

## Summary of an academic research report and policy recommendations Tobacco industry interference in the development of the Tobacco Products Directive

### Introduction

In November 1999, the European Commission proposed a new Tobacco Products Directive (TPD).<sup>1</sup> The proposal aimed to strengthen existing European legislation on cigarette yields and product labelling by lowering limits for tar, nicotine and carbon monoxide yields and by enlarging warning labels. It also sought to introduce stringent ingredients disclosure provisions and a ban on misleading descriptors such as “light” and “mild”, and aimed to prohibit the export of non-compliant products outside the European Union (EU). The tobacco industry mounted an intense lobbying campaign in response and made at least five legal challenges against the Directive. Despite such efforts, the Directive was enacted successfully in 2001.<sup>2</sup> A study of internal tobacco industry documents was undertaken in order to identify and analyse tobacco sector responses to the Directive. **The implications arising for future legislation both within the EU, and beyond, are discussed in light of the current review of the Directive.**

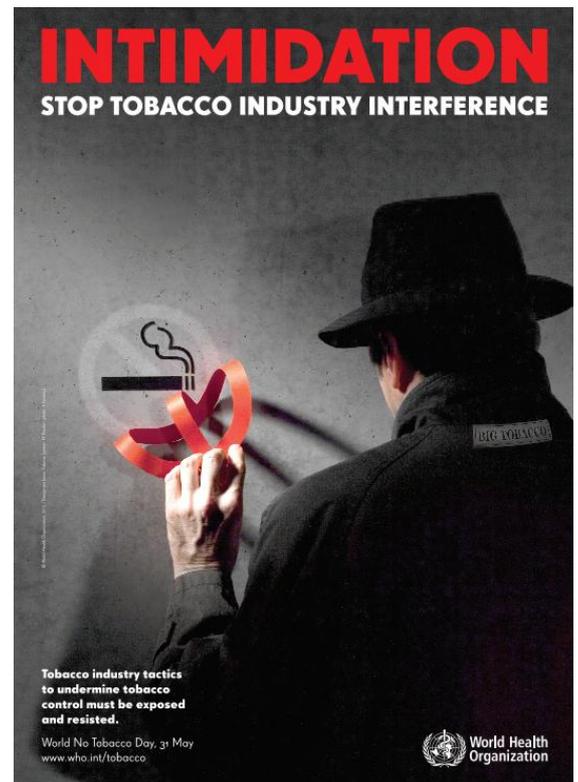
This is a summary of “Block, amend, delay: tobacco industry efforts to influence the European Union’s Tobacco Products Directive (2001/37/EC)”, a research paper written by Sema Mandal<sup>i,iii</sup>, Anna B Gilmore<sup>i,iii</sup>, Jeff Collin<sup>ii</sup>, Heide Weishaar<sup>ii</sup>, Katherine Smith<sup>i</sup>, Martin McKee<sup>iii</sup>. **Please refer to the full report and the documents referenced therein:** <http://www.smokefreepartnership.eu/>.

### Research methods

A qualitative analysis was undertaken of previously secret corporate documents, released into the public domain following litigation in the United States of America. These documents were triangulated with other sources, notably interviews with key informants. The search strategy was developed with guidance from existing literature on research techniques for industry documents.<sup>3</sup>

### The researchers’ findings

The academic researchers concluded that the documents reveal that the industry was seriously alarmed when the idea of further control measures was first floated in Brussels in 1996-7. By the time these were formalised into a proposal for a Directive in 1999, the tobacco industry had activated a comprehensive response framework.<sup>4,5,6</sup> Although initially united in their response, divisions between transnational tobacco companies (TTCs) soon became apparent.<sup>7</sup> Philip Morris (PM), less threatened by the proposed measures given its dominant market share and minimal manufacturing for export, preferred ‘constructive engagement’ to the more aggressive stance taken by its competitors. British American Tobacco (BAT), by contrast, favoured combative tactics to ‘block, amend or delay’ the Directive.<sup>8</sup>



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Notwithstanding such tensions, the tobacco companies, acting alone and in various combinations, recognising the need to influence public opinion, developed legal, economic and scientific argumentation designed to shape debates around the Directive. **The three principal arguments advanced were that the Directive was “ultra vires” (outside the scope of powers, or competencies, of the EU), contravened existing trade agreements, and would have adverse economic impacts.**

