MENTOR GROUP

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"*The Protection of Commercial Free Speech under European Community Law*"

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(A) Introduction: Risk Assessment and Approaches to Regulatory Controls and a specific EC proposal to ban tobacco advertising

1. Judge Stephen Breyer's 1993 Mentor Group paper pointed out that regulatory protection involves an assessment of the risk involved. This may be based on objective assessment of risks and the economic costs of avoiding them or it may be not. Judge Breyer drew attention to the problems of *tunnel vision* (page 7 of his paper), *random agenda selection* (page 11) and *inconsistency* (page 13) and the *vicious circle* (pages 15 to 28). Judge Breyer characterised the source of American regulatory failure as follows:-

> "Risk regulation is plagued by problems of public perception, legislative action and reaction, and technical regulatory methodology, and these problems reinforce each other. This vicious circle diminishes public trust in regulatory institutions and thereby inhibits more rational regulation." (pages 15 to 16; also note the conclusion to this part of his paper at pages 27 to 28).

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2. Judge Breyer's paper illustrated the problem of the *vicious circle* from a memorable case he heard: US v Ottawi & Goss (paper page 7): "spending $9.3 million to protect non-existent dirt-eating children".

3. Judge Breyer concluded his paper by suggesting that the American predicament can provide "*lessons for European Risk Regulation*" (pages 28 to 37):-

> "when designing regulatory institutions, one can more fruitfully consider principles such as subsidiarity, proportionality, consistency, and communication in the context of particular regulatory programs studied in depth, than in the abstract" (page 37).

4. Europe faces risk regulation issues comparable to those faced in the US and other developed societies. Previous Mentor Group discussions have built upon Judge Breyer's paper and considered the issues he raised from various European perspectives. This Paper aims to examine the protection provided under the principles and requirements of EC law when regulatory measures are considered which interfere with commercial freedom of expression.

5. In his 1993 paper, Judge Breyer expressed the view that it is most fruitful to consider such issues against the context of a particular regulatory programme. This Paper does this using a specific proposed Directive (which was not accepted by the Council of Ministers). The proposal in question was for an EC wide ban on tobacco

advertising. I have been engaged professionally to advise a leading tobacco company on this matter and accordingly I have had occasion to consider the proposed Tobacco Directive in some detail.

6. The proposed Directive, if adopted, would have:

(a) banned all forms of tobacco advertising in the Community, except that Member States may authorise advertising in tobacco sales outlets which is not visible from the exterior of the premises;

(b) banned indirect advertising of tobacco, such as sports sponsorship;

(c) banned the use of established tobacco trademarks or brand names for some tobacco products;

(d) banned the free distribution of tobacco products; and

(e) required Member States to provide means by which individuals or organisations can take legal action against tobacco advertising or complain to a monitoring body[2].

7. The EC, as yet, has not established a risk assessment authority of the type considered at previous Mentor Group meetings. In the absence of such a body, this Paper examines what protection EC law affords commercial freedom of expression when restrictive regulatory action of the type described above is being proposed at the EC level.

(B) Freedom of Expression

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[2] COM(91) 111 (OJ C 167 of 27/6/1991) as amended by COM(92) 196 (OJ C 129 of 21/5/1992).

8. Respect for fundamental rights as evidenced in particular by the European Convention on Human Rights ("ECHR") forms an integral part of EU/EEA law[3]. Judge Mancini of the ECJ has spoken of how the ECJ fundamental rights "case law has progressed enormously" and that regulations that derogate from fundamental rights are, in his words, intimately "bound up with fundamental notions governing the relationship between States and their citizens".

9. Article 10(1) of the ECHR states:-

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

10. Paragraph 2 of Article 10 recognises that limitations may be placed on these rights when "prescribed by law" and "necessary in a democratic society" for one of the legitimate purposes listed therein, which includes "the protection of health". The Court of Human Rights has frequently affirmed that under Article 10:-

> "freedom of expression is.. applicable to "information" or "ideas" that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"" (paragraph 71 of the judgment in Open Door v Ireland 15 EHRR 244).

