban. As a June 3, 1994 PM Corporate Affairs Weekly Highlights memo describes:

The German Permanent Representation in Brussels is exploring a compromise which would protect most industry marketing freedoms. The British and German NMAs [national tobacco manufacturers associations] are collaborating on a compromise legislative vehicle in the form of a resolution that would be acceptable to both their governments and which might avoid the procedural problem of putting the advertising before the European Parliament.<sup>53</sup>

Germany opposed the Advertising Directive in all Council votes on the draft and planned, through the subsidiarity process.

Following passage of the ban, Germany implemented the tobacco industry's contingency plan of challenging the ban before the European Court of Justice to have the directive annulled (see “Contingency Planning” below).

## ***ii. United Kingdom***

The UK played a key role in maintaining the blocking minority against the advertising directive in the Council of Ministers. A 1993 PM Marketing Freedoms Plan states: “lobby UK Cabinet, deregulation Czar and European Affairs Minister [and] expand contacts with Labor Party.”<sup>44</sup> Furthermore, PM cultivated and maintained contacts with key government officials such as Prime Minister Margaret Thatcher and Kenneth Clarke, the Secretary of State for Education and Science in 1992.

Prime Minister, Margaret Thatcher publicly expressed strong opposition to the EC Advertising Directive, denouncing the EC’s “meddling” in the domestic affairs of member states.<sup>54</sup> In July, 1992, following the end of Lady Thatcher’s tenure as Prime Minister, Philip Morris Companies, the parent organization of Philip Morris International, hired Thatcher as a consultant. Michael Miles, CEO of Philip Morris Companies, informed the Board of Directors of Philip Morris Companies that:

Mrs. Thatcher would be available to consult with us for an initial three-year period, and that the fee we would pay for those services would consist of a \$250,000 annual payment to her, and a \$250,000 annual contribution to the Margaret Thatcher Foundation [a charitable trust established by Thatcher].<sup>55</sup>

According to *The Sunday Times (London)*, PM viewed Thatcher as potentially useful in their effort against the EC Advertising Directive. As an article from July 19, 1992 reports:

An internal [PMI] company memorandum dated March 31, 1992 ... invites senior executives to suggest ways in which Thatcher could be best employed.

The memo, from Geoffrey Bible, executive vice-president (International) of Philip Morris Companies ... describes key areas where the company believes it can draw on Thatcher's extensive international experience and expertise. These include the proposed EC ban on tobacco advertising...<sup>56</sup>

PM also established contact with Kenneth Clarke, British Secretary of State for Health from 1988-1990, Secretary of State for Education and Science from 1990-1992, and Chancellor of the Exchequer from 1993-1997.\* A correspondence from 1992, between Clarke, then Secretary of State for Education and Science, and Ian Sargeant, Director of Corporate Affairs, Policies and Programs for PM-EEC illustrates the level of rapport and common cause between the two men:

Dear Secretary of State...

26 February 1992

If the UK and Germany remain solidly opposed to the advertising and sponsorship ban, Holland and Greece will be equally solid and the blocking minority is assured. This is something I am sure you would welcome as much as we would.

Knowing your interest in motor racing, may I take the opportunity of asking you and Mrs. Clarke to be my personal guests at a Formula One Grand Prix race. The British Grand Prix takes place on 12<sup>th</sup> July but, if this is not convenient, we would be happy to welcome you to any other venue during the calendar.

Yours Truly, Ian Sargeant<sup>57</sup>

Later, Clarke responded to Sargeant,

Dear Mr. Sargeant...

1<sup>st</sup> May 1992

It was a great pity that someone had insisted that your [PM's] logo should be removed from the car for the occasion. I remain happily opposed to the advertising and sponsorship ban being proposed by the Commission. I will certainly do my best to ensure that our Government maintains its opposition.

---

\*Clarke's role in British Government and his links to the tobacco industry continued. In the Summer of 2001, Clarke was a Minister of Parliament and an employee of the British-American Tobacco Company (BAT), which has paid Clarke £100,000 a year to serve as deputy chairman since 1998. Clarke came under worldwide scrutiny in 2001 during a bid for the leadership of Britain's Tory party. Just prior to announcing his bid, Clarke was linked to a series of BAT efforts to smuggle cigarettes illegally. Campbell, D, Maguire, K "Clarke Company Faces New Smuggling Claims" *The Guardian* (London): August 22, 2001)

I always attend the British Grand Prix and I have already purchased two good Grandstand tickets for the 12<sup>th</sup> July for myself and my adult son. I would be delighted to meet up with you and your colleagues at Silverstone on that day if the chance presents itself.

Yours Truly, Kenneth Clarke<sup>58</sup>

The tobacco industry closely monitored UK governmental actions. To this end, industry operatives circulated long reports discussing large or minute shifts in the official position, and aimed to create debate surrounding EC interference in national matters. For example, a November 1992 report written for PM by PRIMA Europe, a London-based public relations consulting firm, described the following contradictory positions of the UK government:

The key conclusions to be drawn are:

1. Positively, the UK government is not certain to succeed in its attempt to defer any decision on the EC advertising directive until next year, whilst avoiding being trapped by domestic circumstances into conceding the case for an advertising ban;
2. Negatively, the UK government has been forced to toughen its stance on all anti-smoking measures other than a compulsory ban, and it has conceded that there is a link between advertising and consumption of some kind;
3. More generally, there *appears to be a relatively short window of opportunity in which it may be possible to kill the directive altogether*, building on anti-Brussels feeling generated by the Maastricht ratification process, the need to give substance to subsidiarity, the change-over of Commissioners at the end of the year, and the fact that the incoming Danish Presidency of the Council of Ministers has similar reservations to the British about the directive.<sup>47</sup>  
[emphasis in original]

The tobacco industry also employed contacts with British media and business groups in general to promote the tobacco industry's opposition to the advertising directive. An April 1991 letter from Barry Bramley, Chairman of British American Tobacco (BAT) to Frank Rogers, the Deputy Chairman of the *Daily Telegraph* newspaper in London, discusses BAT contacts with CBI, the Confederation of British Industries, and the European Round Table, a consortium in Brussels representing various large business interests across Europe.<sup>59</sup> Notably, Keith Richardson, named in the letter as the Director of the European Round Table, was also Head of Public Affairs at BAT until 1988.<sup>60</sup>

I discussed the threat to advertising with John Banham [Director] of the CBI recently and he shares our concern about the wider implications for business in general.

I understand from Keith Richardson of the European Round Table that he referred during your recent meeting to the many approaches that have been made to various Commissioners, urging them to oppose the imposition of total advertising bans. The first product to be affected by such a ban would be tobacco.<sup>59</sup>

This effort would bear fruit for the tobacco industry.

In November 1991, Linda Jackson, Senior Legal Advisor to CBI sent a letter to David Steel, Clerk and Adviser to the European Legislation Committee of the British House of Commons outlining CBI's opposition to the EC advertising directive. The CBI statement of opposition uses arguments frequently made by the tobacco industry against the ban, stating:

The CBI wholeheartedly supports the creation of the single market by 1992. However it is difficult to see how the implementation of an almost total ban on tobacco advertising, or any other product which can be sold legally within the Community, can be said to advance the principal aims of the single market. Our concern about the use of Article 100A is further heightened by the fact that much of the support for a total ban on tobacco advertising comes from member States which have a monopoly tobacco industry and, therefore, a commercial industry to protect.