*Main arguments: legal, economic and scientific*

Despite receiving diverse legal opinions, some of which confirmed the Directive’s legality, publicly the tobacco industry forcefully argued that the Directive was invalid,<sup>9</sup> claiming that its main legal basis (Article 95) and a later additional basis (Article 133)<sup>10,11</sup> were inapplicable.<sup>12,13</sup> It also alleged that the Directive was incompatible with obligations under World Trade Organization (WTO) agreements on technical barriers to trade and intellectual property rights, threatening trade challenges despite the tenuous nature of claimed conflicts.<sup>14</sup> Alleged economic consequences, particularly a threat to employment, were highlighted<sup>15,16,17,18</sup> with BAT publishing its own economic impact study which focused only on negative economic impacts, overlooking potential health benefits and exaggerating job losses.<sup>19</sup> In addition, science-oriented arguments sought to exploit both the limited technical capacity in the Commission<sup>20,21</sup> and ongoing debates within the health community around product regulation.<sup>22</sup> Such arguments were used, particularly by PM, to secure access to Commission officials to push its own model of ingredient disclosure.<sup>23</sup>

*Lobbying tactics: direct and indirect*

Lobbying efforts were well-organised and informed by a detailed analysis of the EU co-decision procedure,<sup>24,25</sup> in which legislation must be agreed by the Council of Ministers (CoM) and the European Parliament (EP). Thus the industry carefully targeted the key arguments, which it had developed, to appropriate audiences and their delivery was synchronised with the timetable for the Directive’s passage through the legislative process.

Lobbying encompassed both direct and indirect approaches. The direct efforts targeted those who could directly influence the text of the Directive: Commission civil servants, Members of the European Parliament (MEPs) and national politicians, including ministers.<sup>26</sup> Attempts to table industry-favourable amendments and build a blocking minority were made through the Council of Ministers<sup>27</sup> and, in the Parliament, via MEPs on influential committees.<sup>28,29,30</sup> The German government and MEPs were particularly significant in this context.<sup>31,32</sup> Indirect lobbying focused on obtaining support from tobacco farmers, suppliers and distributors and the active engagement of trade unions, mobilised by an alleged high impact on employment.<sup>33,34,35</sup> Such protests helped secure generally sympathetic media coverage, assisted by the placement of letters, articles and advertisements in the press.<sup>36,37</sup> The tobacco companies also viewed the Directive as a significant enough threat to take legal action after it passed into Community law.

Despite intensive and sustained lobbying, the industry neither prevented the Directive from coming into force nor managed to dilute its provisions, as it was unable to gain sufficient blocking votes in the EU Council and Parliament. Strong leadership from Commissioner Byrne and his Cabinet,<sup>38</sup> political commitment across traditionally supportive and some traditionally resistant Member States, and the skilful management of parliamentary debates by the Environment Committee’s Rapporteur, Jules Maaten, enabled effective resistance against industry efforts.<sup>39</sup>

**Discussion and conclusion**

The academics concluded that the disclosed corporate documents provide compelling evidence of a methodical and multilayered strategy to undermine the TPD. Although the Directive was ultimately passed, the activities of the industry illuminate several key issues for tobacco control and public health in the EU.

Central to the industry's lobbying campaign was the development of powerful argumentation against the Directive, carefully designed to appeal to, and target, various audiences from politicians to factory workers. The development of trade and economic arguments, for example, enabled the industry both to shift the agenda away from health onto other issues, where it still retained some credibility, and to engage more powerful ministries and officials in its efforts to influence the policy process. Closely related to this, the industry attempted to use economic impact studies to frame its economic arguments against the Directive. This is consistent with evidence that, along with its efforts to influence the TPD, BAT successfully pushed for favourable forms of impact assessment to be made an obligatory part of the EU policy process.<sup>40</sup> It is also in line with evidence that impact assessment can give industries an advantage in providing information.<sup>41</sup> The study found that the tobacco industry provided exaggerated data on the potential economic impacts of legislation such as on employment.<sup>42</sup>

