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**REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN
PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**

Report on the implementation of the Tobacco Advertising Directive (2003/33/EC)

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1. INTRODUCTION

In accordance with Article 6 of the Tobacco Advertising Directive¹ (hereinafter 'the Directive'), this report on the implementation of the Directive is submitted by the Commission to the European Parliament, the Council and the European Economic and Social Committee.

The Directive does not make provision for a Committee to help the Commission with monitoring, exchange of information or cooperation in the implementation of the Directive between Member States and the Commission. In order to exchange information on the implementation of the Directive, the Commission established an informal group of Member State liaison officials on tobacco advertising.

Feedback from discussions in this group shows that the competent enforcement and control authorities in Member States are willing to have a forum to exchange information and share best practices on the implementation of the Directive. Since the deadline for transposition of the Directive (31 July 2005), the group has met four times.

This report is based on information received by the Commission from the competent authorities in Member States through the above-mentioned group, from citizens, from non-governmental organisations and from observations of the services of the Commission.

Given the short period of time since the transposition of the Directive, including delays in some Member States, it is too early to evaluate the effectiveness of this Directive on public health. However, it is expected that the comprehensive cross-border advertising ban introduced by the Directive will help to reduce the prevalence of smoking within the European Union in the long run, as such an effect is a recognised outcome of comprehensive tobacco advertising bans².

2. BACKGROUND

The scope of the Directive (2003/33/EC) results from the Court's finding that the EU could legitimately only introduce a ban on certain types of tobacco advertising and sponsorship with cross-border implications on the basis of Article 95 of the EC Treaty (internal market)³.

The Directive regulates tobacco advertising and sponsorship with cross-border implications in the media other than television. On 12 December 2006 the Court of Justice confirmed the validity of the Directive⁴. The Court held that the conditions

¹ Directive 2003/33/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 152, 20.6.2003, p. 16.

² See e.g. the World Bank Publication "Curbing the epidemic: Governments and the Economics of Tobacco Control (1999)", p. 50-51.

³ Case C-376/98 Germany v. European Parliament and the Council, judgment of 5 October 2000.

⁴ Case C-380/03 Germany v. European Parliament and the Council, judgment of 12 December 2006.

warranting the choice of Article 95 of the EC Treaty as the legal basis were met. Notably, the Court held that journalistic freedom of expression, as such, remains unimpaired and the editorial contributions of journalists are therefore not affected⁵.

Tobacco advertising and sponsorship on television is banned by the Television Without Frontiers Directive (89/552/EEC). This will be replaced by the Audiovisual Media Services Directive adopted in December 2007, which extends the application of this ban to all forms of audiovisual commercial communications, including product placement.⁶

In the context of the Framework Convention on Tobacco Control (FCTC), the European Community is active in the development of strict international guidelines to protect its population against tobacco advertising from third countries. The EC is a key facilitator in the working group whose task is to develop comprehensive draft guidelines on the implementation of Article 13 of the Convention⁷ and to present recommendations on key elements of a protocol on cross-border advertising, promotion and sponsorship, which would be complementary to these guidelines.

3. TRANSPOSITION BY MEMBER STATES

The deadline for bringing into force the laws, regulations and administrative provisions to comply with the Directive was 31 July 2005.

Most Member States met this deadline. However, a few Member States did not transpose the Directive in time and the Commission opened infringement proceedings against them. The Member States in question subsequently communicated their measures to transpose the Directive and the Commission was able to close these cases during the first half of 2006, with the exception of Germany, whose transposal measures were communicated in December 2006.

As a result, by the end of 2006 all Member States had communicated their laws and regulations to transpose the Directive. However, scrutiny of the transposition measures revealed that a few Member States originally introduced exemptions from the sponsorship ban for certain big events of great economic interest (such as Formula One and motor cycle GP). The Commission swiftly proceeded with infringement cases against these Member States. As all Member States rapidly changed their legislation following the Commission's intervention, the Commission was able to close the infringement cases.

In general the tobacco advertising and sponsorship bans in Member States are wider than and/or go beyond the bans laid down in the Directive and apply also to activities at local level, such as advertising in cinemas or at points of sale, sponsorship of all events and free distribution.

