



# Tobacco Regulation

Canada • European Union

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TOBACCO REGULATION

CANADA

*Executive Summary*

*Canada has strict regulations on the marketing of tobacco products. The federal government has enacted a fairly detailed statute, which is expanded upon in even more detailed regulations. The federal government does not regulate smoking; that is done by the provinces. Applicable provincial laws prohibiting smoking in public places do not cover labeling, since this is a federal responsibility, but some do set higher minimum ages for purchasers of tobacco products, stricter rules for signs, and a broader prohibition on vending machines.*

**I. The Tobacco Act**

In 1997, Parliament enacted the Tobacco Act.<sup>1</sup> As section 4 of this statute states, its purpose “is to provide a legislative response to a national public health problem of substantial and pressing concern.”<sup>2</sup> This section continues by declaring that the Act is intended to protect the health of Canadians, protect young persons from inducements, protect young persons by restricting access, and enhance public awareness of health hazards.<sup>3</sup> The Tobacco Act places many prohibitions on the marketing of tobacco products. Among these prohibitions are:

1. sales to persons under eighteen;<sup>4</sup>
2. sales of packages containing less than twenty cigarettes;<sup>5</sup>
3. displays that may be touched by purchasers;<sup>6</sup>
4. vending machines, except in restricted places where persons under eighteen are not allowed and do not have access;<sup>7</sup>
5. shipments of retail sales from one province to another;<sup>8</sup>
6. promotions, except in very limited circumstances;<sup>9</sup>
7. testimonials or the use of characters or animals in displays;<sup>10</sup>
8. lifestyle advertising;<sup>11</sup>
9. sponsorship of sporting and other events;<sup>12</sup>

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<sup>1</sup> Tobacco Act, 1997 S.C. c. 13, available at [http://laws.justice.gc.ca/en/showdoc/cs/T-11.5/bo-ga:s\\_1::bo-ga:s\\_2?page=2&noCookie](http://laws.justice.gc.ca/en/showdoc/cs/T-11.5/bo-ga:s_1::bo-ga:s_2?page=2&noCookie) (unofficial source).

<sup>2</sup> *Id.* S. 4.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* S. 8

<sup>5</sup> *Id.* S. 10. This provision was inserted to prohibit retailers from selling individual cigarettes to minors.

<sup>6</sup> *Id.* S. 11.

<sup>7</sup> *Id.* S. 12.

<sup>8</sup> *Id.* S. 13.

<sup>9</sup> *Id.* S. 19.

<sup>10</sup> *Id.* S. 21

<sup>11</sup> *Id.* S. 22.

<sup>12</sup> *Id.* S. 25.

10. the offering of free samples;<sup>13</sup>
11. broadcasting promotions;<sup>14</sup>

These prohibitions are subject to very few exceptions. The Act does allow for some direct mailings to adults, limited uses of names on some accessories, signs where young persons are not present, and non-lifestyle advertisements in adult publications.<sup>15</sup>

## II. Tobacco Products Control Regulations

The Tobacco Products Act gives the Minister of Health broad authority to enact regulations to supplement and expand upon its prohibitions. The Tobacco (Access) Regulations set standards for proof of age and for the displaying of signs stating that sale of tobacco products to minors is prohibited in stores and other establishments.<sup>16</sup> The Tobacco Products Information Regulations provide for health warnings, health information, and both toxic emissions and toxic constituent information for various types of tobacco products.<sup>17</sup> These regulations require fifty percent of the display surface on each side of a cigarette package to contain prescribed health warnings in large black and white lettering.<sup>18</sup> The regulations do not set out all of the warnings required as these are communicated to the manufacturers by the government. “Smoking Kills” is one such required warning. Warnings must be printed in English on one side of the package and in French on the other. The bottom portion of the package can contain the brand’s name and logos.

## III. Provincial Law

The labeling of tobacco products falls under federal jurisdiction. The regulation of smoking in public places not under federal jurisdiction falls under provincial jurisdiction. However, there appears to be an overlap in certain areas pertaining to the regulation of tobacco products or access. This is because some of Canada’s provinces have created stricter prohibitions than the ones found in federal legislation. For example, the Smoke-Free Ontario Act prohibits sales of tobacco products to persons under 19 and has a virtually complete prohibition on vending machines.<sup>19</sup> The main purpose of this statute, however, is to prohibit smoking in all public places, including bars and restaurants, and the common areas of condominiums and apartment buildings.<sup>20</sup>

## IV. Conclusion

Canada has enacted many prohibitions and restrictions on the marketing of tobacco products. Most of the laws respecting marketing are federal enactments. The provinces have enacted smoke-free laws. Some of these laws set higher standards for marketing. Labelling, however, is a federal responsibility, and thus tobacco products are packaged in the same manner and carry the same warnings throughout Canada.