A dangerous precedent would be set if the advertising of a legal product was banned ... To replace these [voluntary national advertising codes] would undermine the widely accepted principle of subsidiarity.<sup>61</sup>

Additionally, CBI sent a blind copy of the letter to Brendan Brady, Manager for Government and Corporate relations at BAT, avoiding disclosure of its cooperation with BAT on the matter.<sup>62</sup>

Ultimately, the UK government helped to sustain the strong blocking minority in the EU. According to PRIMA Europe:

The UK presidency has been keen to forestall any early report to COREPER [the Committee of Permanent Representatives to the Council of Ministers] and the full Council by the Health Working Group of the national civil servants which has been considering the draft directive in Brussels. The Health Working Group is still bogged down on technical differences, not least because the blocking minority of member states (UK, Germany, Denmark) sees no merit in a substantial political discussion in full Council. Any vote will have to await the Danish Presidency (of January – June 1993).<sup>47</sup>

As in Germany, PM efforts in the UK sought to employ the subsidiarity debate to prevent passage of the advertising ban. In addition to cultivating opposition to the ban with leaders such as German Chancellor Kohl, the industry also heavily lobbied UK legislators, particularly during the UK presidency of the EC. As reported by PRIMA:

*The subsidiarity debate gives the tobacco industry a one-off opportunity to argue, with almost certainly the full support of the UK presidency, that the tobacco advertising directive should now be withdrawn...whether this can be made to happen will depend in part on effective lobbying by the tobacco industry in Brussels, London and Copenhagen.*<sup>47</sup> [emphasis in original].

However, with the rise to power of the Labor government in 1997, the official UK position shifted and they voted in support of the EC Advertising Directive in the Council of Ministers in 1997.

### *iii. Netherlands*

The Netherlands was allied with the tobacco industry in opposition to the EC Advertising Directive, including after passage of their own weak national tobacco advertising code in 1992-1993. The 1991 PM EEC Corporate Affairs Agenda discusses lobbying efforts in the Netherlands:

Excellent relation[ships] LB [Leo Burnett Agency]/PM with full coordination. Good contacts have been developed with COREPER [Permanent Representatives to the EC Council of Ministers] and selected ministers. The [lobbying information] kit is being fully exploited.

An advocacy advertising campaign was launched earlier this year, with a focus on humour... good results. LB was heavily involved in the advertising community's preparation and publication of "The economic importance of advertising in the Netherlands," which is now widely distributed.<sup>40</sup>

The tobacco industry worked hard to revise the Dutch Code, the voluntary industry code of conduct by which tobacco advertising is currently regulated in the Netherlands, and prevent weakening Dutch opposition to the EC Advertising Directive. A 1992 Marketing Freedoms plan prepared for PM by the public relations firm Burson-Marsteller states:

Objective: Prevent attacks on the Dutch code and on Dutch position at European level.

Strategy: Conduct current re-negotiation of Dutch code in such a way as to "resolve" issue in Holland for 93-94 period. Prevent Christian-Democrats from changing opinion on tobacco advertising via intense lobbying (very new issue), including lobbying by media representatives in the Netherlands.<sup>51</sup>

Further, a 1993 PM marketing freedoms presentation states:

Use successful revision of Dutch code and contacts with the Economics Ministry to keep the Health Minister from undermining the Dutch position. Develop plan to maintain Dutch vote after 1994 election.<sup>44</sup>

Ultimately, with the collapse of the blocking minority in the Council of Ministers, the Netherlands voted for the passage of the EC Advertising Directive in 1997.

### *iv. Denmark*

During the initial debates regarding the proposed advertising ban, Denmark took a vocal position against it. Douglas Herbison, a PM lobbyist in Brussels reported to PMI executives that:

Denmark, which apparently took the strongest line against the idea of a total ban, argued that action on pricing and health education would be the most effective way to alter consumer behaviour.<sup>63</sup>

Later, Denmark participated in the blocking minority, although not as consistently as Germany, the UK and the Netherlands.

Denmark's position in the blocking coalition seems to have been largely determined by the German stances and leadership on the issue. In addition, the Danish EC delegation argued the industry position that the advertising ban was an unnecessary restriction on free circulation of international press. This argument increased opposition to the ban within the Council of Ministers.

The plan that Burson-Marsteller developed for PM for 1992-1993 emphasizes the importance of the tobacco industry remaining in the shadows and operating through seemingly neutral third parties:

Objective: Secure Danish position at European level and stimulate Health Minister to propose alternative to current EC proposal

Strategy: Continue and increase (if necessary) current lobbying efforts

- Let Germans (publishers, advertising industry, etc) lead these efforts
- Continue to make of [*sic*] the Danish reservation on free circulation of foreign press a major issue<sup>51</sup>

A 1993 PM Marketing Freedoms presentation further urges PM operatives to “lobby the Danish Parliamentary EC and health Committees to deepen the Danish reservation to the ban.”<sup>44</sup>

The Danish lobbying efforts were supported by a strong public relations campaign conducted through the third party organizations created to oppose the advertising restrictions. One important lobbying organization, the Committee for Freedom of Commercial Expression was created and organized by the tobacco industry to focus on cultivating opposition to the ban in influential Danish public, social, and governmental circles.

The Committee was designed to appear to the public as an independent third party rather than a front group established by the tobacco industry.<sup>64</sup> An August 1991 speech by Bobby Kaplan, Manager of Communications for PMI Corporate Affairs at an International Marketing Training Conference outlines the successes of the campaign in securing Danish opposition to the advertising ban:

The first element of our defense of marketing freedoms is to build the necessary political opposition to stop restrictions. To achieve this in each of our markets, we need the following program:

1. Prepare the necessary communications material, including the role and benefits of advertising, advertising and initiation, advertising and women, advertising and developing world, etc. These communications are either already available or being prepared by PMI.
2. Develop a new comprehensive communications program so that our point of view is being regularly heard and understood by the media, the public, the legislative bodies and by industry at large. We're working with Regional Management to implement such programs.
3. Foster genuine third parties or coalitions to support marketing freedoms.

In Denmark, for example, we have created a coalition known (in English) as the Committee for Freedom of Commercial Expression. *We were able to recruit more than 50 prominent Danes, including a leading Constitutional lawyer, the President of a major brewery, a leading Danish writer and philosopher and a well-known architect. The group has lobbied, conducted media briefings, participated in debates, and written articles and conducted and publicized an opinion poll which showed more than 70% of Danes opposed the EEC advertising Directive and any move to ban tobacco advertising.* What tangible results has this produced?

- The coalition has positioned itself as the voice of commercial free speech. Members of government (including the Minister of Health) now regularly initiate and consult with coalition members.
- *The coalition was probably the single greatest factor in securing Denmark's neutrality on the Advertising directive [in] the European Council in May 1990.*
- The coalition was instrumental in securing the commitment and public declaration of the Minister of Health to oppose an advertising ban.
- The coalition and its ideas have attracted substantial and positive media coverage and editorial support.
- The coalition orchestrated the public release of the International Publisher's Association's declaration opposing tobacco advertising bans.