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[3] See, for example, Article F(2) of the Treaty, the ECJ case law recently summarised in Case C-260/89 ERT [1991] ECR I-2925 and see article by Judge Mancini and David Keeling "From CILFIT to ERT", enclosed especially at pages 11 to 13.

11. The passage quoted above comes from the judgment in which the Court condemned the Irish ban on advertising and information about abortion services which were available lawfully in the United Kingdom but which were prohibited under the Irish Constitution. In condemning the ban on advertising and the provision of information, the Court said it "was struck" by "the sweeping nature" of the restriction (paragraph 74) which it found was "largely ineffective" (paragraph 76). The Open Door case itself concerned a restriction imposed to protect health, but which the Court held to be "overbroad and disproportionate" (paragraph 74).

12. Article 10 applies to commercial companies and information. In a recent case on commercial broadcasting, the Court said, in relation to Article 10(2), that:-

> "The Contracting States enjoy a margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision...In cases such as the present one, where there has been an interference with the exercise of the rights and freedoms guaranteed in Article 10(1), the supervision must be strict because of the importance - frequently stressed by the Court - of the rights in question. The necessity for any restriction must be convincingly demonstrated". (Informationsverein Lentia v Austria 17 EHRR 93, paragraph 35 of the judgment).

13. In that case, the Court condemned as contrary to Article 10 the *de facto* monopoly enjoyed by the Austrian Broadcasting company. It described a public broadcasting monopoly as a system:-

> "which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting other than through a national station and, in some cases, to a very limited extent through a local cable station. The far reaching character of such restrictions means that they can only be justified where they correspond to a pressing social need." (paragraph 39 of the judgment)

The Court trenchantly rejected the existence of such justification, noting technical developments over numbers of available frequencies and channels and the practice of other European countries in applying less restrictive policies, which enable private commercial channels to operate.

14. That advertising by commercial companies is protected by ECHR Article 10 has been explicitly confirmed by the Court:-

> "Article 10 does not apply solely to certain types of information or ideas or forms of expression, in particular those of a political nature; it also encompasses artistic expression, information of a commercial nature - as the Commission rightly pointed out - and even light music and commercials transmitted by cable". (Casado Coca v Spain 18 EHRR 1, paragraph 35 of the judgment).

15. Before leaving the ECHR case law, mention should be made of the "margin of appreciation" doctrine under which the Court has exercised reserve when reviewing measures adopted by Contracting States affecting economic and commercial matters. It is submitted, however, that the margin of appreciation reserve shown by the ECHR Court and Commission is inapplicable when the ECHR principles

fall to be applied, first by the EC institutions responsible for considering legislative proposals, and secondly by Community courts, notably the ECJ, when called upon to consider the legality of legislation that has been adopted.

16. The rationale for ECHR reserve under a "wide margin of appreciation" was explained, years ago, by the Court when upholding the 1971 prosecution and conviction of the publishers of "The Little Red Schoolbook":-

> "The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines. The institutions created by it make their own contributions to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Art 26)...
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> The view taken by [different States'] respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a 'restriction' or 'penalty' intended to meet them. (Handyside v United Kingdom 1 EHRR 737, paragraph 48 of the judgment)

17. Unlike the ECHR institutions, it is the EC institutions, which, in matters within their jurisdiction, have the primary task of securing respect for rights, including the protection of commercial freedom of expression. The

ECHR margin of appreciation doctrine provides no basis for lessening the rigour with which the existence of a sufficiently pressing justification for any restriction is scrutinised by EC institutions.

18. Accordingly, it can be seen that the necessity for the restrictive measures in the Tobacco Directive proposal would have to be "convincingly demonstrated" for such restrictive measures to be compatible with respect for free speech and freedom of information under European law.

(C) Other legal interests

19. The conclusion on freedom of information means that this Paper can be brief on the restrictions on property rights, including the intellectual property rights in the use of trade marks, intra-brand competition and consumer choice that adoption of the proposed Directive would have entailed. Each of these legal interests provides further reasons why any such proposal would require convincing justification through an adequate risk assessment process based on a objective basis of fact.