- **The legal basis of the Directive was vulnerable to attack due to the supremacy of internal market measures over public health within the EU Treaty.**<sup>43,44</sup> When allegations of inconsistencies with WTO Agreements were added into the debate, the resulting legal confusion introduced doubt into the minds of policymakers. Comparable arguments, despite being privately acknowledged to be baseless, had been politically effective in countering legislation in Canada and Thailand. It is likely the industry will continue to advance such arguments particularly in the contexts of the World Health Organisation (WHO) Framework Convention on Tobacco Control (FCTC) and emerging debates about legislation requiring cigarettes to be sold in plain packaging.
- **The documents highlight how the institutional pluralism of the EU, by providing so many targets for lobbying, advantages well-resourced corporate actors over poorly resourced public health advocates.** The protracted timeframe between proposal, adoption, passage and implementation of a Directive into law, and the enlargement to 27 Member States and over 700 MEPs augments this problem, increasing the scope for well-resourced actors to block legislation.
- **The TPD illustrates the difficulties encountered by officials in undertaking the highly complex and controversial task of regulating tobacco products.** In this context, the Commission's lack of expertise, combined with the lack of consensus amongst health experts on the issues of tar and nicotine reduction and testing methods, may have inadvertently enhanced the industry's ability to use scientific and technical arguments against the legislation.<sup>45,46</sup>
- **Tobacco control advocates need to be alert not only to the efforts of TTCs to obstruct legislation being passed, but also to their actions to stall its implementation.** Litigation against Member State governments may be one important instrument used to achieve this.<sup>47,48</sup>

#### Implications for policy and practice

1. **In reviewing the TPD, the Commission should build on achievements to date by expanding the size of current health warnings to 80% front and back of pack, restricting the effect of product innovations as it has the use of misleading descriptors and introducing plain packaging. Doing so would build on the items in the TPD that a growing evidence base shows are the measures of greatest effectiveness,<sup>49</sup> and help limit the industry's attempts to undermine the TPD.**
2. **The industry's willingness to use arguments that it has been advised are most likely groundless demonstrates the need for policy makers and the media to be aware of industry tactics and to treat its arguments with extreme caution.**

3. **The scope of arguments advanced by tobacco companies, particularly the use of trade and legal arguments, highlights the diverse expertise required for effective tobacco control advocacy in Europe. This in turn, and along with the points outlined below, highlights the lack of resources and capacity in tobacco control in Europe.**<sup>50</sup>
4. **Policy makers need to remain alert to the methods that tobacco companies use to lobby, including efforts to disguise their involvement. This requires that the declarations of interest representatives in the Commission's voluntary register are carefully monitored.**<sup>51</sup>
5. The TPD experience highlights how the industry actively seeks, and is often successful in shaping wider popular debate around tobacco control issues, proving adept at eliciting favourable media coverage and third party support. This underlines the importance of the health lobby pro-actively engaging the media, trade unions and other potentially involved parties to ensure they have accurate information on policies and likely impacts.
6. The industry may seek to exaggerate economic impact and its ability to do so has been enhanced by the implementation of a systematised approach to impact assessment that favours business interests. Policy makers should be aware of a body of evidence that suggests tobacco industry arguments regarding economic impact are likely to be misleading.<sup>40,41,42</sup>
7. Difficulties with scientific and technical aspects of the TPD demonstrate that successful product regulation requires greater scientific consensus on such issues and ongoing access to truly independent expert advice during policy development.
8. The strong position taken by Commissioner Byrne and his staff was key to the Directive's success, highlighting the importance of strong leadership to successful health policy within the EU and the need to successfully implement Article 5.3 of the Framework Convention on Tobacco Control (FCTC) across Europe in order to protect public policy from inappropriate industry influence.<sup>52</sup>
9. The national politics of tobacco control within member states are crucial, and require that health advocates hold governments effectively to account, including via curtailing the influence of the industry.
10. Understanding divisions between individual tobacco companies could be advantageous to tobacco control. Future policy development could be facilitated by detailed understanding of their respective positions and priorities.
11. The overturning of the ban on misleading descriptors on products for export contained within the TPD and the problems with enforcement and implementation of some aspects of the TPD may be in part attributable to draftsmanship. This demonstrates the need for legislation to be carefully drafted and repeatedly checked following contested amendments.
12. Such limitations notwithstanding, the TPD has contributed significantly to the international development of product regulation, not least by strengthening the EU position on this issue in FCTC negotiations and by providing a basis which the FCTC can now take forward via Articles 9 and 10.

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