Why is its successful? The answer is simple, even if the execution is not. *First, its members have no economic self interest in the tobacco industry or in whether or not tobacco advertising is permitted or banned. Second, each individual is credible and well-regarded within their respective fields. And finally, the functioning of the coalition is managed at arms length – distanced from PM.*<sup>64</sup> [emphasis added]

The industry often creates and uses such groups to its advantage in tobacco control legislative battles.<sup>65</sup>

Later, as Danish resolve to oppose the advertising ban wavered, PM worked through Leo Burnett Company to lobby the Danes for their continued support. Carla Michelotti, an executive with the Leo Burnett advertising agency, reported in March 1992

to the PM Europe executive team the results of her meeting with the Danish representatives concerning:

... the “rumor” that Denmark was changing its vote. Last Thursday [Leo Burnett representative] Otto [Baumrucker] had a meeting with the Danish COREPER [permanent representative to the Council of Ministers], Marianne Lauridsen. The Danish COREPER told Otto that the Danish government will sustain their position against a tobacco ad ban in the event that a vote is taken on May 15<sup>th</sup>....

Ms. Lauridsen told Otto that she is concerned that in the event UK changes its vote (post the April 9 election) that the Netherlands will follow the UK. As of last Thursday, she told Otto that Denmark would not be changing its vote in the event the UK changes its position regarding tobacco advertising.<sup>66</sup>

Ultimately, in the final vote on the EC advertising directive in 1997, Denmark abstained from voting.

#### *v. Greece*

Although Vasso Papandreou, European Commissioner from Greece, introduced the 1989 EEC Draft Directive on Advertising,<sup>67</sup> other elements of the Greek delegation in Brussels worked to undermine many tobacco control initiatives in the EC. With respect to the advertising ban, Greece maintained its opposition to a number of initiatives even though it was not formally part of the blocking minority at all times. The tobacco industry utilized high-ranking contacts in the Greek government and prominent third party organizations to help them oppose the advertising ban.

A 1992 marketing freedoms plan prepared for PM by the public relations firm Burson-Marsteller discusses the initiatives in Greece to block the advertising ban:

Objective: Prevent Health Minister to take any measure restricting advertising and sponsorship, both at EC level and an national level.

Strategy:...

- Use good contacts with Prime Minister and other Ministers to keep control of the issue within Govt. and in Parliament and secure negative vote in the council
- Use PM-sponsored events ... to secure good political contacts and favorable public opinion
- Avoid provocative marketing (i.e. posters deregulation)<sup>51</sup>

Later, a 1993 PM marketing freedoms presentation states:

Work with Greek billboard interests, growers and the Greek ambassador to shore up Greece [opposition to the ban]. Follow up with the economics minister and the special advisor to the prime minister.<sup>44</sup>

These documents suggest that the tobacco industry had access to high levels of the Greek government.

The lobbying effort against the ban was also bolstered by ESKEE, the Hellenic Association of European Tobacco Companies. ESKEE circulated a strong statement to EU legislators and press officials stating their opposition to the advertising ban objecting to the measure for the following reasons:

- Principle of subsidiarity
- Different roles of the health authority and the industry
- Already present tobacco advertising health warnings
- Impact of lower tar products
- Advertising bans do not reduce tobacco consumption
- Impact on quality and price
- Economic impact on Greece<sup>68</sup>

In 1997, Greece voted in favor of the tobacco advertising directive.

#### *vi. Spain*

Spain was never a part of the blocking minority, but the industry made efforts to keep Spanish legislators from becoming strong proponents of the EU advertising ban. PM also cultivated non-governmental third party alliances to oppose the ban. According to a 1992 marketing freedoms plan prepared for PM by Burson-Marsteller, the industry strategy in Spain sought to undermine both the proposed EC Directive as well as a Royal Decree banning most forms of tobacco advertising:

Objective: Keep proposed R.D. [Royal Decree] in limbo and have it killed by a solution at European level

Strategy: Achieve credible “European solution” as soon as possible

- Keep allies coalition alive and ready to react
- Continue programs aimed at getting support from politicians, opinion leaders and press
- Use “PM Art Award” to create awareness of threat by EC directive to national corporate giving programs by tobacco companies in Spain<sup>51</sup>

As in other countries, PM executives in Spain also used governmental connections to attempt to influence EU policy in Brussels. A PM plan from 1993 states:

Work through TSA [Spanish tobacco monopoly Tabacalera, S.A.] President Perez to encourage a shift in the Spanish and Portuguese positions [regarding the EC advertising directive].<sup>44</sup>

A 1993 PM memo from Walter Thoma, President of PM-EEC to Pedro Perez, president of Tabacalera, S.A., acts upon this plan:

I hasten to send you the promised document on the proposed EEC Advertising Ban and sincerely hope that you will be able to convince your Minister of Health to propose and indeed vote for the EEC minimum harmonization compromise.<sup>46</sup>

Ultimately, in 1997, Spain joined Denmark in abstaining from voting on the EC advertising ban directive that passed in the Council of Ministers.

## **B. Third-Party Allies and Front Groups**

Tobacco industry lobbying efforts in individual nations relied in part on the industry's ability to establish alliances with national politicians and interest groups. Additionally, as described above, the industry created a purportedly independent third party ally in the Committee for Freedom of Commercial Expression. Beyond the efforts at the level of individual nations, the tobacco industry also sought out alliances with groups representing various industries on a pan-European level. The tobacco industry cultivated many of these international, non-governmental third party allies in their opposition to proposed EC advertising ban to generate widespread corporate and public opposition to the advertising directive. Through alliances with European multi-industry trade organizations, European advertising and media associations, and Formula 1 racing, the industry sought to establish a political and public environment that was hostile to the EC Directive and capable of influencing EC legislation.

### ***i. Multi-Industry Groups***

Industry strategies against European advertising restrictions involved attempts to form alliances with groups representing broad European industrial interests. The tobacco industry had a plan to employ the opposition of allied industrial sectors to attack restrictions on European tobacco advertising as early as 1980. In January 1980 J.M. Hartogh, a PMI Vice President, presented a plan to the lobbying group EAAA, the European Association of Advertising Agencies, focusing on cultivating a strong "channel" for the industry's actions through a third party. Possible "channels" named are the Union of Industrial and Employer's Confederations of Europe (UNICE) and the International Chamber of Commerce (ICC), powerful lobbying groups representing a broad range of European industrial interests.

With this alliance set up as a main route of industry actions, a strategy group could be formed including the third party "channel," tobacco industry groups, advertising industry groups, and media organizations. Finally, an action plan could be formulated and carried out:

1. Find channel – a third party (UNICE or ICC)
2. Form a strategy group, including:
  - ICOSI [International Committee on Smoking Issues; a tobacco industry committee]
  - EAAA [European Association of Advertising Agencies]

- IUAA [International Union of Advertising Agencies]
- Third Party
- (3 Media) [Unspecified Media Organizations]

3. Group makes a plan:

- seminars, forums, symposiums
- booklets
- publication of facts and research
- spokesmen: political and others
- sponsor independent research
- voluntary initiatives
- PR coverage all above

4. Approve Plan

5. Form team to execute action plan (support pledged)

6. Action through third party<sup>69</sup>

Thus, by 1989, when the tobacco industry began actions against the proposed EC advertising ban, the industry thus already had experience in planning to use third party allies to carry out strategy against advertising restrictions in Europe.