20. Last year, the ECJ confirmed the importance of the Commission acting on a sufficiently rigorous basis of fact when adopting restrictions based on assessments of health risks. In Case C-212/91 Angelopharm [1994] ECR I-

171, the Court held illegal a ban on cosmetic products for inadequacy of risk assessment by the Commission. Such prohibitions, the ECJ indicated, are to be:-

> "founded on scientific and technical assessments which must themselves be based on the results of the latest international research and which are frequently complex. This is particularly the case where it is a question of assessing whether or not a substance is injurious to human health" (paragraph 31 of the ruling).

(D) Experience from other jurisdictions pertinent to the Tobacco advertising Directive proposal

21. A number of developed countries provide experience against which risk assessment of the effects of a total ban on tobacco advertising can and should be made.

22. In Norway, a ban has been in force since 1975, one has existed in Canada since 1989, bans have existed in a number of Australian States and one came into force, at Federal level, in mid-1993.

23. The data from these jurisdictions, particularly Norway, has been the subject of analysis and study. While itself supporting a ban, the 1992 United Kingdom's Department of Health "Smee" Report examined the Norwegian experience and found that "advertising does not have a statistically significant effect in any form" on consumption and noted the absence of any causal relationship between consumption and advertising bans. The conclusion of the

Smee Report favouring a ban has been subjected to criticism in a major study conducted by experts for the Canadian Niagara Institute. Their Report "Do Tobacco Advertising Bans Really Work?" concludes that the Smee Report's conclusion favouring a ban:-

> "is both theoretically and empirically suspect in that it fails to meet the necessary tests for ethically credible public policy, namely it fails first to ask the crucial question of whether its considered policy option is consistent with the core values that inform democratic society, something that should precede an examination of the alleged benefits of the policy and second it fails to advance compelling evidence that its option actually works". (page 102)

24. From Canada, the evidence in support of a tobacco advertising ban was extensively considered in the legal proceedings brought to challenge the 1988 Tobacco Products Control Act ("TPCA"). At first instance, Mr Justice Chabot heard the parties and evidence for over a year. In his 1991 judgment, the learned trial Judge found that:-

> "The virtual totality of the scientific documents in the State's possession at the time the Act was passed do not demonstrate that a ban on advertising would affect consumption" (page 127 of the transcript).

Applying the Canadian Charter, the Judge concluded that the advertising ban was a "type of social engineering" that:-

> "constitutes an extremely serious impairment of the principles inherent in a free and democratic society which is disproportionate to the objective of the TPCA" (page 138).

25. On appeal, the judgment of Chabot J. has been reversed by a majority decision in the Court of Appeal (Rothman & LeBel JA's with Brossard JA dissenting). The different approaches amongst the Canadian Judges are relevant to a risk regulation discussion. The majority of the Court of Appeal criticised the Trial judge for considering the evidence "as if it were an ordinary civil trial" (page 33 of the transcript of LeBel JA):-

> "[The trial Judge] analyzed the evidence and determined the issues essentially as if he were hearing an ordinary civil trial and not a constitutional challenge involving governmental choices. The [Attorney General] was not required in this case to prove, on the civil balance of probabilities, either that tobacco truly caused any particular illnesses or that the limitations imposed on tobacco advertising would in fact diminish consumption...what was necessary was to identify the existence of a reasonable basis for the governmental action and to determine whether that action involved the use of means which respect the minimal impairment test..."(pages 50-51).

26. LeBel JA did not place weight on the refusal by the Attorney General to disclose in Court another legislative option, developed by the civil service. In reaching the conclusion that the total advertising ban satisfied the "minimal impairment test" of the Charter, LeBel JA noted that:-

> "...it is true that the evidence of certain experiments in countries where tobacco advertising was banned is not conclusive. There was no decline in tobacco consumption. At times, it has even increased.
>
> Further, civil servants in the Federal Ministry of Health viewed the prohibition unfavourably and doubted its utility...No matter how important, this opinion remains an opinion. It indicates the

existence of controversy with respect to the usefulness of a measure. It does not mean that a government is bound by the opinion of its civil servants. In the Canadian political system, ultimate responsibility for legislative choices belongs to those elected, to the Ministers and to the Parliaments. The disagreement of bureaucrats must not be a bar to adopting a given legislative orientation, provided that a rational basis for its adoption can be found.