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<sup>13</sup> *Id.* S. 29

<sup>14</sup> *Id.* S. 31.

<sup>15</sup> *Id.* S.22.

<sup>16</sup> Tobacco (Access) Regulations, SOR/99-93, available at <http://laws.justice.gc.ca/en/showtdm/cr/SOR-99-93?noCookie> (unofficial source).

<sup>17</sup> Tobacco Products Information Regulations, SOR/2002-272, available at <http://laws.justice.gc.ca/en/showdoc/cr/SOR-2000-272///en?page=1&noCookie> (unofficial source).

<sup>18</sup> *Id.* S. 5.

<sup>19</sup> Smoke-Free Ontario Act, 1994 S.O. c. 10, available at [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_94t10\\_e.htm#BK16](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_94t10_e.htm#BK16) (unofficial source).

<sup>20</sup> *Id.* S. 9

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**TOBACCO REGULATION**

**EUROPEAN UNION**

*Executive Summary*

*At the EU level, two major Directives regulate various aspects of tobacco products: a) Directive 2001/37/EC governs the manufacture, presentation, and sale of tobacco products; and b) Directive 2003/33/EC covers advertising and sponsorship on radio and the Internet. Television advertising and sponsorship have been prohibited since 1990 by the Directive on Television Without Frontiers, as amended.*

**I. Introduction**

Regulation of tobacco products falls within the health, safety, environment, and consumer protection requirements of the EC Treaty, as amended. Consequently, the European Commission in drafting legislative proposals in the field of tobacco products, has the legal mandate to achieve “a high level of protection” and to take into account especially “any new development based on scientific facts.” The European Parliament and the Council within their respective powers are also required to achieve the same objective.<sup>1</sup> The Commission’s legal authority to legislate in the area of tobacco products stems also from the requirement of an effective functioning of the internal market, which presupposes the free movement of products and services across the EU without any distortions on the conditions of competition.

Currently, there are two major directives regulating various aspects of tobacco products:

- a) Directive 2001/37/EC, otherwise known as the Tobacco Products Directive, which regulates the manufacture, presentation, and sale of tobacco products.<sup>2</sup> The adoption of this Directive consolidated the existing Directives concerning labeling of tobacco products, prohibition of certain types of tobacco for oral use, and the maximum tar yield of cigarettes into a single Directive; and
- b) Directive 2003/33/EC, which regulates the advertising of and sponsorship by tobacco products;<sup>3</sup> television advertising and sponsorship has been prohibited since 1990.

The European Commission negotiated on behalf of the European Community the Framework Convention on Tobacco Control under the auspices of the World Health Organization (WHO).<sup>4</sup> The Convention was signed on behalf of the European Community on June 16, 2003, and was approved by the Council on June 2, 2004.<sup>5</sup>

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<sup>1</sup> Art. 95, ¶ 3 of the EC Treaty, as amended.

<sup>2</sup> 2001 (OJ L 194) 26.

<sup>3</sup> 2003 (OJ L152) 16.

<sup>4</sup> WHO Framework Convention on Tobacco Control, <http://www.who.int/tobacco/framework/en/> (last visited Feb. 21, 2008).

<sup>5</sup> Council Decision of June 2, 2004, Concerning the Conclusion of the WHO Framework Convention on Tobacco Control 2004 (OJ L 213) 8.

The EU Member States share competence with the Community in the fields regulated by the Convention. Consequently, the Council urged the EU Members to ratify the Convention and comply with its requirements, in order to ensure a uniform application of its provisions.

## II. EU Legislation

### A. Manufacture, Presentation and Sale of Tobacco Products

Directive 2001/37/EC regulates the manufacture, presentation, and sale of tobacco products. Its objective is to set standards to harmonize the laws, regulations, and administrative provisions of the EU Members regarding the maximum tar, nicotine, and carbon monoxide yields of cigarettes and the warnings regarding health and other information to be included on the packages of tobacco products. It also includes certain measures regarding the ingredients and the description of tobacco products. The Directive allows Member States to legislate stricter rules regarding the manufacture, import, sale, and consumption of tobacco products if they deem such rules necessary for the protection of public health in their respective territories.

The Directive defines tobacco products to include products “for the purposes of smoking, sniffing, sucking or chewing, inasmuch as they are, even partly, made of tobacco, whether genetically modified or not.”

