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Tobacco Proves Addictive: The European Community's Stalled Proposal to Ban Tobacco Advertising

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NOTES

Tobacco Proves Addictive: The European Community's Stalled Proposal to Ban Tobacco Advertising

ABSTRACT

This Note examines the recent initiative to ban tobacco advertising within the European Community. The Note first addresses the European Commission's proposed directive, exploring the Commission's stated justifications as well as the opposing member states' procedural and legal objections. This Note then analyzes the European Community debate by comparing it to the United States movement to ban tobacco advertising. The author concludes that, like its United States counterpart, the European proposal is ill-fated, and that failure to reach a consensus on controversial proposals such as the tobacco advertising ban seriously undermines completion of a true internal market envisioned in the Treaty of Rome.

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I. INTRODUCTION

On May 15, 1991, the European Commission (Commission)¹ adopted a modified proposal (Proposal)² aimed at harmonizing tobacco advertising³ in the twelve member states of the European Community (EC).⁴ The Proposal calls for a ban on all direct and indirect⁵ advertising of tobacco⁶ within the EC.⁷ Although the Proposal is consistent with the

1. See 1 GREGG MYLES, *EEC BRIEF*, 1-137 to 1-165 (rev. 1992) [hereinafter *EEC BRIEF*] for a succinct overview of the Commission's role within the European Community (EC). See also P.S.R.F. MATHIJSEN, *A GUIDE TO EUROPEAN COMMUNITY LAW* 52-66 (5th ed. 1990).

2. Amended Proposal for a Council Directive on Advertising for Tobacco Products, 1991 O.J. (C 167) 3 [hereinafter *Proposal*].

3. For the purposes of the Proposal, the Commission defines advertising as:
[a]ny form of communication, printed, written, oral, by radio and television broadcast and cinema, with the aim of direct or indirect effects of promoting a tobacco product, including advertising which, while not specifically mentioning the product, tries to circumvent the advertising ban by using brand names, trade marks, emblems or other distinctive features of tobacco products.

Id. art. 1, at 4.

4. The current member states of the European Community are Belgium, Denmark, Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. See *Europe and America Prepare for 1992*, *BROADCASTING*, Apr. 17, 1989, at 35 [hereinafter *Europe and America*].

5. See *infra* notes 57-58 and accompanying text.

6. For purposes of the Proposal, the Commission defines tobacco products as "all

Single European Act's⁸ comprehensive plan to bring about European unity,⁹ the EC's consideration of the Proposal has heightened tensions within the European Community and has triggered the "most ferocious lobbying campaign in the [European] Parliament's history."¹⁰ This tension has arisen primarily because the member states disagree on the validity of a tobacco advertising ban and because the ban attempts to regulate through legislation matters which industry and government have traditionally resolved through negotiation.¹¹ Moreover, the Commission's decision to require a simple majority vote for passing the Proposal in the EC Council of Ministers rather than the more rigorous unanimity standard has led to further disagreement.¹²

At stake in this controversy is the long-anticipated¹³ realization of a European internal market.¹⁴ Member states have adopted approximately

products intended to be smoked, sniffed, sucked or chewed, inasmuch as they are, even partly, made of tobacco." Proposal, *supra* note 2, art. 1, at 4.

7. *Proposal to Ban All Tobacco Advertising*, EUR. REP., May 18, 1991, at 11.

8. Single European Act, 1987 O.J. (L 169), 1 [hereinafter SEA].

9. *Why the Commission Proposes a Directive Limiting the Advertising of Tobacco Products*, RAPID (EC PRESS RELEASE), Nov. 11, 1991 [hereinafter *Why the Commission Proposes*].

10. Boris Johnson, *Tobacco Lobby Wins EC Reprieve*, DAILY TELEGRAPH (London), Jan. 17, 1992, at 9.

11. Geoff Meade, *Euro MPs Set to Back Tobacco Adverts Ban*, PRESS ASS'N NEWSFILE, Feb. 11, 1992.

12. The Commission based this decision on article 100A of the Single European Act which allows the Commission to require only a qualified majority approval if a proposal is deemed necessary for establishment or furtherance of the single market. SEA, *supra* note 8; see discussion *infra* part III.A.

13. The Common Market, first promised in the Treaty of Rome over 30 years ago, has yet to materialize. As a consequence, the term "Common Market" has become a term used with increasing embarrassment and decreasing accuracy in describing the trading and market relationships among the EC states. This failure prompted Lord Cockfield, with the endorsement of the EC Summit, to prepare a renewed campaign for a single European market. The campaign is explained in detail in Cockfield's "White Paper." See *Completing the Internal Market: White Paper from the Commission to the European Council*, COM(85)310 final at 7 [hereinafter *Completing the Internal Market*]; see also J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2453. "The bulk of the [White Paper] is little more than a legislative time table for achieving in 7 years what the Community should have accomplished in the preceding 30." *Id.*; see also *infra* notes 14-16 and accompanying text.

14. Although the Treaty of Rome does not define the term "internal market," additions to the Single European Act indicate that internal market means: "[a]n area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." Treaty Establishing the European Economic Community [EEC TREATY] art. 8.

90%¹⁵ of the 282 measures outlined in the European Community's blueprint for a "Europe without frontiers,"¹⁶ entitled the White Paper.¹⁷ Despite these significant advances, the statistical estimates of the success of the harmonization program are misleading.¹⁸ The often proffered measures of success are misleading because many of the measures already adopted are among the least controversial.¹⁹ Recent proposals, however, including the tobacco advertising ban, involve traditionally protected industries and, therefore, invariably elicit assertions of sovereignty by the member states. These attempts to retain control over certain industries threaten the progression toward complete integration.²⁰

The motivations of the dissenting member states vary, but few dissenters have hands unstained by nicotine.²¹ Greece's opposition, for example, stems from protectionist concerns about its domestic tobacco industry.²² The United Kingdom's opposition reflects the British desire to protect advertising and the commercial news media which spend more than fifty-five million pounds each year on tobacco advertising.²³ Implicit in each state's dissent, however, is the belief that the evils of tobacco adver-

Broadly speaking, the European Community has set out to eliminate three types of barriers to trade: (1) Physical—meaning border stoppages and delays from customs formalities; (2) Technical—regarding varying product standards, technical regulations, and nationally protected procurement markets; and (3) Fiscal—involving varying rates of value-added taxes (VATs) and excise duties. See LARAINÉ L. LAUDATI, AMERICAN BAR ASSOCIATION, REPORT OF THE DELEGATION TO THE EUROPEAN COMMUNITY: KEY ISSUES IN THE 1992 UNIFORM PROGRAM 7-13 (1990).

15. [New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 96,566 (Oct. 16, 1992).

16. See *Europe's Internal Market*, ECONOMIST, July 9, 1988, at 8.

17. Completing the Internal Market, *supra* note 13, at 7.

18. The "harmonisation programme" is outlined in the Single European Act. See SEA, *supra* note 11. The term "Harmonize", a favorite word of the integrationists, conveys the conclusion that when complete agreement among the 12 nations is impossible, approximate agreement is acceptable.

19. See Mark Miller, *Single Market to Reshape Continent*, CRAIN'S CHI. BUS., Sept. 25, 1989 at T1, available in LEXIS, Nexis Library, OMNI File.

20. See Brian Love, *EC Commission Makes Sacrifices for Edinburgh Summit*, REUTERS LIBR. REP., Dec. 9, 1992; *Europe's Internal Market*, ECONOMIST, July 9, 1988.

21. *Saved by Greek Smoke*, THE TIMES (London), Nov. 12, 1991. Margaret Thatcher, who as the United Kingdom's Prime Minister was one of the most vocal opponents of the ban, recently agreed to be a geopolitical consultant to the United States-based tobacco giant Philip Morris. *That's Life*, CALGARY HERALD, Jan. 2, 1993, at D9.

22. *Saved by Greek Smoke*, *supra* note 21, at 3.

23. Boris Johnson, *Europe Votes to Ban All Advertising of Tobacco*, DAILY TELEGRAPH (London), Feb. 12, 1992, at 10.

tising are not so egregious as to necessitate Community-wide legislation.²⁴

This Note examines the dispute between the EC members concerning the possible implementation of the tobacco advertising ban. The Note first addresses the terms of the Proposal as well as its purposes and justifications. It then discusses the opposing member states' legal challenges to the ban. Next, it analyzes the EC debate against the backdrop of a similar United States movement in 1986 and 1987.²⁵ Finally, this Note concludes that although the Proposal is timely and would effectuate advancement toward a true European internal market, its passage, like its United States counterpart, is ill-fated.