⁵ Paragraph 156 of the judgment.

⁶ Directive 2007/65/EC, OJ L 332, 18.12.2007, p.27.

⁷ Article 13 of the Convention lays down the obligations of the Parties to ban or restrict tobacco advertising, promotion and sponsorship.

This is in line with the Council Recommendation on the prevention of smoking and on initiatives to improve tobacco control⁸. This Recommendation invites Member States to prohibit, in accordance with national constitutional principles, any forms of advertising, sponsorship or practices directly or indirectly addressed to promote tobacco products.

All Member States have fully transposed the Directive. The Commission is not aware of any transposition gaps at the legislative level.

4. IMPLEMENTATION BY MEMBER STATES

4.1. Print media

4.1.1. The term "printed publications"

Article 3(1) obliges Member States to ban tobacco advertising in the press and other printed publications. There are two exceptions: professionals in the tobacco trade and publications which are printed and published in third countries, where those publications are not principally intended for the Community market.

The Court of Justice has clarified that the term 'printed publications' used in Article 3(1) of the Directive covers publications such as newspapers, periodicals and magazines. The Court has stressed that the rationale of Article 3(1) is to ensure free circulation throughout the internal market for all such media, and therefore it is necessary to limit tobacco advertising therein to those magazines and periodicals which are not intended for the general public (the fourth recital of the Directive). Thus, the ban does not cover bulletins produced by local associations, programmes for cultural events, posters, telephone directories and various leaflets and prospectuses⁹.

4.1.2. Transposition by Member States

Member States have fully transposed Article 3(1) of the Directive. Most of the Member States have done this by adopting a general ban covering all forms of tobacco advertisement, promotion and sponsorship. Thus, in most Member States the ban covers also publications of a local nature and thus has a wider scope than Article 3(1).

All Member States also apply the two exceptions allowed by Article 3(1) of the Directive.

4.1.3. Implementation

In general, the ban on tobacco advertising in print media is complied with. Traditional cigarette brand advertisements appear to be absent from publications intended for the general public. However, print media within the EU is not yet completely free from tobacco advertising and promotion.

⁸ No 2003/54/EC, OJ L 22, 25.1.2003, p.31.

⁹ See Case C-380/03 Germany v. European Parliament and the Council, paragraphs 84-86.

Tobacco advertising may take the form of references in press stories and print media content. Experience shows that such references may either be coincidental or organised. For example, tobacco brand logos were inserted in the background of fashion photos in a fashion magazine. Tobacco brand emblems with reverse colours as well as graphical tobacco logos were used besides the editorial content. This indicated that the display of tobacco brand logos in the background was organised and not coincidental.

In addition, tobacco advertising has occasionally been spotted in catalogues at certain points of sale. Typical examples are tax-free shop catalogues on cross-border vessels and in-flight magazines.

Furthermore, tobacco advertisements are often visible in news images (e.g. from sports events) from third countries where tobacco sponsorship of events and activities is still legal. The scope of this problem will depend on how well the Parties of the FCTC implement the comprehensive ban on tobacco advertising, promotion and sponsorship in events in line with its Article 13. The Commission is closely involved in the international efforts to enhance speedy and effective implementation of this Article.

The Directive exempts publications that are intended exclusively for professionals in the tobacco trade. The Commission has been informed about advertisements published by several tobacco companies in magazines targeted at the 'hospitality' business in general (hotels, restaurants, cafes, bars, etc.) on the grounds that these magazines are aimed at persons working in the tobacco trade.

In general, the implementation of Article 3(1) of the Directive is satisfactory: no traditional cigarette brand advertisements in press and other printed publications in the sense of Article 3(1) of the Directive have been reported to the Commission.

4.2. Information society services

4.2.1. Transposition by Member States

Article 3(2) of the Directive extends the advertising ban in printed media to information society services¹⁰. In other words, Member States also need to ban tobacco advertising in information society services, with the same exceptions as those for printed media (publications intended exclusively for professional traders; publications printed and published in third countries and not principally intended for the Community market).