On the whole, it seems to me that we are faced with a legislative measure the utility of which is certainly debatable. It represents a policy choice and involves an experiment the effects of which will only be known in the future." (pages 59-60)

The case has been appealed to the Canadian Supreme Court and judgment is awaited.

27. Would the majority approach in the Canadian Court of Appeal be acceptable in Europe? Would (or should) the requirements of EC law call for a stricter approach, such as that taken by Chabot J and Brossard JA in the Canadian case?

28. For reasons outlined above, it is submitted that institutions with primary responsibility for considering proposed restrictions on commercial freedom of expression and other important interests need to adopt a rigorous approach to reviewing the case for proposed restrictive measures. Community courts, particularly the ECJ have, it is submitted, an important and legitimate judicial function in checking that intrusive measures are objectively and adequately justified.

29. It would, it is submitted, be seriously insufficient simply to rely upon health risks associated with tobacco consumption to justify the freedom of expression restrictions that were contained in the proposed EC Directive.

30. In addition to considering the objective experience of other jurisdictions in assessing the case for the intrusive measures, the case for EC measures must take account of the current balance and agreed principles regulating when a matter is appropriate for EC level action.

31. Questions arise about the substantive justification for regulatory action and about whether action should be at national or European level. Institutionally the discussion of appropriate approach merges with that on subsidiarity, the role of the EC institutions and questions of legality, including legal base. These matters are outlined in the next section of this Paper.

(E) The legal base and its implications

32. EC institutions must act within the limits of the powers given to them by the Treaties. The ECJ controls the legality of the bases under which legislation is adopted.

33. Article 100a (internal market) was the legal base proposed for the tobacco advertising ban. This proposed legal base was subjected to trenchant criticism from Professors Brunno Simma and Joseph Weiler, two distinguished European law experts. They put the matter as follows:-

> "In our view the total ban exceeds the level of harmonization which is necessary to ensure a proper functioning of the internal market as an area without internal frontiers in which the free movement of goods persons services and capital is ensured in accordance with the provisions of the Treaty and thus is *ultra vires* and illegal. In the field of health, where the Community has no original jurisdiction and unlike the field of Environmental protection where it does, it can act to the extent and only to the extent that market conditions so demand."(page 9 of their opinion dated October 1992).

34. Since Professors Simma and Weiler gave their opinion, the Treaty on European Union ("TEU") has come into force and the EC has acquired relevant limited jurisdiction over health and consumer protection. The terms of Articles 129 and 129a of the amended EC Treaty now point decisively against Article 100a being an acceptable legal base for what purports primarily to be a health protection proposal.

35. Underlying both provisions is the concept of EC action as **supportive of but not replacing action and co-operation amongst Member States**. Article 129(1) speaks of the Community:-

> "contributing towards ensuring a high level of human health protection by **encouraging co-operation between the Member States** and, if necessary, **lending support** to their action."

Whilst Article 129a(1((b) indicates that the Community shall contribute to the attainment of a high level of consumer protection through:-

> "specific action which **supports and supplements** the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers."

With the entry into force of the above provisions, there is a powerful case that the general base of Article 100a can no longer be used for predominantly health protection measures, quite apart from and in addition to, the critique of using Article 100a made by Professors Simma and Weiler.

36. When Articles 129 and 129a are analysed, however, it becomes clear that those provisions cannot properly be used to justify the proposed Tobacco Directive. The proposed measures stopping tobacco advertising go beyond **encouraging co-operation** or **lending support** (Article 129) or **supporting and supplementing** (Article 129a) the action or policies of Member States. Nor can the proposals be brought within the second sentence of Article 129(1) which authorises "Community action...directed towards the prevention of diseases, in particular the major health scourges, including drug dependency" since the provision specifies the forms of

action that the EC is permitted to undertake as limited to:-

> "**promoting research** into their causes and transmission, as well as **health information and education**".

37. If the proposed restrictions on tobacco advertising can be lawfully adopted under EC law (which is questionable in terms of the intrusiveness on commercial freedom of expression and other protected legal interests), the appropriate legal basis must be Article 235. Article 235 allows the Council acting unanimously on a Commission proposal and after consulting the Parliament to legislate when necessary to attain an objective of the Community and the Treaty has not provided the necessary powers.