II. THE PROPOSAL: HISTORY AND IMPLEMENTATION

A. *History of the Proposal*

In July 1986, the European Council (Council)²⁶ and representatives from the EC member states launched a program entitled Europe Against Cancer.²⁷ Designed to reduce the incidence of cancer,²⁸ the program concentrated on measures to reduce tobacco use within the European Community.²⁹ Within the context of the Europe Against Cancer program, the Council adopted a plethora of directives³⁰ including a ban on smoking in public areas,³¹ strict regulations with respect to the labelling of tobacco products,³² and a limit on the tar content in cigarettes.³³ In October 1989, the Council banned television advertising for cigarettes and other tobacco products.³⁴

In 1989, the Commission introduced a new proposal to regulate tobacco advertising.³⁵ This proposal sought to harmonize authorized adver-

24. *See id.*

25. *See infra* part IV.

26. *See* 1 EEC BRIEF, *supra* note 1, at 1-308 to 1-311 (providing a succinct overview of the European Council); *see also* MATHIJSEN, *supra* note 1, at 34-52.

27. 3 EEC BRIEF, *supra* note 1, at 3-266 to 3-267.

28. *Id.*

29. *Id.*

30. *See id.*

31. Council Regulation, 89/C 189/01, 1989 O.J. (C 189) 1. Public areas include: establishments where services or goods are provided to the public, hospitals, schools, cinemas, sports arenas, airports, and transportation systems. *Id.* at 2.

32. Council Directive 89/622, 1989 O.J. (L 359) 1.

33. Council Directive 90/239, 1990 O.J. (L 137) 36.

34. Council Directive 89/552, 1989 O.J. (L 298) 523.

35. Commission Proposal for a Council Directive on the Advertising of Tobacco

tising and established a ban on indirect forms of advertising in children's publications.³⁶ The European Parliament (Parliament),³⁷ however, rejected the proposal as too limited³⁸ and advocated an alternative proposal that would ban all tobacco advertising.³⁹

Responding to a December 1990 announcement by EC Social Affairs Commissioner Vasso Papandreou⁴⁰ that a ban on tobacco advertising was vital to the success of the European Community's larger campaign against cancer, the Commissioners agreed in May 1991 to accept a modified proposal⁴¹ that would ban tobacco advertising everywhere except inside tobacco sales outlets.⁴² Brought before the Parliament for debate in January 1992, adoption of the proposal was delayed until the Parliament could evaluate its legal basis.⁴³

Following the consideration of nearly 30 amendments to the Proposal⁴⁴ and a declaration by the Parliament's Legal Affairs Committee affirming the Proposal's legal foundation,⁴⁵ the Parliament approved the Proposal in February 1992 by a vote of 150 to 123.⁴⁶ The Parliament scheduled the Proposal for debate by the EC Health Ministers in May

Products in the Press and by Means of Bills and Posters, 1989 O.J. (C 124) 5.

36. *Commission Proposes a Drastic Limit on the Advertising of Tobacco Products*, RAPID (EC Press Release), May 15, 1991, at 29 [hereinafter *Commission Proposes a Drastic Limit*].

37. See 1 EEC BRIEF, *supra* note 1, at 1-234 to 1-283 (discussing the role of the Parliament in the EC); see also MATHIJSEN, *supra* note 1, at 16-34.

38. Because this proposal was limited to indirect advertising in the press and by means of bills and posters which could influence children, the Parliament found the proposal to be too limited in scope. *Commission Proposes Limit on Tobacco Advertising*, [New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 95,913, at 52,214 [hereinafter *Commission Proposes Limit*].

39. See *id.*

40. Ironically, Vasso Papandreou, the original supporter of the Proposal, is a chain-smoker. Shelia Kaplan, *Up in Smoke*, LEGAL TIMES, Dec. 16, 1991, at 5.

41. Of the seventeen Commissioners, only a handful opposed this proposal. See *Proposal to Ban All Tobacco Advertising*, *supra* note 7, at 11.

42. For the purposes of the Proposal, the Commission defined tobacco sales outlets as "establishments specializing in the sale of tobacco and with enclosed indoor premises for serving customers. Shops with several counters for a range of different goods on sale are excluded from this definition." Proposal, *supra* note 2, art. 1, at 4.

43. See *infra* part III.A.

44. See Andrew Hill & Philip Rawstorne, *MEPs Likely to Back Plan to Ban Tobacco Advertising*, FIN. TIMES, Feb. 11, 1992, at 2. The amendments range from changing the Proposal's legal basis to overturning the draft directive altogether. *Id.*

45. *Id.*

46. See *EC Parliament Backs Tobacco Advert Ban*, REUTERS LIBR. REP., Feb. 11, 1992. There were 12 abstentions. *Id.*

1992.⁴⁷ The United Kingdom, Germany, the Netherlands, and Greece voiced serious objections which created a deadlock within the EC⁴⁸ and delayed a decision on the Proposal. The Proposal was discussed at the following EC Health Ministers meeting in November 1992 but was again tabled when no breakthrough could be reached.⁴⁹ Reacting to the impasse, Social Affairs Commissioner Vasso Papandreou warned that the success of the single market was at stake and noted that under current EC rules member states with domestic tobacco advertising bans may prohibit the free flow of any publication that carries tobacco advertising.⁵⁰

The Proposal cannot become an enforceable directive until a majority of the EC Health Ministers agree to its terms.⁵¹ Even if a majority of the Health Ministers approve the Proposal, it would be subject to review by the Parliament.⁵²

B. *The Proposal of the Directive in Detail*

The main provisions of the Proposal include:

- (a) A ban on advertising for tobacco products in such media as newspapers, billboards, or cinemas;
- (b) A provision limiting tobacco advertising to tobacco sales outlets only;
- (c) A ban on free distribution of tobacco products;
- (d) A ban on indirect tobacco promotion by, for example, using a tobacco trademark, logo, or other characteristic sign used to advertise a product other than tobacco; and
- (e) A ban on the launching of a new tobacco product or brand by

47. Jane Thynne, *Setback for EC Smoking Adverts Ban*, DAILY TELEGRAPH (London), Nov. 28, 1991, at 4. Each of the 12 member states has a representative Health Minister. *Id.*

48. In January of 1992, due to public pressures at home, Denmark changed its position from opposing the ban to supporting it. Melinda Wittstock, *MEPs Vote to Ban Tobacco Adverts*, THE TIMES (London), Feb. 12, 1992, at A19. Greece also seems to be moving toward favoring the ban. Johnson, *supra* note 23, at 10.

49. Coopers & Lybrand, *Consumer Policy*, EC COMMENTARIES, Jan. 28, 1993.

50. *The Week in Europe*, PRESS ASS'N NEWSFILE, Nov. 19, 1992. Vasso Papandreou explained that the Treaty of Rome allows the protection of public health to take precedence over the free movement of goods. Sarah Lambert, *Ministers in Fog Over Tobacco Advertising*, INDEPENDENT, Nov. 14, 1992, at 9.

51. See *infra* note 123 and accompanying text.

52. See REIN RIJKENS & GORDON E. MIRACLE, EUROPEAN REGULATION OF ADVERTISING 67-80 (1986), for a discussion of the draft directive process from initiation to implementation. The author details the various phases through which a directive must pass: (1) preparatory, (2) consultative, (3) decisionmaking, and (4) implementation.

using the reputation of an established trademark acquired with a product other than tobacco.⁵³

The terms of the Proposal translate into a total ban on direct advertising, with the sole exception being point of sale advertising.⁵⁴ According to sources within the European Community, the point of sale exception will not include retail stores such as supermarkets and shopping centers because of the perceived inability of such outlets to afford adequate consumer protection.⁵⁵ Moreover, the Proposal would prohibit establishments operating within the point of sale exception from displaying any tobacco advertisements that would be visible from the street.⁵⁶

The Proposal also would ban all forms of indirect advertising, that is, advertising that does not specifically offer the product but uses its reputation.⁵⁷ In practice, a tobacco company would be able to sponsor cultural or sporting events and inform the public that it was doing so, but it would not be able to use a tobacco logo or sign associated with tobacco products in connection with its sponsorship.⁵⁸ Finally, the Proposal would provide the EC with effective means to enforce the ban by providing the EC with the power to bring legal action against violating member states.⁵⁹

C. *The Commission's Purpose in Adopting the Proposal*

The Commission's motive in adopting the tobacco advertising ban is clear from the face of the Proposal. The proposed directive purports to expand and strengthen the EC-wide campaign to combat cancer.⁶⁰ During a press conference following the Commission decision, Social Affairs Commissioner Vasso Papandreou maintained that the ban was justified

53. Proposal, *supra* note 2.

54. *Health: Proposal on Tobacco Advertising Ban on Agenda for Next European Commission Meeting*, Eur. Rep., May 9, 1991, at 14. The ban would include any radio, poster, or film advertisements of tobacco products. *Id.*

55. *Id.* Likewise, automatic cigarette vending machines would not qualify under the point of sale exception. Proprietary to the United Press International 1992, Feb. 11, 1992.

56. *Id.*

57. *Commission Proposes Limit*, *supra* note 38.

58. *Id.* The Commission agreed to amend the Proposal so that a company that sells tobacco products as a secondary activity could continue to sponsor public events. The Cartier company, for example, would be covered by this amendment. *E.C. Minority Holds Up Ban on Tobacco Advertising*, AGENCY FRANCE PRESSE, May 14, 1992.