In addition to finding third party groups to work through covertly, the tobacco industry sought to build coalitions with other industrial sectors and lobbying groups. According to the PM EEC Corporate Affairs Agenda for 1991, these allied groups included:

- The International Chamber of Commerce (the marketing commission in particular). The ICC's General Secretary sent letters to key EC officials.

- UNICE, the Union of Industrial and Employers' Confederations of Europe.<sup>40</sup>

Together, these covert third party and coalition-building actions were focused on combating European tobacco advertising restrictions.<sup>40</sup>

***ii. Advertising and Media Industry Groups***

The tobacco industry also established strong alliances with advertising and media groups in Europe. A 1990 lobbying and action information kit described in the PM EEC Corporate Affairs Agenda For 1991 included:

- Position papers and letters for media owners and advertising agencies with the aim of sensitizing them to the issue and raise their voices in front of local governments, COREPER [Permanent Representatives to the EC Council of Ministers] and the EC Commission.<sup>40</sup>

The PM EEC Corporate Affairs Agenda For 1991 also describes plans “to make the communications and business communities in Europe appreciate the dangers of the ‘domino effect,’ and to activate them in the defense of marketing freedoms for

tobacco.”<sup>40</sup> The idea of the “domino effect,” in which the creation of strong advertising restrictions in one country or legislative body would necessarily lead to restrictions elsewhere, was a constant industry worry and an argument used by allies of the tobacco industry against advertising bans throughout Europe.

A 1992 speech by a Paul Maglione, Director of Communications and Issues Management, Phillip Morris Corporate Services, Brussels, to the UK Chapter of the International Advertising Association, an advertising industry lobbying group, discussed this effect:

The so-called ‘domino effect’ has now been understood loud and clear by the advertising, media, and publishing communities, which have publicized their oppositions to advertising bans to an extent that we could only dream about two years ago.<sup>70</sup>

Using the lobbying and information kit, a pan-European lobbying approach was taken using numerous third parties.

These third parties included advertising industry groups such as the European Association of Advertising Agencies (EAAA), the International Advertising Association (IAA), the European Advertising Tripartite (EAT), and the European Group of Television Advertising (EGTA) as well as tobacco industry trade groups such as the Tobacco Advisory Council. The PM EEC Corporate Affairs Agenda for 1991 reports:

Permanent contacts have been established with EAAA..., IAA..., EAT..., the Tobacco Advisory Council,... the EAT Domino Task Force..., and the coordination of messages and programs is being improved. The information kit is being circulated across all these organizations and affiliates (over 200 agencies in Europe), the EGTA, and numerous press associations...<sup>40</sup>

The agenda goes on to note specific activities coordinated between PM and advertising industry groups:

-EAT, the European Advertising Tripartite. PM organized with them a major press conference (Feb. 1990) with representatives from the press, advertisers and agencies. Press coverage was substantial.....

-WFA, the World Federation of Advertisers, for whom PM prepared a definition of sponsorship submitted to the Council of Europe. PM also is actively involved in the working groups on advertising issues, and participated as a speaker at the last annual WFA conference in Venice.<sup>40</sup>

Targeted public communications activities designed to reach a large public audience were implemented throughout Europe, utilizing tobacco industry contacts in newspapers, television, and sports. These included:

-Full page ads on the marketing freedom issue in 10 major European dailies signed by Jacques Seguela of the RSCG advertising agency, on the eve of the EP vote in March [1990].

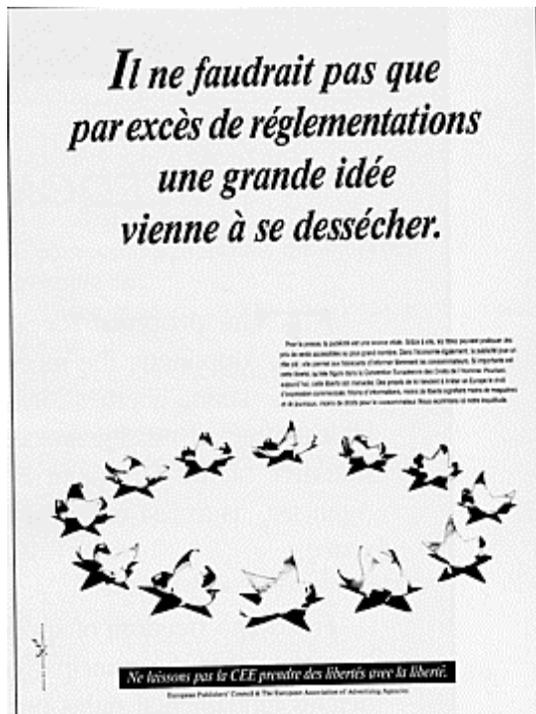
-Interviews set up ... for the specialized and general press for the leading executives of advertising organizations.

-A Viznews television feed containing celebrity interviews on the sports sponsorship issue, which was seen by 20 million viewers in Europe.

-A local coalition of opinion leaders in the Netherlands, “Multiple Choice,” which undertook communications efforts and lobbied the Dutch government on the EC directive.

-In Italy, the sponsorship of a guidebook to sports sponsorship and the organization of a petition calling for the right for sports bodies to choose their own sponsors from any legal industry.<sup>40</sup>

The tobacco industry also supported the formation of media groups intending to oppose the advertising ban. A 1991 letter from BAT chairman Barry Bramley to Frank Rogers, Deputy Chairman of the *Daily Telegraph* in London, states how they were “delighted to hear of the formation of the European Publishers Council and its stated intention to defend advertising freedoms within the European Single Market.”<sup>59</sup>



**Figure 1.** *The European Publishers’ Council and the European Association of Advertising Agencies campaign against the Tobacco Advertising Directive. Translated, the headline reads: “It is unnecessary that a great idea should dry up due to excess regulations.” The footer states: “Let’s not let the EEC take liberties with liberty.” (In: BASP Newsletter 15, January 1992.)*

In 1993, the European Publishers Council, consisting of some of the largest newspaper publishers in Europe, released a news statement relating their strong opposition to the Advertising Draft Directive:

The European Publishers Council, representing major newspaper and magazine publishers in Europe, opposes a ban where: 1) there is no evidence to support that advertising increases overall tobacco consumption; 2) products legally for sale may not be advertised; 3) a ban would represent a curtailment of freedom of speech; 4) and where existing legislation and industry self-regulation already provide a high level of consumer protection.<sup>71</sup>

The tobacco industry also hired purportedly independent third party groups to issue papers against the advertising directive without acknowledging industry funding or ties. Through the Adam Smith Institute (ASI), a British policy institute based in London, the tobacco industry commissioned two “separate but complementary projects... within a total budget of £30,000.”<sup>72</sup> These projects would argue against the EC advertising directive by placing “the EC anti-tobacco proposals in the context of a host of proposals which progressively restrict personal freedom.”<sup>72</sup> Regarding one of the reports, the ASI “agreed in principle to adopt the proposed report and effectively to market it as an ASI report.”<sup>72</sup>