As the Commission has stated in its second report on the Application of the Tobacco Products Directive, the above definition does not cover the tobacco leaf itself or other natural or unprocessed tobacco plant parts. Consequently, the Commission stated that the definition in the Directive is not in line with the definition used in the WHO Convention or with the legislation of other countries, including Canada. Due to the numerous inquiries regarding radioactive and other elements contained in tobacco products, the Commission noted that it will examine whether it is appropriate to broaden the definition to include tobacco leaf and other natural and unprocessed tobacco plant parts.<sup>6</sup>

#### Cigarettes – Tar, Nicotine, and Carbon Monoxide

As of January 1, 2004, the maximum yields for cigarettes released for free circulation, marketed, or manufactured in Member States has been as follows:

- 10 mg per cigarette for tar,
- 1 mg per cigarette for nicotine; and
- 10 mg per cigarette for carbon monoxide.

Greece was granted a temporary derogation. Thus the date of application of maximum tar yield of cigarettes manufactured and marketed within Greece began on January 1, 2007.<sup>7</sup> Currently, the limits are applied to all 27 Member States.

The Directive provides that the yields of cigarettes shall be measured based on ISO standards 4387 for tar, 10315 for nicotine, and 8454 for carbon monoxide.<sup>8</sup> Member States have the option to require tobacco manufacturers or importers to carry out additional tests in order to assess the yields of other substances produced by tobacco products.<sup>9</sup>

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<sup>6</sup> See Second Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM (2007) 754 final.

<sup>7</sup> Art. 3 of the Directive

<sup>8</sup> Art. 4, ¶ 1.

<sup>9</sup> Art. 4, ¶ 3.

## Labelling

The Directive requires that the tar, nicotine, and carbon monoxide yields must be printed on one side of cigarette packages in the official language of the Member State where the products is marketed, so that at least ten per cent of the surface of the package is covered. If a Member State has two official languages, then the percentage is raised to twelve, and if a member has three languages, then the percentage is raised to fifteen.

Each tobacco product package must carry two warnings described below that must be printed on the most visible surface of the unit package and on the outside packaging. Additional transparent wrappers used in retail sale of the product are excluded.

- a) A general warning:
  - Smoking kills/smoking can kill; or
  - Smoking seriously harms you and others around you.
- b) An additional warning selected from Annex I of the Directive.<sup>10</sup> It must be printed on the other most visible surface of the unit package.

Tobacco for oral use and smokeless tobacco products are prohibited. In places where the marketing of such products is permitted, they must carry the following warning: “This tobacco product can damage your health and is addictive.”

Article 5, paragraphs 4, 5, 6, 7, 8, and 9 contain additional detailed rules on the placement of warnings.<sup>11</sup>

## Illustrations – Photographs

Article 5(3) of the Directive authorizes the Commission to adopt additional warnings in the form of color photographs. In 2003, the Commission adopted Decision 2003/641/EC on the use of color photographs or other illustrations as health warnings on tobacco packages.<sup>12</sup> The Decision establishes rules for the use of color photographs or other illustrations used to depict the ill effects of smoking. It is left to Member States to decide the content of the illustrations<sup>13</sup> A number of Member States have asked the Commission to make mandatory the combined warnings on all tobacco product. Also, the European Parliament, in unison with several Member States, has asked the Commission to make cessation information mandatory.

## Additional Product Information

Manufacturers and importers of tobacco products are obliged to submit annually a list of all ingredients and quantities used in the manufacture of the tobacco products. The list must also be accompanied by a statement indicating the reasons for inclusion of each ingredient.

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<sup>10</sup> Among the list of additional health warnings included in the Annex are the following: smokers die younger, smoking clogs the arteries and causes heart attacks and strokes, smoking causes fatal lung cancer, smoking when pregnant harms your baby, smoking is highly addictive, do not start, smoking causes ageing of the skin.

<sup>11</sup> See Directive, June 5, 2001, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:194:0026:0034:EN:PDF>

<sup>12</sup> 2003 (OJ L 226) 24

<sup>13</sup> Annex III to Commission Decision C (2006) 1502 final of April 12, 2006, established additional specifications. for printing combined illustrations and written warnings on the packages.



### **Product Descriptions**

As of September 30, 2003, the Directive prohibits the description of a product as less harmful than another tobacco product through the use of names, signs, etc.<sup>14</sup>

### **Reporting by the European Commission**

Member States were required to implement the Directive by September 30, 2002, and to inform the Commission as to the steps taken towards application of the Directive. The Commission is required to report to the European Parliament, the Council, and the Economic and Social Committee regarding application of this Directive. The Commission is assisted by scientific and technical experts.

The Commission drafted the initial report on the application of Directive in 2005.<sup>15</sup> The second report was drafted in 2007.<sup>16</sup> Following standard procedure, both reports were subsequently forwarded to the European Parliament, the Council, and the European Economic and Social Committee.