59. *See Commission Proposes a Drastic Limit*, *supra* note 36, at 31.

60. Proposal, *supra* note 2.

on public health grounds.⁶¹ She supplemented the Proposal's language that tobacco use "constitutes a very important death factor each year"⁶² with the powerful statistic that almost 440,000 people in the EC die annually as a result of tobacco use.⁶³

Another motivating factor for the Commission was the desire to protect the public health of young people.⁶⁴ As the Commission stated, "No tobacco prevention policy can be consistent as long as tobacco advertising remains accessible to non-smokers and children."⁶⁵ In the European Community, forty-four percent of all adolescents have experimented with or habitually use tobacco products.⁶⁶ Children as young as six-years old have displayed the ability to identify cigarette advertisements.⁶⁷ Further, studies have shown that ninety percent of all smokers begin using tobacco before the age of twenty.⁶⁸ Because of these statistics, Commission health authorities are convinced that advertising contributes to the initiation and continued use of tobacco by adolescents.⁶⁹

D. *The Commission's Justification for the Proposal*

The Commission defends its adoption of the Proposal on five grounds. First, the Commission argues that a tobacco advertising ban is an effective way of reducing smoking, especially among children.⁷⁰ Second, the Commission maintains that the terms of the Proposal are narrowly tailored to achieve its purposes.⁷¹ Third, the Commission contends that voluntary codes have not proven to be an effective alternative to an advertising ban.⁷² Fourth, the Commission maintains that public opinion strongly supports the ban.⁷³ Lastly, the Commission insists that the Proposal is necessary to achieve completion of true internal market.⁷⁴

61. See *EC Commission Proposes Total Ban on Cigarette Ads in Member States*, Daily Rep. Executives (BNA) No. 95, at A-3 (May 16, 1991) [hereinafter *Total Ban*].

62. See Proposal, *supra* note 2, at 3.

63. *Total Ban*, *supra* note 61. The Commission maintains that one person dies every minute in the EC from a smoking-related illness. *EC Parliament Backs Tobacco Advert Ban*, *supra* note 46, at 7.

64. See Proposal, *supra* note 2, at 3.

65. *Why the Commission Proposes*, *supra* note 9.

66. *Id.*

67. *Id.*

68. *Commission Proposes a Drastic Limit*, *supra* note 36, at 29.

69. *Why the Commission Proposes*, *supra* note 9.

70. See *infra* part II.D.1.

71. See *infra* part II.D.2.

72. See *infra* part II.D.3.

73. See *infra* part II.D.4.

74. See *infra* part II.D.5.

1. Nexus Between Cigarette Advertising and Smoking Initiation and Maintenance

There are generally four functions of tobacco advertising.⁷⁵ Tobacco advertising may be effective in: (1) influencing smokers to change brands, (2) influencing smokers to smoke more, (3) influencing non-smokers, including children, to begin smoking, and (4) deterring smokers from quitting.⁷⁶ The Commission's Proposal is founded on the belief that tobacco advertising fulfills all of these functions and, moreover, creates a climate of social acceptability for smoking.⁷⁷ The Commission supports its conclusions with evidence that illustrates where tobacco advertising bans have been instituted consumption of tobacco has decreased.⁷⁸

The Commission further justifies the ban as a means of preventing adolescents from ever beginning the smoking habit.⁷⁹ Relying on evidence that individuals who are still nonsmokers by the age of twenty are unlikely to begin smoking,⁸⁰ the Commission concludes that teenagers and younger children must constitute a "market segment of highest priority"⁸¹ for the tobacco industry. As the Commission has asserted, "The failure of this generation to start smoking would devastate the [tobacco] industry within years."⁸² Thus, the Commission justifies the Proposal as a necessary method of stopping the tobacco industry's advertising campaign against vulnerable adolescents.⁸³

75. SIMON CHAPMAN, *GREAT EXPECTORATIONS: ADVERTISING AND THE TOBACCO INDUSTRY* 23-24 (1986).

76. *Id.*

77. *See Why the Commission Proposes, supra* note 9.

78. For example, the Commission cites to New Zealand where tobacco consumption fell to 25.1% among the adult population 6 months after the ban compared to 26.7% immediately prior to the ban. *See id.*

79. *Id.*

80. *See* CHAPMAN, *supra* note 75, at 30.

81. *Id.*

82. *Why the Commission Proposes, supra* note 9. A recent study at the University of Massachusetts Medical School confirmed the importance of juvenile smoking. The study found that since 1988, when R.J. Reynolds Tobacco Company began its advertising campaign featuring a cartoon camel, the proportion of smokers under the age of 18 who smoked Camels rose from less than 1% to 32.8%. The percentage of adult smokers choosing Camels, however, is only 4%. Michael Conlon, *Cigarette Makers Trying to Target Children, Researchers Say*, *REUTERS BUS. REP.*, Dec. 10, 1991, at 9.

83. The Commission deems adolescents and children to be "the most vulnerable members of our society." *Commission Proposes a Drastic Limit, supra* note 36, at 30.

A document acquired by the United States Federal Trade Commission illustrates the tobacco industry's strategy in reaching children:

[A]n attempt to reach young smokers, starters, should be based . . . on the follow-

2. Narrowly Tailored

The Commission justifies the Proposal as being narrowly tailored on the grounds that it would suppress the illicit effects of tobacco advertising while retaining its legitimate functions.⁸⁴ Specifically, the Commission maintains that the ban would limit tobacco advertising to smokers.⁸⁵ By prohibiting tobacco advertising generally, while still allowing it within the tobacconists' shops the advertising would not entice non-smokers into smoking and any useful information about new brands would still be provided to tobacco consumers.⁸⁶

The Commission also points to the fact that tobacco advertising represents only 1.6 percent of the European Community's total advertising budget.⁸⁷ Consequently the Commission believes that the advertising ban will not have serious adverse economic repercussions in the EC.⁸⁸

3. Voluntary Codes Are Not Effective

In approving the blanket ban on tobacco advertising, the Commission concluded that voluntary codes within the member states are not an effective means of regulating the tobacco industry.⁸⁹ Specifically, the Commission criticized voluntary codes as failing to cover all aspects of tobacco promotion, being "lengthy and secretive," difficult to monitor, and having no real penalties for violations.⁹⁰ As the Commission stated, "The term 'voluntary' means that the measures are agreed to by the indus-

ing major parameters:

- Present the cigarette as one of a few initiations into the adult world.
- Present the cigarette as part of the illicit pleasure category of products and activities.
- In your ads create a situation taken from the day-to-day life of the young smoker but in an elegant manner have this situation touch on the basic symbols of the growing-up, maturity process.
- [R]elate the cigarette to 'pot', wine, beer, sex, etc.
- DON'T communicate health or health-related points.

CHAPMAN, *supra* note 75, at 31-32.

Furthermore, the Commission noted that in Norway a tobacco advertising ban reportedly decreased the percentage of 13-15 year olds who were smoking at least 1 cigarette a day, from 17% in 1975 to 10% in 1990. *Why the Commission Proposes, supra* note 9.

84. See *supra* notes 75-77 and accompanying text.

85. *Why the Commission Proposes, supra* note 9.

86. *Id.*

87. *Id.*

88. *Id.*

89. Geoff Meade, *Decision Delayed on Tobacco Ads Ban*, PRESS ASS'N NEWSFILE, Nov. 11, 1991.

90. *Why the Commission Proposes, supra* note 9.

try—clearly no industry will voluntarily agree to measures that genuinely threaten its trading viability.”⁹¹

4. Public Support

The Commission believes that past acknowledgment and present support for tobacco advertising limitations is a further justification for the Proposal.⁹² For example, in October 1991 a television advertising ban for all tobacco products was applied to all EC states.⁹³ Moreover, in December 1991 an EC survey showed that three out of four people in the European Community support a tobacco advertising ban.⁹⁴

5. A Single Market Measure

Under article 100A of the Single European Act, the Commission may impose regulations which are necessary to further the EC's progression toward complete integration.⁹⁵ Because Italy, France, and Portugal have placed a total ban on tobacco advertising, and all of the EC states limit tobacco advertising to some degree, the Commission is fearful that states with more stringent regulations on tobacco advertising will inhibit the free circulation of publications from other member states that do not have a ban or have less restrictive guidelines for tobacco advertising.⁹⁶ The Commission views the Proposal as a way of harmonizing existing EC law in a manner that will avoid the barriers to trade inherent in a segmented market.⁹⁷

91. *Id.*

92. *See id.*

93. *See* Barry James, *Can a Tobacco Ad Ban Help EC Smokers Quit?*, INT'L HERALD TRIB., Feb. 26, 1992.