### ***iii. Formula 1***

Recognizing the popularity of Formula 1 racing in Europe (as well as its importance as an advertising venue for the tobacco industry), the tobacco industry organized a campaign to secure the racing industry’s position against the EC advertising ban. As the PM EEC Corporate Affairs Agenda For 1991 reports, “following the threats on advertising and sports sponsorship – particularly worrying for motor racing – a program has been established to strengthen the relations with the F1 [Formula 1] media, in order to sensitize them to the issue and make them react against the proposals of restrictive legislation, both at the European and national (France, Spain, Belgium) level.”<sup>40</sup> The tobacco industry effort to ally itself with Formula 1 included speeches at Formula 1 press gatherings, regular personal mailings to about 300 journalists covering Formula 1, and the establishment of personal contacts in the field.<sup>40</sup>

## **C. Actions Against the European Bureau for Action on Smoking Prevention (BASP)**

Where groups such as the EAT and IAAA constituted third-party allies for PM, the tobacco industry recognized the European Bureau for Action on Smoking Prevention (BASP), as an opponent that could mobilize support for the Advertising Directive. BASP, founded as the Belgian Association for Smoking Prevention on May 26, 1988, was incorporated into the EC as the European Bureau for Action on Smoking in 1990. BASP served the European Commission as a consulting service for tobacco control efforts in the EC and across Europe. Its primary role was to advise the European Union’s “Europe Against Cancer” program and provide information regarding the tobacco industry to the EC. It also coordinated national anti-tobacco campaigns into a broader, European-wide movement.<sup>73</sup>

Philip Morris viewed this development with concern and paid close attention to this fledgling health group. A 1994 PM document discusses the main functions of BASP, stating that it was founded:

By the E.C. in Belgium mainly to collect, analyze, and criticize any document or argument developed by the tobacco industry.

BASP provides the E.C. opinion leaders (civil servants, members of Parliament) and pressure groups related to it with renewed anti-tobacco arguments.<sup>74</sup>

An internally distributed PM memo states that the name change “reflects the wider lobbying and information role BASP has undertaken for itself in the European Community since its inception... This trend of ‘europeanization’ by the anti-tobacco groups appears to be accelerating dramatically as we approach 1992.”<sup>75</sup>

BASP produced a range of materials to aid advocates of the advertising ban. Philip Morris tracked these efforts; a 1990 internal PM memo reported:

BASP has maintained an aggressive anti-tobacco stand in Europe over the past 2 years, using the ‘BASP Newsletter’ as the main vehicle for its attacks on the European tobacco industry and support for the ‘Europe Against Cancer Action Plan’. The newsletter is distributed widely with the EC, being sent to all members of the European Parliament as well as Commissioners and their staff.<sup>75</sup>

The industry was threatened by the release of the newsletter and major BASP reports, as John Lepere, head of CECCM (the Confederation of European Community Cigarette Manufacturers), a committee formed to coordinate tobacco industry activities in Europe, wrote to his colleagues in 1993 to say that “BASP publications usually signal the current thinking of DG V [the bureau of the European Commission responsible for Employment, Industrial Relations, and Social Affairs] in relation to the anti-tobacco campaign as past of its ‘Europe Against Cancer Programme.’”<sup>76</sup>

The BASP publication “Give Children a Chance,” published in March 1991,<sup>77</sup> included research on the importance of advertising to the tobacco industry, the effectiveness of advertising bans on reducing consumption, and the legislative aspects of the EC Directive on Tobacco Advertising and Sponsorship.

The tobacco industry recognized the “Give Children a Chance” report as an important aid to both governmental and non-governmental advocates of the advertising ban, and responded with public relations maneuvers against the report. A May 1991 letter from D.R. Hare, Director of Trade Affairs at the Tobacco Advisory Council, a British tobacco manufacturers group, shows the industry as working through the a third group, the Council for British Industry (CBI) to argue against the conclusion of the “Give Children a Chance” report:

A letter...has been sent to the CBI .... There was very little time as we needed to get this cleared yesterday. I picked what we considered to be the main points from the BASP report [“Give Children a Chance”] on which CBI could respond.<sup>78</sup>

The letter contains detailed arguments against the BASP positions on the functions of advertising, the effectiveness of advertising bans, and the effectiveness of voluntary agreements.<sup>78</sup> Thus, the industry's effort against the EC ad ban included campaigns focused on countering the efforts of BASP both directly and through a third party pro-ban lobbying group.

PM regarded BASP's efforts as so effective in influencing EC tobacco control policy debates that they advocated for the creation of a "BASP-style information bureau" of their own, as shown in the following PM Corporate Affairs 1994-1996 Plan:

Convince other tobacco companies to help us create a BASP-style 'information bureau' to regularly publicize all favorable findings to media, EC officials, and allies<sup>79</sup>

BASP produced much controversy and ire within the EC when it reported that the EC was spending £719 million a year on subsidies to farmers in Greece and Italy to grow low grade tobacco while only spending £1 million a year on anti-smoking efforts (of which £270,000 went to BASP).<sup>80</sup> Apparently, the tobacco had little market value and most of it was exported at low prices to the developing world.

BASP also exposed how the tobacco industry circumvented EC labeling regulations providing for health warnings on cigarette packaging. A study conducted by BASP revealed that the EC labeling directive was weak and not enforced as the industry created under-sized warning labels and used non-contrasting colors that tended to obscure the health messages.<sup>81</sup>

The governments of Germany, the UK, and the Netherlands were displeased with BASP's advertising and tobacco subsidy reports as well as the widespread anti-tobacco campaigns it orchestrated at the national and EU level.<sup>73</sup> (The delegations from these three countries also were the most sympathetic to the tobacco industry and formed the core of the blocking minority against the advertising ban directive.) These three governments pressured the European Commission in 1995 to withdraw funding from BASP and replace it with a weakened successor organization named the European Network for Smoking Prevention to gather tobacco-related information but not engage in any of the lobbying or coordination activities of its predecessor.<sup>73</sup>

While the Commission's spokeswoman denied that they had been pressured to disband BASP, Leonard Doyle, then correspondent for the London-based newspaper *The Guardian* and foreign editor for the London-based *Independent* in 2001, reported evidence to the contrary:

Internal Commission correspondence, obtained by the Guardian, reveals that furious EU officials took steps to ensure that BASP was effectively excluded from future funding, because of the perception that it had become "the leading anti-tobacco lobby" in Europe.<sup>80</sup>

The industry scored an important victory when BASP, a leading opponent whose tactics the industry even sought to emulate, was dismantled by the efforts of the countries

leading the opposition to the advertising directive and other tobacco control legislation. The end result was a replacement of the vocal and effective anti-tobacco organization with one that had much less funding and a restricted mandate. Efforts by the tobacco industry to restrict the activities of tobacco control agencies and prevent them from engaging in the policy making process are used widely by the tobacco industry to protect its interests.<sup>82,83</sup>

As a result of these actions, in 1995 the advertising ban proponents lost an important ally whose efforts directing media attention and coordinating tobacco control lobbying were absent in subsequent fights to get the directive passed.