Member States have transposed this obligation either by adopting a general ban or by introducing a specific ban covering information society services.

¹⁰ Article 2(d) of Directive 2003/33/EC defines information society services as "services within the meaning of Article 1(2) of Directive 98/34/EC", OJ L 204, 21.7.1998, p.37, Directive as amended by Directive 98/48/EC, OJ L 217, 5.8.1998, p.18. Directive 98/48/EC defines information society services as: "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of the recipient of services".

Most Member States also apply the above-mentioned exemptions of Article 3(1) to material posted on the internet.

4.2.2. *Implementation*

Virtual environment is the most common cross-border platform for tobacco advertising and the biggest challenge for the effective implementation of the EU advertising ban. The pace of change of communication technologies provides for a variety of platforms for tobacco advertising and sponsorship. The challenge is also well-known in areas such as child pornography, arms trade and terrorism.

Elements of tobacco advertising and promotion are regularly inserted into a variety of digital media contents, including internet sales of tobacco and specialised communication applications that function in the virtual environment. In addition, promotional material primarily designed for other platforms – such as print media and various events – is often made readily available through the internet as well.

The key challenge of implementing the tobacco advertising ban in the virtual environment is how to recognise covert forms of advertising. Tobacco advertising in the internet is normally not advertising in the traditional sense, but takes a variety of forms, mostly indirect.

For instance, buying tobacco through the internet has become easier and more common. The Directive does not cover the sale of tobacco products, but the websites selling tobacco often involve an element of promotion (“buy cheap”). The problem is not only linked to advertising bans but also includes sales to minors, tax evasion and unfettered advertising, marketing and promotion. Some Member States have made retail sale of tobacco subject to a licence that may be granted only to vendors with a fixed retail sale outlet.

Cross-border selling of tobacco via the web is in almost all cases completely illegal for fiscal reasons, as the vendors generally do not respect the obligation to pay excise duty and VAT in the Member State of destination.

Another challenge is the number of entities involved in the virtual environment and their identification. Almost anybody (citizens, traders, smoker organisations) may produce advertising and promotional content, post it on the internet and thus make it available worldwide¹¹.

The international dimension poses the biggest challenge in terms of implementing the tobacco advertising ban in the virtual environment. Servers hosting the advertising content may be located in another Member State or in third countries.

Practice has shown that it may be difficult to identify the natural or legal person who put the material on-line. This person might rapidly close up the site and reopen it elsewhere. This is further discussed in the context of cross-border enforcement in Section 4.6 below.

¹¹ For example, a website of a student network displaying tobacco brand logos attached to pictures taken from a student party.

As regards third countries, guidelines and upcoming decisions of the Third Conference of Parties under the FCTC are expected to improve exchanges of information with third countries.

The virtual environment is one of the most common cross-border platforms for tobacco advertising. The major challenge here is the covert nature of advertising and the difficulty in identifying and reaching the persons behind such advertising, especially in so far as they establish themselves in third countries.

4.3. Sponsorship issues

4.3.1. Transposition

Article 5(1) of the Directive obliges Member States to ban tobacco sponsorship of events or activities taking place in several Member States or otherwise having cross-border effects. Most Member States have banned sponsorship of not only cross-border events, but also local events.

Article 5(2) of the Directive obliges Member States to ban any free distribution of tobacco products in the context of cross-border events. Many Member States have a total ban on free distribution of tobacco products, i.e. not only in the context of cross-border events as required by the Directive.

4.3.2. Sponsorship of events

The ban on tobacco sponsorship of cross-border events is well implemented within the EU. Shortly after the transposition deadline the Commission found problems in those countries that still maintained exemptions to enable sponsorship at certain sports events.

However, tobacco sponsorship arrangements within the EU have not completely stopped. Instead, they have taken indirect and more insidious forms that pose a challenge to the enforcement authorities in Member States. There are indications of exclusive selling arrangements and free distribution of tobacco products at festivals for young people. There are also attempts to glamorise tobacco products by associating them with events, festivals, celebrity artists, movie stars and different products in various ways, e.g. colours, shapes, de-branded logos, emblems, font faces, fun phrases, words, designs, modified brand names or other campaigns.