94. Sytske Looijen, *European Topics: Joint Profit for U.S. and Scotland Yard*, INT'L HERALD TRIB., Dec. 5, 1991. "Of the 13,000 people interviewed in the 12 EC countries, 74 percent supported the idea of the ban, 15 percent opposed it and 11 percent gave no opinion." *Id.* Further, an absolute majority of smokers in all of the member states supported a ban (64% support, 27% against). *Community-Wide Support for Closer Union at Maastricht*, ORIGIN UNIVERSAL NEWS SERVICES LIMITED, Dec. 3, 1991. Only in the Netherlands are smokers evenly divided on the issue (47% support, 45% against). *Id.*

95. *See* SEA, *supra* note 8.

96. *See* *Total Ban*, *supra* note 61, at A-3.

97. *Why the Commission Proposes*, *supra* note 9. *See also* *Community-Wide Support for Closer Union at Maastricht*, UNIVERSAL NEWS SERVICES LIMITED, Dec. 3, 1991.

III. MEMBER STATES' CHALLENGES TO THE PROPOSAL

In a speech at the Forum Europe Conference on Advertising in Brussels, Sir Leon Brittan detailed three types of Commission proposals.⁹⁸ In the first type of proposal, the Commission sets a basic framework for action but does not impose rigid terms.⁹⁹ Such proposals are not regulatory per se, but aim to eliminate existing restrictions within the member states.¹⁰⁰ Brittan cites the Directive on Comparative Advertising¹⁰¹ as illustrative. In the Directive on Comparative Advertising the Commission granted all EC states the right to use comparative advertising thereby overriding four or five member states that had previously banned such advertising within their states.¹⁰² Generally regarded as a practical means to achieve the Single Market, this first type of proposal is relatively uncontroversial.¹⁰³

The second type of proposal, however, has been subject to increased criticism because it requires a decision as to whether the European Community should get involved with matters that arguably are better left to the individual member states.¹⁰⁴ Although some states question whether the Commission has the power to enforce such legislation, member states have usually acquiesced because of the underlying policies of the legislation.¹⁰⁵ Most member states find the proposals to be a pragmatic way to proceed.¹⁰⁶

The third group of proposals, according to Brittan's scheme, are "the most contentious."¹⁰⁷ These proposals involve areas where there exists no obvious consensus within the EC.¹⁰⁸ The problem with these proposals is that they regulate affairs through Community legislation rather than through the traditional means of negotiation between industry and

98. Sir Leon Brittan, Advertising in Europe: Freedom to Choose—Freedom to Trade, Address Before the Forum Europe Conference (June 20, 1991), in RAPID (EC Press Release), June 20, 1991.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* An example of such lack of consensus is the recent EC effort to establish a single European currency and common central bank. See Neville Nankivell, *European Community: It Was 'One's Bum Year'*, FIN. POST, Dec. 26, 1992, at 28.

government.¹⁰⁹ Finally, such proposals breed contention because the Commission requires only a qualified majority to approve them, thereby silencing any minority opposition. Brittan maintains that the Proposal falls within this third category.¹¹⁰

The dissenting member states oppose the tobacco advertising ban for seven specific reasons. First, they raise the technical argument that because the Proposal is not vital to achieving the internal market, it may not be passed by a mere majority under article 100A, but rather requires unanimity under article 235.¹¹¹ Second, the opponents claim that any connection between cigarette advertising and increased tobacco consumption is tenuous at best.¹¹² Third, the opponents claim that voluntary codes are the preferred and the more effective means of curbing tobacco consumption.¹¹³ Fourth, they assert that the ban amounts to protectionism in favor of EC tobacco monopolies and discriminates against foreign competitors.¹¹⁴ Fifth, they maintain that the Commission has underestimated the adverse economic consequences of a tobacco advertising ban on the EC economy.¹¹⁵ Sixth, the opponents insist that the Proposal is an unwarranted attack on free speech principles.¹¹⁶ Lastly, the opponents are hostile to the Commission's increasing regulation because they fear that the Commission will extend its regulatory reach to other internal matters.¹¹⁷

A. *The Legal Basis of the Proposal*

In January 1992, Europe's tobacco lobby won a small victory in its strategic battle against the tobacco advertising ban.¹¹⁸ Relying on the Parliament's legislative procedures, the opposing member states complained that Parliament's legal affairs committee had failed to issue its requisite opinion either supporting or rejecting the legal basis of the Proposal.¹¹⁹ Despite the fact that the legal affairs committee effectively had approved the Proposal's legal basis when it had considered the Commis-

109. *Id.*

110. *Id.*

111. *See infra* part III.A.

112. *See infra* part III.B.

113. *See infra* part III.C.

114. *See infra* part III.D.

115. *See infra* part III.E.

116. *See infra* part III.F.

117. *See infra* part III.G.

118. *Tobacco Lobby Scores Win in Delaying Advertising Ban, 1992—EXTERNAL IMPACT EUR. INTEGRATION*, Jan. 24, 1992 [hereinafter *Tobacco Lobby Scores*].

119. *Id.*

sion's original 1989 version of the ban, lobbyists succeeded in stalling the Parliament for twenty-six days while the committee's opinion was pending.¹²⁰

In February 1992, the legal affairs committee issued its opinion.¹²¹ The committee agreed with the Commission that the Proposal was justified as a measure related to the establishment or furthermore of the internal market under article 100A of the Single European Act.¹²² Under the auspices of article 100A, a proposal need garner only a simple majority in the Council of Ministers to be passed.¹²³

Although a moot point following the committee's finding, opposing member states continue to challenge the questionable legal basis of the Proposal.¹²⁴ Opposing member states contend that the Proposal is not tied to the establishment of a single market as article 100A requires.¹²⁵ They claim that the Commission has misused article 100A and that the Proposal should fall under article 235, the "catch-all" category, requiring unanimity for all standard Commission proposals not vital to the single market.¹²⁶ The opposing member states base their fierce criticism of the Proposal's legal basis on the fact that under article 100A, as many as four member states may be effectively silenced, regardless of how fervent their opposition to the ban may be.¹²⁷ In essence, the opponents attack the Commission for "us[ing] procedural measures to solve political arguments."¹²⁸

Moreover, opposing member states, especially the United Kingdom,

120. *See id.*

121. *Id.*

122. *Id.*

123. *See* MATHIJSEN, *supra* note 1, at 13. Decisions under the Single European Act's majority voting are made as each minister casts his member states' apportioned number of votes. *How EC Legislation is Decided*, MARKETING, Sept. 15, 1991, at 3. The Proposal will pass if 54 of the total 76 votes support the ban. *Id.* However, if 23 votes are cast in opposition to the ban, the Proposal will fail. *Id.*

124. *See* Tony Dawe, *Art of Hitting the Political Target*, THE TIMES (London), Feb. 10, 1992, at 18; *see also infra* note 162 (discussing a lobbyist's two-tiered framework for challenging the Proposal).

125. *See Health Council: Important Debate on the Ban on Tobacco Advertising*, EUR. REP., Nov. 9, 1991, at 16.

126. *See* David Buchan, *Countdown to Maastricht: In Search of Clearer Legal Base for EC Activities*, FIN. TIMES, Nov. 14, 1991, at 3.

127. Johnson, *supra* note 10, at 9. In other words, if the vote had occurred and Denmark, Greece, Germany, the Netherlands, and the United Kingdom opposed the ban, only two of these nations needed to have changed their position to have the ban pass the majority requirement. *See id.*

128. Sarah Lambert, *Ban on Cigarette Advertising Delayed By Firms*, INDEPENDENT, Jan. 17, 1992, at 3.

fear what they perceive as a trend away from the technical debate of whether a proposal is 'single market enough' to become law on a majority decision, toward whether its general policy area has been recognized by the Single European Act.¹²⁹ Specifically, the United Kingdom fears that by breaking up the new treaty into separate policy areas, the Commission will be free of having to justify its specific proposal as vital for completion of the internal market.¹³⁰ The United Kingdom argues, moreover, that because the Treaty does not treat industrial policy as a distinct policy area within the Treaty, the tobacco advertising ban must relate unequivocally to the internal market if it is to come under the less rigorous majority standard.¹³¹

B. *Nexus Between Cigarette Advertising and Smoking Initiation and Maintenance*

1. Consumption Levels

Economic theory recognizes that there are two kinds of markets for products.¹³² The first is characterized as immature.¹³³ In immature markets, total market size is volatile. Market size will tend to increase as consumers become aware of the products, as the products become more widely available, and as price of the product decreases due to technological advances.¹³⁴ In an immature market, product consumption is directly proportional to the product's promotion in the marketplace. Economists point to the home computer market as illustrative of an immature market.¹³⁵

In the second category, the market for products is characterized as mature.¹³⁶ In a mature market products are firmly established, widely distributed, easily recognized by consumers, and available for a relatively low price.¹³⁷ In contrast to an immature market, the total market size in a mature market remains relatively static.¹³⁸ Advertising for mature products, therefore, is directed at building brand loyalties and luring

129. Buchan, *supra* note 126, at 3.

130. *Id.*

131. *See id.*

132. T.C.H. King, *Advertising Tobacco*, THE TIMES (London), Feb. 21, 1992.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

consumers away from competing products.¹³⁹

The tobacco companies of the opposing member states claim tobacco falls into the mature market category.¹⁴⁰ The opposition argues that it is much more profitable for a tobacco company to use advertising to insure brand loyalty or to persuade people to change brands than it is to persuade consumers to initiate an activity they have never participated in.¹⁴¹ In support of this argument, the opposition points to a 1988 finding by the Quebec Superior Court that found no significant connection between tobacco advertising and tobacco consumption.¹⁴² In *Imperial Tobacco Ltd. v. Canada*, the Canadian court struck down the Tobacco Product Control Act, finding that the international data supporting the link between advertising and consumption to be no more than speculation.¹⁴³

139. *Id.*

140. See Philip T. Circus, *Tobacco Advertising*, INDEPENDENT, Jan. 16, 1992, at 22.

The plain fact is that there is no hard evidence of a link between tobacco advertising and total consumption. In a mature consumer market, such as that which exists for tobacco products, the role of advertising is in relation to brand competition. To suggest otherwise is to imply that a great deal of money is being spent to no effect, given the continuing fall in consumption.