## **6. Alternative Proposals**

Alongside their attempts to block the passage of the draft directive through national lobbying efforts and actions at the level of third parties, the tobacco industry developed alternative, permissive proposals intended to take the place of the more stringent EC Directive. These proposals were generated through the Confederation of European Community Cigarette Manufacturers (CECCM), a coalition of European tobacco manufacturers and National Manufacturers Associations. A May 12, 1992 memo from Ian Sargeant Director of Corporate Affairs, Policies and Programs for PM-EEC, to PM executive Johan Puotilla, states that

There are two projects under development in CECCM which are designed to fill the vacuum that might be created if the Commission's proposal is definitively defeated through the blocking minority. The first is a directive on minimum harmonization; this would be a list of restrictions that would be the minimum that each member state must apply—they could go further, all the way to a total ban e.g. Italy, Portugal, if they chose. The other scheme is an EC-wide industry code of conduct on advertising that would reassure the politicians that the industry had put its own house in order and would remove the political pressure to legislate.<sup>84</sup>

Thus, the industry produced two alternative measures to the EC Draft Directive on Tobacco Advertising.

The first was a “revised draft directive on tobacco advertising,”<sup>85</sup> authored by the tobacco industry. The directive would aim for “minimum harmonization,” meaning that it would seek to set a standard, minimal level of advertising restriction across the Community. Individual nations would then be allowed to enact stricter measures as they saw fit.

Industry documents clearly describe the initial plan for the submission of this draft,<sup>41,86</sup> and suggest that the German representation to the Commission may have promoted this proposal.<sup>87</sup> Through such a strategy, PM executives hoped that the presence of such a compromise would not only fill the gap created if the EC proposal were to be defeated, but could actually hasten the defeat of the proposal, persuading pro-ban factions, such as Irish European Commissioner Pádraig Flynn to withdraw and amend the EC proposal:

Conditions are therefore now ripe to attempt to persuade Commissioner Flynn to announce withdrawal and amendment of the proposal. To do so, he would need to be convinced that no qualified majority was ever likely to emerge for a total ban. This would be especially plausible if some pro-ban Member State urged that the proposal be withdrawn in favor of a compromise....<sup>87</sup>

As a second alternative measure, CECCM developed a voluntary code of practice in advertising and sponsorship for the tobacco industry. This code was designed to substitute minimum restrictions for the more stringent EC advertising ban, substituting industrial self-regulation for regulation by government agencies.

### **A. The Industry Directive on Harmonization of Advertising Restrictions**

Industry documents state that the industry worked with Germany to introduce a weak proposal designed to replace the proposed strong EC advertising ban. This proposal (Table 2) was drafted by the tobacco industry and submitted, without acknowledgement of its true origin,<sup>41</sup> through German representatives to the EC.<sup>53</sup> The proposal was produced by the Confederation of European Community Cigarette Manufacturers (CECCM), an organization that the industry created to coordinate political efforts of all major EC tobacco manufacturers. This proposed initiative was intended to be submitted to the European Commission “by a third party and that it should not be attributable to the tobacco industry.”<sup>84</sup>

Dr. Marion Funck, a representative to CECCM from the German tobacco company Reemtsma, was the lead author of the industry proposal.<sup>88</sup> On April 24, 1992, “the final proposal for the minimum restrictions directive” was circulated among PM executives for review prior to attempts by John Lepere, head of CECCM, to introduce the directive to the EC in early May of that year.<sup>88</sup> The proposal called for harmonization of minimum restrictions among member states and allowed for free circulation of press complying with the minimum provisions of the bill. Thus, each member state would be required only to comply with a minimum set of advertising restrictions, and could enact stricter measures as they saw fit. Media containing tobacco advertisements would be allowed to circulate between EC member states if it adhered to the minimum restrictions of the directive. A summary of the draft’s main provisions appears in Table 2.

Industry documents indicate that Lepere was responsible for covertly introducing the industry-authored Directive to the European Commission. His main route of access to the Commission was through Directorate General III (DG III,) the division of the European Commission responsible for industry in the European Community.<sup>17</sup> As he writes in a memo to Wilfried Dembach, Vice President of Public Affairs and Public Relations for R.J. Reynolds Tobacco in Europe, the Middle East and Africa, the directive was intended

Table 2: Comparison of Industry Minimum Harmonization Proposal and German Compromise Proposal	
Industry Minimum Harmonization Proposal (May 1992) <sup>89</sup>	The German Compromise Proposal (May 1993) <sup>46</sup>
<ul style="list-style-type: none"> <li>• Ban on advertisements aimed at young people, featuring models of less than 25 years of age and testimonials by well-known people.</li> <li>• Ban on claims related to health properties and links with physical prowess.</li> <li>• The warning “Tobacco seriously damages health” is required on all press and billboard ads (10% of total space).</li> <li>• Information on tar and nicotine yields are required on all ads (print and billboards)</li> <li>• No cinema or radio advertising of tobacco products before 6:00 p.m.</li> </ul>	<ul style="list-style-type: none"> <li>• Ban on advertisements aimed at young people, featuring models of less than 25 years of age and testimonials by well-known people.</li> <li>• Ban on claims related to health properties and links with physical prowess.</li> <li>• National warnings or the warning “Smoking seriously damages your health” are required on all press and billboard ads (10% of total space).</li> <li>• Information on tar and nicotine yields are required on all ads (print and billboards)</li> <li>• Ban on advertisements in press appealing to youth and on billboards near schools or places attended mainly by young people.</li> </ul>

to be covertly suggested in the form of a draft directive to D.G. III of the Commission, in a way that would not be attributable to the manufacturers, individually or collectively. As you know, we have reason to believe that D.G. III may be amenable to promoting such an initiative.<sup>41</sup>

Lepere goes on to describe the initiative as “the draft minimum harmonization directive which is to be ‘leaked’ to D.G. III.”<sup>41</sup>

In a subsequent memo to CECCM members, Lepere requests final revisions to the draft, stating that “unless I hear from you to the contrary by 1 May 1992, I intend to initiate a contact with D.G. III on the basis of the enclosed [draft] on 4 May 1992.”<sup>86</sup> By mid-May 1992, efforts were still being made to introduce the draft proposal, which PM’s Ian Sargeant reported was “being kept confidential *since it has to appear to be spontaneously forthcoming from the Commission [emphasis added]*.”<sup>84</sup>

Industry documents suggest that the German delegation to the European Commission was targeted to introduce the industry proposal. According to a 1993 CECCM summary of the industry strategy against the EC advertising directive, the industry proposal was written with the intent of being submitted to the EC by Germany:

From the start of CECCM's campaign for minimum harmonization, an initiative in Council to be led by Germany was perceived to be of critical tactical import. Only Germany could be counted on unilaterally to propose minimum harmonization with minimum advertising restrictions....<sup>90</sup>

Industry documents name Martin Bangemann, a European Commissioner from Germany and head of D.G. III at the time,<sup>91</sup> as a crucial German PM ally within the EC. Bangemann's ties to the tobacco industry extend at least as far back as 1982, when he was a member of the European Parliament. In October of that year, he gave a presentation on taxation at an international workshop organized by the tobacco industry's international coordinating committee INFOTAB (later renamed ICOSI).<sup>92</sup>