Tobacco advertising and sponsorship is still visible in media coverage received from third countries which allow it. Such advertising and sponsorship is not covered by the Directive, but it risks undermining the EU ban. The most visible events are famous sports and cultural events that get wide media attention, such as Formula One races¹². The Audiovisual Media Services Directive (2007/65/EC), which now clearly

¹² Article 13 of the FCTC requires each Party to prohibit tobacco sponsorship of international events, activities and/or participants therein. The only exception is adherence to constitutional principles, in which case restrictions must be applied.

prohibits product placement for tobacco products, could be relevant in such cases after its transposition deadline of 19 December 2009.¹³

Visibility of tobacco advertising and sponsorship in motor sports races has shown a diminishing trend in recent years. Only three countries organising Formula One races allowed tobacco sponsorship during the 2006-2007 season: China, Bahrain and Monaco.

4.3.3. *Tobacco promotion in films*

While sponsorship of events is often concrete and visible, sponsorship of other activities is more hidden. It might be difficult to find evidence of whether a sponsorship arrangement exists or not. This requires investigation and additional resources.

Although the Directive does not expressly address smoking in films, it bans tobacco sponsorship of cross-border activities. Direct or indirect promotion of tobacco products in films could fall within the notion of sponsorship of cross-border 'activities' forbidden under Article 5(1) of the Directive if a contribution by a tobacco company is given to the film producer or actor. Thus, tobacco sponsorship in films and DVDs is illegal under EU law.

4.3.4. *Corporate promotion*

One of the remaining common marketing practices is to advertise the tobacco manufacturer with a positive image as a responsible market operator. Even if brands are not directly presented, such corporate promotion is a method of marketing the company's reputation and its products.

Corporate promotion may happen through a paid advertisement, usually accompanied by messages about the excellent quality of raw materials, use of modern technologies, responsible concerns about product safety or social responsibility of the company. In some Member States such practices are subject to a fine.

One method for such promotion is corporate social responsibility (CSR) reports published in corporate websites. Companies seek to reinforce their reputation by drawing attention to their "socially responsible" business practices, e.g. relating to employment or environmental stewardship.

Since the full transposition of the Directive by Member States, the Commission has not observed or been informed about direct tobacco sponsorship of cross-border events organised within the EU. However, different forms of indirect sponsorship pose a challenge to the enforcement authorities in Member States.

¹³

At present indirect television advertising resulting from appearance of screen hoardings visible during the retransmission of sporting events does not constitute a separate broadcast announcement in order to promote goods or services within the meaning of the Television Without Frontiers Directive (89/552/EEC) and thus does not amount to 'television advertising' in the sense of the Directive.

Work needs to be done within the FCTC in order to prevail on third countries to adopt comprehensive tobacco sponsorship bans.

Corporate promotion still exists as a cross-border method to market tobacco products. There is a need to streamline ways in which different Member States address such cases.

4.4. Penalties

Article 7, first paragraph, of the Directive requires that penalties be effective, proportionate and dissuasive. Most Member States use criminal law sanctions (fines and, in more serious cases, jail sentences). Sanctions of an administrative nature are also generally applicable, such as warnings and administrative decisions to stop and not repeat the advertising with the threat of a periodic penalty payment.

Practice has shown that the enforcement authorities in Member States are able to stop most of the dubious practices by administrative means (contacts, meetings, warnings, administrative decisions). Therefore, penalties have a proven deterrent effect and court proceedings are needed only in a few controversial cases.

Administrative enforcement is successfully employed. Criminal penalties have a deterrent effect and court proceedings are needed in a few controversial cases.

4.5. Access to justice

4.5.1. Transposition by Member States

Article 7, second paragraph, of the Directive obliges Member States to provide for access to justice for persons or organisations which, under national legislation, can justify a legitimate interest in the suppression of tobacco advertising or sponsorship. This may involve bringing a case directly before a court, or making a complaint to an administrative body that has the power to make an administrative decision or to bring about legal proceedings.