Id.

141. Moreover, the opposing member states claim that not only does advertising not initiate smoking, but neither does it encourage people to smoke more:

Does advertising encourage more people to buy cigarettes, or people to buy more cigarettes? The answer in both cases is no. When manufacturers advertise soaps do you wash more often? When oil companies advertise petrols do you increase your car mileage? When catfoods are advertised do you rush out and buy a cat? No. Despite the welter of new launches, competitions, giveaways, promotions, advertising campaigns and other hullabalo, total sales of newspapers have not increased for more than a decade.

William Fletcher, *Ifs, Butts and Brussels*, THE TIMES (London), Feb. 13, 1992, at A9.

142. See *Imperial Tobacco Ltd. v. Canada*, 55 D.L.R. 4th 555 (1988) (Que. Super.), *aff'd*, 59 D.L.R. 4th 743 (1989) (Que. C.A.); see also Randal Marlin, *A Judicious Use of Words?*, OTTAWA CITIZEN, Aug. 12, 1991, at A7. Judge Chabot of the Quebec Superior Court found that the connection between tobacco advertising and increased consumption was "remote and unproven." *Id.* Judge Chabot explained that just because some groups allege that there is a connection between tobacco advertising and consumption does not necessarily make it so. *Id.*

143. *Imperial Tobacco Ltd. v. Canada*, 55 D.L.R. 4th 555 (1988) (Que. Super.), *aff'd*, 59 D.L.R. 4th 743 (1989) (Que. C.A.). Judge Chabot struck down the Tobacco Product Control Act on numerous other grounds: (1) that the government exceeded its authority in attempting to regulate advertising, an area which falls under provincial jurisdiction, (2) the law interfered unjustifiably with the tobacco industry's right to freedom of expression under the Charter of Rights and Freedoms, and (3) the law denied consumers the right to choose for themselves. David Vienneau, *Can Health Groups Send Tobacco Ad Ruling Up In Smoke?*, TORONTO STAR, Aug. 4, 1991, at B4.

Moreover, the opposing member states, especially the United Kingdom, contend that there is no evidence that advertising bans have been effective in those states that have instituted them.¹⁴⁴ The opposition points to China and the former Soviet Union as prime examples. Those states had large smoking populations as well as the two largest tobacco monopolies in the world, in spite of government prohibitions on tobacco advertising.¹⁴⁵ In addition, Norway, Finland, and Portugal, all states that have banned tobacco advertising for more than ten years, have together experienced the largest increases in smoking in Europe.¹⁴⁶

Furthermore, opponents claim a ban may cause a reversal of the downward trend in tobacco consumption, similar to that which took place with illegal drugs such as cocaine and marijuana, which thrive without advertising.¹⁴⁷ According to the opponents of the ban, the present amount of promotion for tobacco products arguably reduces their subversive glamour and that a ban could actually have the effect of enhancing the appeal of tobacco products.¹⁴⁸

2. Smoking Among Children

The tobacco industry does not deny that children constitute a portion of the European market for tobacco.¹⁴⁹ The industry rejects the conten-

Although ruled unconstitutional, the Tobacco Product Control Act will remain in effect until all of the appeals are exhausted, a process that could take up to five years. *Id.* Health organizations around the world have urged Canada to appeal the decision, believing that such a decision could have negative repercussions on worldwide efforts to reduce tobacco consumption. *See Canada to Appeal Against Ruling Overturning Tobacco Ad Ban*, REUTERS LIBR. REP., Aug. 14, 1991, at 11.

Many still support Canada's comprehensive tobacco strategy. *See* Garfield Mahood, *Clearing Away the Smoke*, OTTAWA CITIZEN, Sept. 12, 1991, at A14. According to the Canadian government, Canada's program against tobacco use has resulted in unprecedented declines in consumption. *Id.* Canadian tobacco consumption has declined approximately 25% since January 1989. *Id.* The government attributes its success to a combination of the tobacco advertising ban, stronger warnings, higher taxes, and restrictions on smoking. *Id.*

144. *See* Fletcher, *supra* note 141, at A9.

145. *Id.*

146. *Id.*; *see also* Michael J. Waterson, *Advertising and Tobacco Consumption: An Analysis of the Two Major Aspects of the Debate*, in THE IMPACT OF TOBACCO ADVERTISING 59, 66-72 (1990) (Special Report to the International Journal of Advertising).

147. Fletcher, *supra* note 141, at A9.

148. *Id.*

149. *See* Simon Chapman, *Cigarette Advertising and Smoking: A Review of the Evidence*, in SMOKING OUT THE BARONS: THE CAMPAIGN AGAINST THE TOBACCO INDUSTRY 85 (British Medical Association ed., 1986). For example, in Britain in 1982, children between the ages of 11 and 16 spent approximately £60 million on smoking. *Id.*

tion, however, that advertising has a direct effect on a juvenile's decision to begin smoking.¹⁵⁰ Rather, the industry asserts that any effects on children are indirect and minimal compared to other factors such as family, peer pressure, and socioeconomic variables.¹⁵¹ The opposing member states cite the British experience as supportive of their argument. That is, although the British tobacco industry advertises extensively, spending approximately £55 million each year, smoking among British juveniles continues to decline among both females and males.¹⁵²

C. *Voluntary Codes Are More Effective*

Opposing member states insist that the regulation of advertising is a national matter¹⁵³ and therefore should be decided internally by each state, free from Commission interference.¹⁵⁴ Moreover, they maintain that each state's voluntary code of conduct for the tobacco industry is more effective than the proposed blanket ban on advertising.¹⁵⁵ The British claim they have had more success in reducing the number of tobacco-

150. The controversy over whether tobacco advertising has a direct effect on children has made the Proposal one of the more emotional measures that the Commission has introduced. *EC Parliament Backs Tobacco Advertising Ban*, *supra* note 46. In a letter to THE TIMES, John Moxham, Chairman of Doctors for Tobacco Law, illustrates the amount of emotion involved in the debate:

As [my patients] suffer their breathlessness and their cancers they recall how they were recruited to their addiction when impressionable youngsters. These patients have one wish: that their children and grandchildren are not also fooled by the illusion of glamour fabricated by the tobacco industry and its supporters.

John Moxham, *Tobacco Advertising*, THE TIMES (London), Nov. 19, 1991, at A2.

151. See W. Fred van Raaij, *The Effect of Marketing Communication on the Initiation of Juvenile Smoking*, in THE IMPACT OF TOBACCO ADVERTISING, *supra* note 146, at 15. In his study, Professor van Raaij found that many different factors influence smoking initiation among adolescents. He categorizes the factors as either "distal" (meaning characteristics such as personality and socio-economic standing, mass media information such as advertising, and social norms about smoking, including smoking behavior of the household members and peers) or "proximal" (pertaining to perception, evaluation, and the decision processes of juveniles). *Id.* at 16. Relevant socio-economic traits are age, gender, education, social class, and culture. *Id.* Relevant personality traits are maladaptation, locus of control, lifestyle orientation, tolerance for deviance, health orientation, and time preference. *Id.* at 17-18. As a means of illustration, van Raaij asserts that juveniles of a lower social class are more susceptible to start smoking, due in substantial part to their level of education. *Id.* at 17.