In November 1991, Bangemann contacted W.C. Owen, head of Britain's Tobacco Advisory Council, to express his continuing opposition to the EC Tobacco Advertising Directive and his observation that industry arguments against the ban would be useful in "future discussions with my commission colleagues."<sup>93</sup> In 1992, CECCM Board Meeting minutes state the intent of John Lepere, Chairman of CECCM, to submit the industry-authored minimum harmonization proposal "on a non-attributable confidential basis to a member of the Bangemann cabinet."<sup>94</sup>

The 1993 PM EEC Region Three Year Plan describes Bangemann's intended role in advancing the industry proposal; the plan states as PM's goal to "defeat the current draft directive for a total ban" and designates a "minimum harmonization directive (Bangemann's proposal)" as "an alternative [to be] approved or at least proposed during 1993-1994."<sup>95</sup> The plan goes on: "secure Bangemann's availability to present 'his' proposal; establish a timetable with his staff."<sup>95</sup>

Ultimately, an industry-authored minimum harmonization proposal became the basis for a compromise proposal put forward by the German delegation to the Health Council of Ministers in 1993 as an alternative to the EC Advertising Directive. According to a 1993 CECCM report: "Germany has however now committed itself to introducing a proposal at an early date under the Belgian Presidency [of the EC Council of Ministers]; barring accident, it will be largely based on the VdC's [the German tobacco manufacturer's association] proposal to the German Health Ministry. The scope of the German proposal will be confined to media that have cross-border intra-community circulation."<sup>90</sup>

The German proposal was essentially identical to the industry minimum harmonization draft (Table 2). The German proposal would not impose new advertising restrictions beyond a set of minimum provisions, leaving individual nations to enact stronger laws as they saw fit. According to a PM history of the directive, the German faction in the Health Council of ministers advocated "the withdrawal of the current proposal and its replacement by a proposal aimed at 'minimum harmonization'" on May 27, 1993.<sup>39</sup>

## B. The Voluntary Code

In a letter dated October 23, 1991, W.C. Owen, Chairman of Britain's Tobacco Advisory Council wrote John Lepere of CECCM: "in the event that a common position was not reached on the EC Directive [on Advertising], it would be extremely valuable to offer in its place a working alternative in the form of a Voluntary Code of Practice."<sup>96</sup> A later memo from Lepere to RJR Public Affairs Director Wilfried Dembach states the public relations value of a code that would be

designed to demonstrate that the industry is willing to apply self regulation to the satisfaction of reasonable would-be regulators; such a code would be adopted, and be seen to be adopted, by the manufacturers unilaterally and not as a result of negotiations under pressure with legislative authorities.<sup>41</sup>

According to a memo to top PM executives from Lee Pollak, Vice President and General Counsel of Philip Morris International, the content of the proposed voluntary code was carefully worked out under the premise "that if there is to be any chance for the Commission's backing down on the proposed ban, the industry will have to make some concessions beyond those contained in the national codes such as those now existing in Germany and the U.K."<sup>97</sup> Pollak's memo, dated March 2, 1992, lists "the more significant concessions suggested by PM/EEC:"

- no people will appear in advertising,
- no cinema advertising,
- all advertising will contain a health warning which will occupy 10% of the advertisement's area,
- all direct-mail advertising will be prohibited,
- the promotion or advertising of sporting events is prohibited,
- there will be no sponsorship of overtly athletic sports (this would cover tennis but not motor racing),
- no sporting event will use a tobacco-related brand name in the title of the event.<sup>97</sup>

A later letter from Pollak to Andre Reiman, Senior Vice President & Chief Counsel Philip Morris Europe, reports the PM response to the suggested concessions:

Aleardo [Buzzi, Chairman of Philip Morris International] suggested that the ban on promotion of sporting events exclude motor racing explicitly, as you have done with sponsorship. Geoff [Bible, PMI Executive Vice President and PMI Chairman as of 1995] also was concerned about the ban on promotion of sporting events and suggested that we at least be able to promote the events on site. Geoff and Aleardo also reacted negatively to the direct mail prohibition.<sup>97</sup>

A memo dated April 3, 1992, from Philip Morris International regulatory affairs director Matthew Winokur affirms PM's emphasis on preserving sponsorship opportunities: "[PM] USA strongly opposes prohibitions on the advertising of sports events and the use of tobacco product brand names in event titles."<sup>98</sup> In a draft of the Tobacco Marketing

<b>Table 3: Tobacco Industry Voluntary Code of Conduct</b>
Industry Code of Conduct, July 1992 <sup>99</sup>
No advertising for tobacco products shall be directed towards persons under 18 years of age, and shall not feature persons under 25 years of age
Tobacco manufacturers shall not use television, radio, cinema, or publicly rented video or audio cassettes to advertise tobacco products
Tobacco manufacturers shall not use public service vehicles (e.g. buses) to advertise tobacco products
Advertising of tobacco products will not appear in newspapers, magazines, or periodicals that appeal especially to consumers under 18.
Tobacco advertisements will not appear in proximity to schools or other facilities frequented by persons under 18
All tobacco advertising in print media or on billboards shall carry a health warning
Direct mail advertising of tobacco products shall be confined to known adult users of tobacco products.

Code of Practice dated July 1992, the industry makes very few concessions overall, primarily emphasizing that “advertising for tobacco products” and activates sponsored by tobacco manufacturers, will not be “directed towards persons who are under eighteen years of age.”<sup>99</sup> Additionally, health warnings would be included in advertisements in “print media or on billboards” as well as on “event signage bearing the brand names or logos of tobacco brands.”<sup>99</sup>

The proposed voluntary code was weak compared to the proposed EC Advertising legislation, which proposed a total ban on tobacco advertising and sponsorship in Europe (Table 3). The voluntary code ultimately failed as an alternative to the EEC legislation. However, its attempts to preserve direct mail advertisements, advertising and sponsorship of sporting events, and Formula One racing in particular demonstrate the value of these advertising venues to the industry in Europe.

## **7. Contingency Planning: Litigation**

A significant portion of the efforts of PM and the tobacco industry focused on blocking the EC Draft Directive on Advertising through legislative means and the substitution of alternate proposals in its place. At the same time, however, the overall industry strategy against the advertising ban allowed for the possibility that the Draft Directive might be approved by the European Commission, as it eventually did occur in 1998. PM thus prepared as a contingency plan a series of court cases intended to fight the implementation of the ban.

Beginning as early as 1990, just over a year after the initial proposal of the EC draft directive, the tobacco industry started contingency planning for litigation against tobacco advertising legislation should they fail to prevent its passage. Industry plans for litigation focused on two potential arenas in which the EC Directive could eventually be challenged. First, through court cases in individual EC member nations, the industry planned to show the ban to be in violation of national constitutions and laws. Second, through a challenge to be brought before the European Court of Justice (ECJ), the industry hoped to have the ban annulled as having no legal basis in the EC treaty. Ultimately, it was through the latter strategy that the Advertising Directive was finally defeated in October 2000,<sup>37</sup> highlighting the significance of contingency planning in the tobacco industry's strategy against the ban.