Member States either apply the general procedural rules on access to justice or have adopted a specific access to justice regime for tobacco control purposes.

4.5.2. Implementation

Article 7, second paragraph, involves two ways of activating legal proceedings: through competent authorities and through civil activity. Implementation of this Article varies: in some Member States government action is the primary means, mostly through specialised government agencies, while some Member States rely more on NGOs' action, mostly through direct litigation and precedents in courts.

NGOs in the field consist of many specialised organisations, such as cancer groups, health and medical organisations as well as specific tobacco control organisations. Action by consumer groups is also essential to achieve good implementation of the Directive.

Enforcement is ensured by specialised government agencies and by providing direct access to legal proceedings for non-governmental organisations. The Commission has received no complaints about difficulties in gaining access to justice in Member States for the suppression of tobacco advertising and sponsorship.

4.6. Cross-border enforcement

The Directive does not contain any provision concerning cooperation between the enforcement authorities in Member States. However, modern media platforms do not recognise national borders. In the absence of an effective enforcement mechanism, possibilities to detect, investigate and bring about the cessation of illegal advertising are limited. This enables wrongdoers to evade enforcement attempts by relocating themselves.

Practice shows that Member States are willing to learn from approaches developed in other Member States to similar problems, specifically cases solved by administrative or legal interventions. When faced with a cross-border advertising problem, Member States could share best practices and request enforcement assistance from other Member States. For this purpose, the Commission has taken the first steps towards facilitating the exchange of information between contact points in Member States.

Mechanisms for cross-border enforcement have already been developed in consumer matters. The Regulation on Consumer Protection Cooperation¹⁴ establishes a framework for mutual assistance which covers the exchange of information, requests for enforcement measures and coordination of market surveillance and enforcement activities. This mechanism is already applicable to certain Directives on consumer protection that could be relevant for tobacco advertising and promotion particularly in the internet¹⁵.

The Commission will explore the possibility of making the cross-border enforcement mechanism in the Regulation on Consumer Protection Cooperation applicable to the Tobacco Advertising Directive.

The Commission invites the Member States to designate enforcement liaison offices, exchange information, take all necessary enforcement measures to bring about the cessation of any infringement and respond without delay to enforcement requests of other Member States.

The EC should support the development of a similar mechanism in the context of implementation of Article 13 of the FCTC.

¹⁴ Regulation (EC) No 2006/2004, OJ L 364, 9.12.2004, p.1.

¹⁵ Directive 97/7/EC, OJ L 144, 4.6.1997, p.19 ('Distance Selling Directive') and Directive 2005/29/EC, OJ L 149, 11.6.2005, p.22 ('Unfair Commercial Practices Directive'). This Directive bans misleading actions and misleading omissions, e.g. false claims of "tax free" (Article 6 and 7). These Directives also require that the consumer is informed on the identity and the address of the trader and on the price inclusive taxes (Article 4 of the Distance Selling Directive and Article 7(4) of the Unfair Commercial Practices Directive).

5. CONCLUSIONS

On the basis of the information available to the Commission, it can be concluded that the laws to transpose the Directive are in place and are well implemented. In general, Member States have wider advertising and sponsorship bans than those required by the Directive.

Following the introduction of the EU-wide ban, traditional tobacco brand advertising and direct sponsorship of a cross-border nature has ceased within the European Union.

On the other hand, there are indications that tobacco promotion has intensified in local merchandising and at points of sale, especially in Member States that either allow it or do not effectively control it.

The Directive is wide enough to cover changing patterns of cross-border tobacco advertising and sponsorship. On the other hand, it leaves ample discretion to Member States in its interpretation and application. There is a risk of inconsistent interpretation and application of the Directive in different Member States.

There is a need to continue to streamline monitoring and provide guidance to Member States so as to avoid differences of interpretation, on the basis of a common approach to be defined in consultation with MS authorities and experts.

Mechanisms for cross-border enforcement need to be developed and strengthened.

Virtual environment is the big challenge. It is difficult to control because of the covert nature of advertising and the fact that the wrongdoers can easily relocate themselves.

At this point in time, the Commission does not see any need to propose to amend the Directive.