152. See Fletcher, *supra* note 141, at A9.

153. David Fletcher, *Tobacco Advert Split Grows*, DAILY TELEGRAPH (London), Nov. 11, 1991, at 3.

154. *Id.*

155. *Id.*

related deaths than have some states that have banned tobacco advertising.¹⁵⁶ Under the current voluntary code in the United Kingdom, tobacco companies have agreed to refrain from advertising in cinemas and in women's and youth-oriented magazines.¹⁵⁷ In addition, Ireland has designed its own program, the Children and Young Persons (Protection from Tobacco) Act, to ensure that tobacco is not easily accessible to children.¹⁵⁸ By the terms of the Act, the maximum penalty for selling tobacco to children under 16 is £2,500,¹⁵⁹ and the sale of single or loose cigarettes is forbidden.¹⁶⁰

D. *Protectionism*

Relying on the statistics which indicate that advertising bans may have no effect on tobacco consumption or may even increase it, the opposition concludes that health is only a very small part of the impetus behind the Proposal.¹⁶¹ Rather, the opposition maintains, the Proposal represents one last desperate attempt by Europe's state monopolies to recover their cigarette market share lost to Philip Morris.¹⁶² Specifically, France, Italy, and Spain each have nationalized monopolistic tobacco industries that they want to protect.¹⁶³ According to opponents of the ban, the tobacco monopolies have pushed through the tobacco advertising ban to

156. Wittstock, *supra* note 48, at A19.

157. Meade, *supra* note 11.

158. Lambert, *supra* note 128, at 3.

159. *Id.*

160. *Id.* Although the Act was due to become effective on January 1, 1992, local authorities are postponing implementation because they realize that the Proposal, if passed, may affect the Act's applicability. *Id.*

161. Andrew Leigh, *Debate Over Protected Speech Heats Up in Advertising*, INVESTOR'S BUS. DAILY, Nov. 20, 1991, at 10. Compare with the similar attack by an advertising association that if health were the real issue, one should ban tobacco, not the advertising for it. See *Advertising a Bad Habit*, INDEPENDENT, Jan. 17, 1992, at 20.

162. *Bomb the Ban*, FORBES, Feb. 17, 1992, at 54. The tobacco monopolies of France, Italy, and Spain produce and market cigarettes. Revenues from the sale of their tobacco flows directly into the hands of the government. Ten years ago, the tobacco monopolies had the domestic tobacco market substantially to themselves, however, the United States tobacco industry led by Philip Morris has cut into their market share. Since 1980, Philip Morris' sales have climbed to \$3.3 billion in Europe, with a market share of 33%. Marlboro, a brand manufactured by Philip Morris, has now become Europe's most popular cigarette brand. *Id.*

Leading lobbyist and European affairs director of the Advertising Association, Lionel Stanbrook, believes that the most significant challenge to the proposed ban is the protectionism argument. However, as the debate intensifies, he plans to then raise objections over the Proposal's legal basis. Dawe, *supra* note 124, at 18.

163. *Free Speech Up in Smoke*, DAILY TELEGRAPH (London), Feb. 13, 1992, at 18.

reduce the visibility of Philip Morris cigarettes, in order to reduce the consumer demand for them.¹⁶⁴ The tobacco monopolies could then rely on the price differential to regain that share of the market previously lost to Philip Morris products, which typically sell for about twice the price of local brands.¹⁶⁵ The opponents of the ban argue that the Proposal, by erecting protectionist trade barriers against multinational manufacturers, will stifle competition¹⁶⁶ and only make the tobacco industry more profitable.¹⁶⁷ The opponents have labelled the Proposal a disguised blessing for the industry which the ban set out to constrain.¹⁶⁸

E. *Adverse Economic Consequences*

Opposing member states oppose the Proposal because of its potential economic impact upon the European Community. According to the opposition's figures, a total ban on tobacco advertising would mean a loss of more than 150,000 jobs in the EC and cost newspapers and magazines more than £60 million a year in revenues.¹⁶⁹ Although the Commission estimated tobacco advertising throughout the European Community constitutes 1.6 percent of Europe's total advertising expenditures, the opposition claims that the correct figure is closer to 3 percent.¹⁷⁰ There are 15,000 German jobs directly dependent upon tobacco advertising and another 100,000 German jobs that would suffer from a tobacco advertising ban.¹⁷¹ Moreover, a ban on tobacco advertising would decrease the overall advertising revenue of magazines by 6.6 percent, and of newspapers by 3.6 percent.¹⁷² The Proposal could also endanger sports, arts, and other events that rely on the sponsorship of tobacco companies.¹⁷³ British

164. *Bomb the Ban*, *supra* note 162.

165. *Id.*

166. Valerie Katham, *EC Plan to Smoke Out the Truth About Tobacco Ad Effectiveness*, *MARKETING*, May 23, 1991, at 8.

167. Fletcher, *supra* note 141.

168. *Id.* Moreover, opponents of the ban point to the irony of the Proposal given that the European Community subsidizes the tobacco industry in Europe by \$1.7 billion a year, yet complains about high tobacco consumption. See *Sport Cash Could Go Up in Smoke*, *PRESS ASS'N NEWSFILE*, Feb. 11, 1992, at 23; see also *infra* notes 194-99.

169. Jane Thynne, *£60m A Year May Go Up in Smoke*, *DAILY TELEGRAPH* (London), Jan. 18, 1992, at 6.

170. Geoff Meade, *Smoking Ads Ban Necessary to Cut Deaths*, *PRESS ASS'N NEWSFILE*, Jan. 16, 1992, at 16.

171. *Id.*

172. Thynne, *supra* note 169, at 6.

173. Gary Mead, *Tobacco Advertising May End in a Puff of Smoke*, *FIN. TIMES*, Nov. 26, 1991, at I12. Recently, the International Motor Sports Federation (FISA) announced that France's Grand Prix will be cancelled because of tobacco companies' with-

sports, for example, could lose as much as £12 million in sponsorship revenues as a result of a tobacco advertising ban.¹⁷⁴

F. *Unreasonable Restriction on Free Speech*

The opposing member states regard the tobacco advertising ban as an attack on freedom of speech. The opposition maintains that advertisements are a legitimate form of expression and deserve protection.¹⁷⁵ "Like all utterances with a purpose to persuade, advertisements are sometimes untrue, but they are a legitimate form of expression which helps consumers to find out what is an offer."¹⁷⁶ Furthermore, the opposition points to the inconsistency of outlawing the promotion of a product while still allowing for its sale.¹⁷⁷ To the opposition, the question of whether smoking is unhealthy is irrelevant. Rather, "[i]f smoking needs to be defeated, it must be by free persuasion, not by suppression."¹⁷⁸

G. *The Domino Effect*

Opponents of the Proposal assert that a ban on tobacco advertising would encourage the Commission to initiate a greater number of similar or even more intrusive regulatory directives.¹⁷⁹ Specifically, the opposition fears that the Proposal represents the beginning of excessive EC

drawal of funds as a result of France's domestic ban on tobacco advertising. *Parliament Starts Race Against Time to Save Grand Prix*, AGENCY FRANCE PRESSE, Dec. 18, 1992.

174. Wittstock, *supra* note 48.

175. *Free Speech Up in Smoke*, *supra* note 163, at 18. The opposition argues that advertisements are a legitimate form of commercial expression because they aid consumers in learning about the type of products available for purchase. *Id.*

176. *Id.*

177. See Leigh, *supra* note 161, at 10. Both Germany and the Netherlands maintain that the Proposal would subvert constitutional guarantees that all legal products may be freely advertised. Brian Love, *For Europe's Governments, Tobacco Ads Prove Addictive*, REUTERS BUS. REP., May 14, 1992.

178. *Free Speech Up in Smoke*, *supra* note 163, at 18. "If we believe that people are grown up enough to decide on the merits of political parties after studying their propaganda, we must also believe that they can do the same about industrial products." *Id.*

179. See *Tobacco: European Parliament Presses for Total Ban on Advertising*, EUR. REP., Jan. 11, 1992, at 6. Ronald Beatson, director general of the European Association of Advertising Agencies, stated his concern about a domino effect if the Proposal was enacted and that he and the other opponents were wary of "a whole mass of legislation coming out of the EC, aimed at barring all sorts of commercial speech." Charles Goldsmith, *Lobbyists in EC Battle Ban on Tobacco Ads*, INT'L HERALD TRIB., Nov. 11, 1991.

regulation and that advertising restrictions on alcohol,¹⁸⁰ toys, candy, sports cars, and other products the Commission deems harmful are likely to follow.¹⁸¹

IV. ANALYSIS OF THE EUROPEAN COMMUNITY DEBATE

The debate over the proposed ban on tobacco advertising in the EC is illuminated by a comparison to its parallel movement in the United States in 1986 and 1987. The 1986 and 1987 bills requiring a ban on the advertisement of tobacco products in the United States lend a helpful perspective to the EC experience.