38. It would distort the decision making scheme of the Treaty and the balance between the powers of national legislatures and EC institutions for such intrusive measures as those were in the proposed Directive to be adopted by qualified majority (whether under Article 129 or 129a(1)(b) or 100a), instead of requiring unanimity under Article 235 thus giving each Member State a veto over adoption of measures.

(F) Relevance of Subsidiarity

39. The TEU introduced the principle of subsidiarity expressly into the EC Treaty. It is submitted that the proposed Directive would fall squarely under Article 3b of the Treaty (as amended):-

> "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed measure cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

40. For reasons already outlined, the health and consumer protection powers conferred by the Treaty do not cover the proposed Directive. Treaty Articles 129 and 129a explicitly indicates that "health" and "consumer protection" are not "areas of exclusive Community competence" to use the language of Article 3b. Accordingly, to comply with Article 3b, the measures in the proposed Directive should be adopted:-

> **"only if and in so far as [the measure] cannot be sufficiently achieved by the Member States and can therefore, by reason of scale or effects of the proposed action, be better achieved by the Community".**

41. It is difficult to see how any of the measures in the proposed Directive can be thought to satisfy the above requirement. Can it sensibly be contended that an EC wide ban on sports sponsorship satisfies the "better achieved by the Community" than the national or regional authority standard? The simple answer is that it cannot. Consideration of subsidiarity re-enforces the case against such over-broad measures being adopted by majority voting.

42. It has yet to be settled whether Article 3b can have direct effect and be relied upon in a challenge to the legality of EC measures. Views differ on this matter, although some weight should be placed, in my submission, on the provision being put in that part of the Treaty of Union which is subject to the jurisdiction of the European Court of Justice particularly when so much of the Maastricht provisions were explicitly excluded from the ECJ's jurisdiction by virtue of Article L.

43. However this may be, Article 3b and the principle of subsidiarity are plainly of significance to the EC Council when considering whether proposed legislation is appropriate. Guidelines were adopted at the Edinburgh Summit of December 1992, including:-

> "The Community should only take action involving harmonisation of national legislation, norms or standards, where this is necessary to achieve the objectives of the Treaty. (Guideline II(iii))

> The reasons for concluding that a Community objective cannot be sufficiently achieved by the Member States but can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators. (Guideline II(v))."

It is hard to see how either of these tests could reasonably be considered fulfilled by the Tobacco Directive proposal. It is not surprising that the measures proved controversial and have not been endorsed.

(G) Proportionality

44. Respect for proportionality is a fundamental requirement of the EC legal system, now enshrined in Article 3b of the Treaty and in the Guidelines of the EU Council quoted above. Respect for proportionality is also required by the fundamental rights dimension of the matters under discussion.

45. Judge Breyer described proportionality "seems to be a polite way of describing the need to avoid "overkill" (page 34 of his 1994 paper). As that paper also pointed out there is the institutional issue of which body should control this matter.

46. When, as with the Tobacco Directive, proposals before the EC Council are being discussed, questions on the appropriate role of the Courts can be side-stepped or, at least, postponed. It is clear that the bodies first

called on to respect proportionality are the Community Institutions, which participate in legislation.

(H) Conclusions: suggestion for a possible further Paper

47. This Paper has considered the importance which EC law attaches to compelling justification when measures are considered which would interfere substantially with commercial freedom of speech and other rights. The legal message for the competent EC institutions is that objective and specific justification are needed and that sweeping restrictions should not be adopted in the absence of a compelling case being made out.

48. A further paper might usefully study concretely the mechanisms which exist within the EC institutions to ensure that health protection measures avoid the problems of *tunnel vision*, *random agenda selection* and *inconsistency* which Judge Breyer described as the *vicious circle* in his paper. Such a paper might assist in the continuing Mentor Group discussions on how to produce "optimizing" of the policy objectives of risk assessment and regulatory action and in ensuring that the rigorous justification for measures that intrude upon fundamental commercial rights and interests is applied effectively in practice.