## **B. Advertising and Sponsorship by Tobacco Products**

Directive 2003/33/EC governs issues related to advertising of and sponsorship by tobacco products. Its scope extends to advertising and promotion:

- in the press and other printed publications;
- in radio broadcasting;
- in information society services; and
- through tobacco related sponsorship, including the free distribution of tobacco products.<sup>17</sup>

### **Prohibitions**

The Directive prohibits the following forms of advertising and sponsorship:<sup>18</sup>

- a) radio advertising;
- b) advertising in the press and other printed publications; two exceptions apply, limiting advertising in the press and other printed publications to
  - publications intended exclusively for professionals in the tobacco trade; and
  - publications which are printed and published in third countries, where those publications are not mainly intended for the Community market.
- c) advertising in information society services.

The Directive prohibits the following forms of sponsorship:<sup>19</sup>

- radio programs shall not be sponsored by undertakings whose principal activity is the manufacture or sale of tobacco products;

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<sup>14</sup> Art. 7.

<sup>15</sup> See Document COM(2005) 339 final.

<sup>16</sup> COM (2007) 754 final.

<sup>17</sup> Art. 1, Directive 2003/33/EC, 2003 (OJ L 152) 16.

<sup>18</sup> Arts. 3 & 4.

<sup>19</sup> Arts. 4 & 5.

- sponsorship by tobacco product companies of events and activities which involve or occur in several Member States or otherwise have cross-border effects; and
- any free distribution of tobacco products within the context of sponsorship of events referred to above and which has the purpose of the direct or indirect promotion of such products.

### Television Advertising and Sponsorship

The 1989 Television Without Frontiers Directive prohibits all forms of television advertising for tobacco products. It also provides that television programs may not be sponsored by natural or legal persons whose main activity is the manufacture or sale of tobacco products.

In 2007, this Directive was replaced by Directive 2007/65/EC<sup>20</sup> Article 3c explicitly prohibits “all forms of audiovisual commercial communications for cigarettes and other tobacco products.” The same prohibition also applies to teleshopping.

On the question of sponsorship, article 3f, paragraph 2 contains language to the effect that audiovisual media services or programs shall not be sponsored by companies “whose principal activity is the manufacture or sale of cigarettes and other tobacco products.”

### Penalties and Enforcement

EU Member States were required to harmonize their laws, regulations, or administrative provisions to ensure implementation of the provisions of this Directive by July 31, 2005.<sup>21</sup> Subsequently, Member States were required to notify the European Commission of their domestic implementation and of any further amendments.

The Directive imposes two additional important requirements on the Member States to ensure effective enforcement of its provisions:

- imposition of penalties in domestic legislation. The penalties must meet the following standards: a) be effective; b) be proportionate; and c) be dissuasive; and
- cause of action to persons and legal entities which can meet the criterion of legitimate interest under domestic legislation in the suppression of advertising, sponsorship, or other issues in conflict with this Directive, to file a complaint or to initiate legal action.<sup>22</sup>

### Legal Challenges to Directives

The current Directives and some previous ones dealing with manufacture, sale, marketing and advertising have not been immune to legal action brought by the Member States before the European Court of Justice (ECJ) to assess their validity.

In 2001, Germany sought partial annulment of Directive 2001/37/EC. The ECJ dismissed the case on procedural grounds, as it was not done within the required time frame. The Court had the

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<sup>20</sup> Amending Council Directive 89/552/EEC on the Coordination of Certain provisions Laid down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 2007 (OJ L332) 27.

<sup>21</sup> Art. 10 of the Directive.

<sup>22</sup> Art. 7.

opportunity to pass judgment on the validity of the Directive in other cases calling for a preliminary ruling from a United Kingdom court and a German court.

In 2003, Germany<sup>23</sup> also requested that the ECJ review the validity of Directive 2003/33/EC and sought partial annulment on the grounds that the EU institutions in adopting this Directive exceeded their powers under the internal market provisions of the EC Treaty and specifically article 95. Consequently, since the legal basis chosen for the Directive was wrong, Germany continued to allow the advertising of tobacco products in print media and on the Internet. On June 13, 2006, the Advocate General for the Court issued his opinion that the Court should dismiss the action brought by Germany against the Directive. The Advocate General held that article 95 is in fact an appropriate basis, since the national rules on advertising and sponsorship were diverse and would result in “fragmentation of the internal market” by restricting the freedom of movement of products and freedom to provide services. He also emphasized that the Directive’s fundamental purpose is to eliminate or prevent barriers to free movement.<sup>24</sup>

The Advocate General’s opinion is not binding but highly influential upon the Court. It appears that the Court has not passed a judgment as yet.

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<sup>23</sup> A previous legal action brought against Directive 98/43/EC on tobacco advertising and sponsorship in 2000 was successful and the Directive was declared null. The Commission subsequently adopted Directive 2003/33/EC.

<sup>24</sup> Press release No 48/06 of June 13, 2006 Advocate General’s opinion in Case C-380/03, *available at* <http://curia.europa.eu/en/actu/communiqués/cp06/aff/cp060048en.pdf>