Although the 1986 bill died while still in committee,¹⁸² a similar bill introduced in 1987 existed long enough to create a stir in the United States.¹⁸³ Entitled the Health Protection Act of 1987, the bill was clearly the most pervasive attempt in a series of efforts to reduce United States tobacco consumption and its accompanying health hazards.¹⁸⁴ Reasoning that the advertising of tobacco products "deceptively portrays use of tobacco as socially acceptable and healthful [and] undermines the credibility of government and private health education campaigns against smoking,"¹⁸⁵ the legislative committee recommended a complete ban on tobacco advertising.¹⁸⁶ In relevant part, the statute read, "No manufacturer, packer, distributor, importer, or seller of tobacco products in or affecting commerce may engage in any consumer sales promotion of such products."¹⁸⁷ The bill exempted tobacco retail outlets, however, providing that they could display a type of tombstone advertisement stating that tobacco products were available for sale on the premises.¹⁸⁸

The Health Protection Act raised considerable controversy in the

180. According to several officials in the private television sector, the Commission already has plans to ban alcohol advertising. The Commission, however, has refused to confirm this allegation. See *Tobacco: European Parliament Presses for Total Ban on Advertising*, *supra* note 180, at 7.

181. See Goldsmith, *supra* note 179.

182. H.R. 4972, 99th Cong., 2d Sess. (1986).

183. See Kenneth L. Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 134 (1988).

184. Krista L. Edwards, Comment, *First Amendment Values and the Constitutional Protection of Tobacco Advertising*, 82 NW. U. L. REV. 145 (1987).

185. H.R. 1272, 100th Cong., 1st Sess. §§ 2(14), (15), (23) (1987) (setting forth proposed congressional findings).

186. *Id.* at § 3(a).

187. *Id.*

188. See Polin, *supra* note 183, at 134.

United States. The American Bar Association,¹⁸⁹ the American Civil Liberties Union,¹⁹⁰ and, not surprisingly, the American Advertising Federation condemned the bill.¹⁹¹ In 1988, Congress voted against the Act.¹⁹² This defeat in the United States of the Health Protection Act of 1987 illustrates the international character of the tobacco advertising debate and the subtle workings of other variables such as nationalism, heritage, and history that can weigh heavily in a legislative forum.

A. *The Hypocrisy of the EC Proposal*

According to the Commission, the proposed ban on tobacco advertising is in accord with the European Community's overall agenda of decreasing tobacco consumption and its accompanying evils.¹⁹³ Although the proposed ban may be in tune with the rhetoric of the Commission, it is not consistent with the EC's larger policy of maintaining tobacco subsidies and nationalized tobacco industries within Europe.

Specifically, the greatest irony of the Proposal is that the European Community continues to pay the equivalent of more than \$1.7 billion each year in tobacco subsidies to tobacco farmers in the EC member states.¹⁹⁴ In the words of the opposition: "Several European countries subsidise the growing of tobacco, and all garner huge amounts of tax from it. But [the Commission is] attempting to put the entire burden on the advertising—to shoot the messenger."¹⁹⁵ Moreover, more than fifty percent of the tobacco cultivated through subsidies from the EC is of such low quality that it is deemed unsaleable.¹⁹⁶ The unsaleable tobacco must then be dumped at a loss in the world market.¹⁹⁷ While extolling

189. Gary A. Hengstler & Paul Marcotte, *A.B.A. Rejects Tobacco Ad Ban*, A.B.A. J., Apr. 1, 1987, at 32; see also Polin, *supra* note 183, at 106 n.48 (listing reasons for the American Bar Association's rejection of the tobacco advertising ban).

190. See Jean Cobb, *Clearing the Air: Should All Cigarette Advertising and Promotion Be Banned?*, COMMON CAUSE MAG., Mar./Apr. 1986, at 34, 37 (outlining some of the representative opinions).

191. *Id.*

192. See Mark A. Stein, *Reynolds Scion Taking Role in Prop. 99's Anti-Tobacco Drive*, L.A. TIMES, Oct. 27, 1988, at A3.

193. See *supra* part III.C.

194. *Anti-Smoking Campaigners Seek E.C. Tobacco Advertising Ban*, AGENCE FRANCE PRESSE, Sept. 24, 1992 [hereinafter *Anti-Smoking Campaigners*]. See also *Sport Cash Could Go Up In Smoke*, *supra* note 168, at 23. In contrast, the EC spent only \$14 million a year in its fight against cancer. *Anti-Smoking Campaigners*, *supra*.

195. Thynne, *supra* note 169, at 6 (statement of Sir Frank Rogers, chairman of the European Publishers Council and deputy chairman of *The Daily Telegraph*).

196. Wittstock, *supra* note 48.

197. *Free Speech Up in Smoke*, *supra* note 164.

publicly the virtues of its Europe Against Cancer campaign, the EC is, in reality, merely exporting its cancer.¹⁹⁸

Similarly, the existence of tobacco subsidies in the United States was clearly one of the many determinative factors in the failure of the Health Protection Act.¹⁹⁹ In the United States, the tobacco industry continues to receive significant funding from the government each year.²⁰⁰ At present, the EC and the United States are both guilty of pursuing conflicting governmental policies which aim to reduce tobacco consumption at the same time they attempt to sustain or even increase tobacco production levels.²⁰¹ Until they recognize and rectify this situation, any tobacco advertising ban is doomed to contradiction and ultimate defeat.

B. *The Free Speech Argument*

In the United States, the notion of freedom of speech²⁰² played an integral part in the downfall of the tobacco advertising ban.²⁰³ Supporters of the United States ban maintained that smoking advertisements

198. See Thynne, *supra* note 47, at 4. A European official stated recently that the Commission is considering a crop substitution scheme whereby European tobacco farmers would receive 20,000 ECU more in subsidies if they agree to grow less harmful products. Tim Jackson, *UK Fights Ban on Tobacco Advertising*, INDEPENDENT, Nov. 13, 1992, at 14.

199. Janny Scott, *Study Links Ads, Coverage of Smoking Hazards*, L.A. TIMES, Jan. 30, 1992, at A27.

200. It is estimated that United States tobacco farmers receive approximately one billion dollars per year in the form of federal subsidies. *All Things Considered*, NAT'L PUB. RADIO, Oct. 22, 1992. The United States tobacco industry also enjoys a full tax write-off for its advertising, costing the United States Treasury more than one billion dollars per year. Louis J. Pauly & Louis Cohen, *Reduce Tax Break to Tobacco Firms*, CHI. TRIB., Sept. 20, 1992, at 2C.

201. See *All Things Considered*, *supra* note 200.

Well, they're taxing you and me to pay the tobacco farmers a billion dollars a year to grow tobacco, while at the same time they're taxing you and me millions of dollars a year to pay the surgeon general's office to try to convince us not to use this drug that they're taxing us a billion dollars a year to subsidize . . . [that is] insanity.

Id.

202. The First Amendment to the United States Constitution protects the freedom of speech. "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

203. The American Bar Association refused to support the ban due mainly to the Health Protection Act's conflict with the First Amendment. See Polin, *supra* note 183, at 106 n.48. It has been suggested, however, that the American Bar Association was not really as concerned with freedom of speech as it was with avoiding lobbying expenses they would incur if they agreed to support the bill. *Id.*

which fraudulently depict healthy people involved in athletic activity²⁰⁴ or suggest to women that smoking is glamorous, sexy, or sophisticated²⁰⁵ are deceptive advertising not worthy of First Amendment protection.²⁰⁶ Opponents responded that they believed that the proponents contrived the ban merely as a method of bypassing an unwillingness to ban tobacco itself, and that such circumvention was clearly inconsistent with protected speech status afforded to commercial expression.²⁰⁷ The controversy focused upon prior judicial decisions, with the debate centering over whether the United States Supreme Court had in fact recognized First Amendment protection for commercial speech.²⁰⁸

Specifically, until 1976,²⁰⁹ the Supreme Court had refused to extend First Amendment protection to commercial speech.²¹⁰ As a result, in 1968, threatened with antismoking advertisements, the tobacco industry agreed to refrain from advertising on television.²¹¹ By 1971, Congress decided to formalize the agreement by passing legislation that banned cigarette promotion on television.²¹² Although broadcasters lost substantial revenues as a result of the television ban, the United States courts rejected all constitutional challenges to the ban.²¹³

Then in 1976, in the case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court extended free speech protection, albeit in a lesser degree, to commercial speech.²¹⁴ As a direct result, the Court found various restrictions on the advertising of legal services, utilities, contraceptives, and pharmacies to be unconsti-

204. Leigh, *supra* note 161, at 10.

205. See generally Celia Hall, *Women's Magazines 'Promoting Smoking'*, INDEPENDENT, Jan. 10, 1992, at 2.

206. See generally Polin, *supra* note 183.

207. *Id.*

208. See *infra* note 214 and accompanying text.

209. *Id.*

210. Leigh, *supra* note 161, at 10.

211. *Id.* From its actions it is clear that the tobacco industry actually preferred a complete ban of television advertising rather than sharing airtime with anti-smoking commercials. *Id.*

212. *Id.* at 11.