In a fax dated 30 August 1990, John Lepere, head of CECCM, reported on proposed court proceedings before the German Constitutional Court. While the court proceedings concern an earlier EEC Directive establishing labeling standards for tobacco products, the court case was envisioned as highly relevant to the industry's fight against the EC advertising ban at the level of individual nations:

During a meeting of the [CECCM] Advertising Study Group held on 14 August 1990, it was reported that several member companies of the VdC [the Verband, the German national tobacco manufacturer's association] are actively considering the initiation of court action before the German Constitutional Court to question the validity of implementation in Germany of the provisions of the [1989] EEC Labeling directive....

The litigation now proposed, should it succeed, would have obvious relevance also to the validity of implementing in Germany the key provisions of any EEC directive on tobacco advertising on any of the lines so far mooted, should such a directive be adopted.

The members of the Study Group unanimously acknowledged that success in the proposed litigation would be of enormous benefit in effectively countering the spread and severity of anti-tobacco restrictions throughout Europe....<sup>100</sup>

Lepere's memo demonstrates the degree to which the lawsuit against the labeling directive was seen as a part of a larger contingency plan to be enacted if the Advertising Directive were to pass. As Lepere writes, by demonstrating that the labeling directive transgresses "the fundamental rights guaranteed by the German Constitution"<sup>100</sup> the lawsuit could be used in the future to call into question the validity of "key provisions" in the advertising ban.

Subsequent references to the German lawsuit against the Labeling Directive in PM documents affirm the relevance of the suit to PM's attack on the ad ban. In regard to the Labeling Directive, the PM EEC Corporate Affairs Agenda for 1991 states that: "a legal challenge in Germany is under consideration with regard to its influence on the government policy for the advertising directive."<sup>100</sup> Later, the Action Plan 1991 section of the 1991 Agenda states: "legal intervention in Germany to be considered as designed to ensure continued support of German government"<sup>100</sup> in regard to the Draft Directive on Tobacco Advertising.

With the passage of the Directive in 1998, the tobacco industry sought to prevent implementation of the advertising ban through a series of court cases at the level of individual nations. In September, 1998, Britain's Tobacco Manufacturers Association, along with a group of major British tobacco companies, Imperial, Gallaher, Rothman's UK, and British-American Tobacco, asked the High Court of England to refer the EC Directive to the European Court of Justice for a declaration that the directive was illegal and violates several principles of Treaty Law.<sup>101,102</sup> In October, 1999, the tobacco companies won a court order blocking the implementation of the ban in Great Britain.<sup>103</sup>

The tobacco industry also planned to attack the directive at a supranational level through the European Court of Justice (ECJ). While the document record does not provide evidence that PM sought to influence the ECJ's decision directly, it does show that the industry anticipated a German case before the ECJ as the ultimate means of defeating the advertising directive.

In the minutes of a CECCM Board Meeting of April 1, 1992, Lepere reports on the status of the EC advertising directive. According to Lepere, in the event that the U.K. Labour Party would form or lead the incoming government following the April 1992 U.K. general election, U.K. opposition to the advertising directive could be lost. This would disrupt the blocking minority and would leave "only the prospect of a legal challenge by Germany against the provisions of the directive when it would have been adopted ... before the end of 1992."<sup>94</sup> In preparation for such a challenge in 1992, CECCM planned to allocate D.M. 50,000 for two studies to determine if there was a sufficient basis for a legal challenge to prove the advertising ban to be "null and void on constitutional grounds."<sup>94</sup> Later, a 1993 PM Marketing Freedoms presentation outlines plans to "reinvigorate contingency planning for legal challenge to EC Ad Ban at national level and in the European Court of Justice."<sup>44</sup> This early planning highlights the foresight with which PM was able to prepare for the possibility that the EC could pass the advertising directive. It also sheds insight into how the industry planned to attack the implementation of the ban through well-prepared litigation.

Ultimately, the advertising directive was overturned in the European Court of Justice court case brought by the Republic of Germany.<sup>104</sup> While a number of private-sector plaintiffs, including Salamander, A.G. (Germany),<sup>105</sup> Alma Media (Greece), Davidoff (Switzerland), and Una Film (Austria),<sup>106</sup> the ECJ dismissed these cases, finding these plaintiffs lacked the necessary legal standing.<sup>101,106</sup> The German suit was ultimately successful in having the Directive annulled. According to the Court, the level of advertising restrictions imposed by the directive was inconsistent with the Directive's treaty basis. The Court ruled that the directive failed to further the goals of an open internal market among EC member states. Thus, it was in the European Court of Justice, which PM recognized as early as 1992 as an important part of its contingency planning, that the EC advertising directive was finally annulled in October 2000.

## 8. Conclusions

Evidence taken from internal industry documents demonstrates a coordinated, highly effective effort by the tobacco industry to subvert EU advertising regulations. Tobacco industry documents reveal plans to block the ban through extensive lobbying in a number of EC member states (often through third-parties and front groups), attempts to substitute alternative, industry-sponsored proposals for the EC directive, and contingency planning for litigation in the event of passage.

Understanding these strategies remains relevant to current tobacco control politics in Europe and the world. First, the events that contributed to the failure of the EC directive on tobacco advertising and sponsorship can provide important support to advocates of future EC tobacco control policies by helping them to understand the routes through which the industry subverts legislative action against it.

Second, many strategies used to attack the EC advertising ban are repeated in tobacco industry efforts to subvert tobacco control measures, not just in the United States, but worldwide. As documented in Switzerland<sup>10</sup> and the WHO,<sup>11</sup> industry tactics often involve direct lobbying, the formation of undisclosed third-party allies, and attempts to influence policy through actions by officials within regulatory bodies who are friendly to the tobacco industry. The tobacco industry remains as a methodical actor in world politics with an often formulaic, but effective, approach to influencing policy.

A large degree of the industry's effort to influence EC policy focused on securing governmental and industrial alliances within a number of key EC member states, including Germany, the UK, the Netherlands, and Denmark. The tobacco industry's lobbying practices are nonetheless significant for their degree of access to and possible influence with powerful figures in European politics. Particularly noteworthy are industry alliances with German Chancellor Helmut Kohl, and European Commissioner Martin Bangemann, and British Secretary of State Kenneth Clarke.

The industry has engaged in a number of practices that documents suggest were intended to be deceptive, particularly in the formulation and covert introduction of a minimum harmonization proposal intended to replace the EC ad ban draft. The industry's attempt to covertly introduce such a proposal would represent an effort to undermine the very framework of EC policy-making by seeking to make industry, rather than appropriate political actors, the source of EC policy. In addition, document evidence demonstrates the likely involvement of Martin Bangemann and the German delegation to the European Commission in introducing the proposal.

The fight for an effective pan-European advertising ban continued with the EC Draft Directive on Advertising and Sponsorship proposed in Spring 2001. The new draft seeks to eliminate provisions that rendered the earlier advertising ban inconsistent with EC jurisdiction. In order to succeed, however, the new ban must not only have a secure legal basis, but must also escape from the organized and powerful industry effort that contributed to the defeat of the prior ban. Understanding of industry tactics and strategies

can help advocates of strong EC public health legislation overcome obstacles that have so far hindered the implementation of an effective EC Tobacco Advertising Directive.

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