213. *Id.*

214. 425 U.S. 748 (1976). Specifically, the Court invalidated a Virginia statute making it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. The Court based its decision on the grounds that society has an interest in the free flow of commercial information and that a state cannot ban the dissemination of truthful information. *Id.* Moreover, in the words of Justice Blackmun, writing for the majority: "[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." *Id.* at 761.

tutional.²¹⁵ In the 1986 case of *Posadas v. Tourism Co.*, however, the Court retreated from its position of affording free speech protection to advertisements and again upheld restrictions on advertising.²¹⁶

As a result of the wavering interpretations by the United States Supreme Court, the commercial speech debate became one of semantics, with each side attempting to undermine the other sides argument through subjective analyses of the Court's decisions. In the EC, however, the free speech issue has surfaced quite differently.

First and most notably, the Commission has avoided the legalistic dilemma of whether advertising constitutes a protected form of expression. Rather, the Commission avoided this argument by asserting that while advertisements may constitute protected speech, this protection is never absolute.²¹⁷ The Commission relied on article 10 of the European Convention of Human Rights which states: "Everyone has the right to freedom of expression. . . . [T]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of health."²¹⁸ Thus, because the Commission considers public health protection to be the basis of the ban, the Proposal has constitutional value independent of any alleged infringement on commercial expression.²¹⁹ Whereas the United States debate has focused on the hypertechnical legal analysis of freedom of speech, the controversy in the EC is more effects-oriented and focuses on the more practical considerations of whether the tobacco advertising ban is a restriction necessary for the protection of health.

215. Leigh, *supra* note 161, at 11.

216. 478 U.S. 328 (1986). The *Posadas* Court upheld a Puerto Rico statute and regulations restricting advertising of casino gambling on the ground that the government's interest in decreasing demand for gambling to residents of Puerto Rico constituted a substantial governmental interest that superceded any First Amendment commercial speech challenge. *Id.*

217. See *Why the Commission Proposes*, *supra* note 9.

218. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, 213 U.N.T.S. 221, 230 (entered into force Sept. 3, 1953); *Why the Commission Proposes*, *supra* note 9.

219. *Why the Commission Proposes*, *supra* note 9. The Commission relies in part on a ruling adopted by the French Constitutional Council which specifically recognizes that the public health concerns underlying a tobacco advertising ban constitutionally validate such an action. *Id.*

C. National Sovereignty

The federalist campaign of EC Commission President Jacques Delors is struggling for survival. Although the Proposal boasts a seventy-four percent public support rating,²²⁰ several opposing member states, especially the United Kingdom, are uncertain how much sovereign power they are willing to cede in the name of a "United States of Europe."²²¹ This uncertainty places the Proposal in a precarious position. The federalist campaign in Europe nonetheless has made advances. Most notably, the Single European Act's qualified majority voting, which provides that a reluctant member state may be vetoed, firmly implanted within the EC the idea that the pursuit of political and economic union mandates some sacrifice of sovereignty.²²²

The United Kingdom, however, remains influenced by the "Euro-scare stories" about the implications of ceding too much authority to the Commission. Stories abound about such things as the institution of compulsory square cheese and the demise of prawn cocktail crisps.²²³ Implicit in the British concern about EC-wide legislation is a perceived need to ensure that the EC "does not become greater than the sum of its parts."²²⁴

In contrast, the rejection of the United States tobacco advertising ban involved its own unique set of variables. Specifically, in the United States, the individual states rarely asserted that they, not the federal government had the power to regulate tobacco advertising.²²⁵ The lack of public support, not disputes regarding federalism, led to the bill's defeat.²²⁶ At stake in the United States debate, therefore, were the prevailing policy arguments over the need and effectiveness of a ban and its possible infringement on free speech principles. By contrast, at stake in

220. See *supra* note 94 and accompanying text.

221. Geoff Meade, *Sovereignty Question at the Heart of Euro-Unity*, PRESS ASS'N NEWSFILE, Dec. 4, 1991, at 16.

222. *Id.*

223. *Id.* Although appearing outlandish, the Commission has, for example, used its power to harmonize condom sizes within the EC. *Id.*

224. *Id.*

225. Although the federal system recognizes that in many matters the states may be able to deal more effectively in their own affairs without federal interference, Congress is not significantly limited by federalism. See generally DAVID P. CURRIE, *THE CONSTITUTION OF THE UNITED STATES: A PRIMER FOR THE PEOPLE* 25-30 (1988) (discussing the notion of federalism in the United States).

226. A Gallup poll taken in 1985 showed that only 32% of the United States public favored a blanket ban on cigarette advertising. *Smoking Guns: Philip Morris Seeking to Turn Tide, Attacks Cigarettes' Opponents*, WALL ST. J., Feb. 4, 1986, at 1.

the EC debate is the coveted concept of national sovereignty.

V. CONCLUSION

The debate over the EC proposal to ban tobacco advertising centers on the fight over the true function of tobacco advertising and its effect on society. Despite the opposition's clever reliance on the dichotomy between immature and mature markets, there can be no doubt that tobacco advertising intends, to a substantial degree, to increase tobacco consumption,²²⁷ either by bringing new smokers into the market or by increasing tobacco consumption among existing smokers. The existence of monopolistic tobacco industries that continue to advertise counters the opposition's assertions that advertising merely serves the function of informing smokers about other brands.²²⁸

The opposition's argument that a ban would actually be beneficial for the tobacco industries in Europe is also suspect. As commentators have noted, "[i]f banning tobacco advertising is as good for the tobacco industry as [the industry] says . . . why isn't the industry advocating the ban?"²²⁹ In fact, the tobacco industry has run full-page ads condemning the Proposal in approximately 100 newspapers and 200 magazines.²³⁰ The cost of this advertising space has reached the equivalent of almost \$60 million.²³¹ Moreover, "[t]he fact that tobacco companies spend so much money on advertising shows that it does make a difference."²³²

Perhaps the most notable aspect of the EC debate is its implications for the internal market. One of the lessons of the controversy is that the dismantling of internal trade barriers necessitates not only crucial logistical moves, but crucial psychological moves as well. In a poll which asked business leaders of over 11,000 European firms to detail the worst barriers to trade,²³³ the most harmful barriers were administrative and customs paperwork, followed by frontier delays. The business community, however, did not feel that subsidized markets are very important to the

227. See Daniel H. Lowenstein, "Too Much Puff": *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1215 (1988).

228. See *id.* There are at least five states (Austria, Japan, South Korea, Thailand, and Turkey) that have state tobacco monopolies, that is, no brand-switching opportunities, and yet still allow tobacco advertising. *Id.* at 1215-16.

229. Norman Harrison, *Advertising Tobacco*, THE TIMES (London), Feb. 20, 1992, at B2.

230. Goldsmith, *supra* note 179.

231. *Id.*

232. *Should Tobacco Advertising Be Banned?*, INDEPENDENT, Feb. 16, 1992, at 20.

233. See 1992; *Border Wars*, ECONOMIST, July 9, 1988, at 9.

success of completing the internal market. Moreover, the business community often responds to efforts to eliminate invisible barriers with open hostility and it is certain that without the business community's support, achievement of a true internal market is unlikely. To achieve the single market, the Commission must not waver in its efforts to eliminate invisible barriers to trade such as the varying tobacco advertising regulations among the EC member states.

In addition, national sovereignty plays a role in the opposition to the tobacco advertising proposal. President de Gaulle's statement in 1965 serves well to describe the prevailing attitude in the EC states: "However big the glass which is proffered from the outside, we prefer to drink from our own glass, while at the same time clinking glasses with those around us."²³⁴ It seems that most of the EC member states like the idea of a single market and agree to most of the same free market standards. Yet they are not so sure that they should cede any more of their national sovereignty. They would prefer, that is, to drink from their own glass.

Moreover, the "United States of Europe" notion the Commission promised must seem almost absurd to those million or so Europeans who can still recall the deep hatred, divisions, and destruction of World War II. Clearly, another factor delaying the successful completion of the internal market is the language barrier that is exemplified by the fact that many Europeans require a bilingual dictionary merely to exchange greetings.

The European Community still lacks a central organ of government comparable to the powerful federal government in the United States, and member states remain wary of delegating their authority to the various existing EC organs. Furthermore, the Commission, in proposing the tobacco advertising ban, is entering into an area with a long history and solid tradition. Europeans discovered tobacco during Columbus' historic voyage in 1492,²³⁵ and from that moment tobacco has been firmly implanted in European society. The tobacco industries have armed themselves with enough economic influence and political clout to sway legislative acts in their favor. Nevertheless, EC Commissioners are confident that they will pass the Proposal within the next several years. Surely, regardless of whether the member states ultimately reject the ban, the vote in the EC Parliament supporting the Proposal represents a significant step toward harmonizing the varying tobacco advertising regulations in the EC. In the words of one of the supporters of the ban: "The vote in

234. *Id.*

235. JEROME E. BROOKS, *THE MIGHTY LEAF: TOBACCO THROUGH THE CENTURIES* 11-12 (1952).

the European Parliament is yet another nail in the coffin of tobacco advertising."²³⁶

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236. Wittstock, *supra* note 48. In addition, Vasso Papandreou was quoted as saying: "It's a question of time. If it's not this year or the next, it may well be the year after." Love, *supra* note 178.

