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Justice Ombudsman  
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Examination of whether the Swedish National Board for Consumer Policies and the National Board of Health and Social Welfare have acted in contravention of the Swedish Constitution, Chap. 1, para. 9, etc.

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The Swedish Tobacco Industry Association is an organization consisting of all the companies which, on a larger scale, manufacture, import and sell tobacco products on the Swedish market.

As representative for the Swedish Tobacco Industry Association, hereafter called the Complainant, we hereby request that the Justice Ombudsman should immediately investigate the circumstances described in this complaint. As stated in detail below, the case is a matter of great urgency for the Complainant.

The Swedish National Board for Consumer Policies and the National Board of Health and Social Welfare, in cooperation with the International Organization of Consumers Unions (IOCU), published in 1989 the enclosed brochure entitled "Smart Promotion" and, in the Swedish edition, "Mörkade  
"oklam", hereafter called "the Brochure" (Appendix 1). According to information on page 1, the Brochure is to serve as teaching material in schools and organisations. However, the design of the Brochure indicates that the aim is by all means to create propaganda against tobacco and tobacco companies.

The Brochure, according to the Swedish National Board for Consumer Policies, has been printed in an edition of 10 000 copies in Swedish and 5 000 copies in English (Appendix 2).

1. Assertion concerning circumvention of the law, etc.

1.1 A main theme, reiterated in the Brochure, is that the tobacco industry constantly "finds new forms and channels for its advertising as new rules and legislation enter into force" (page 1) - which means that the tobacco companies in various ways try to get around current restrictions on the advertising of tobacco. Concrete assertions to this effect are made mainly on pp. 8-9, pp. 10-11, p. 21 (in connection with the picture of a cowboy), page 23, p. 28, p. 32, pp. 34-35, pp. 36-37, pp. 38-39 and on the back cover of the Brochure.

All the assertions referred to are untrue and they accuse the tobacco companies of committing reprehensible and criminal actions. The assertions are particularly serious in view of the fact that the Brochure is entitled "Mördande Reklam" and of the fact that the tobacco companies are in no way afforded an opportunity to give their views in the Brochure.

1.2 The accusations made by the Swedish National Board for Consumer Policies and the National Board of Health and Welfare concerning surreptitious advertising, circumvention of the law and other rules are more surprising in view of the fact that as recently as Autumn 1986 the above-mentioned Board for Consumer Policies issued new guidelines for tobacco advertising (KCVFS 1986:2), for application of the law (1978:764), with certain regulations concerning the advertising of tobacco products, hereafter called "the Tobacco Advertising Law". The new guidelines were developed following consultations between the Board for Consumer Policies, the National Board of Health and Welfare and the tobacco industry during 1986 and came into force on 1 January, 1987. The new guidelines are considerably stricter than the old ones.

Moreover, the tobacco industry decided to appoint an Examining Committee to examine all tobacco advertising. The Committee has four members, under the chairmanship of a lawyer, Dr. Sten Tengelin, and it is authorised to take interim measures to stop tobacco advertising that contravenes the guidelines and to impose heavy fines on the companies that do this. The new guidelines, the rules for the Examining Committee, etc. are enclosed as Appendix 3, A-E.

The Swedish National Board for Consumer Policies (Consumer Ombudsman Laila Freivalds) stated in, inter alia, a press release (Appendix 4) that the establishment of the new guidelines and the Examining Committee mean "a stricter application than in the present rules... The agreement means that the tobacco industry itself has assumed a considerable responsibility not least as regards ensuring that all the companies in fact follow the rules".

The Brochure does not mention the guidelines or the Examining Committee nor even the fact that the tobacco companies carefully follow the guidelines of the Board for Consumer Policies. Thus only in relatively few instances has the Examining Committee found that a company infringes the guidelines and consequently had to pay a fine. No definite complaints about the tobacco companies' behaviour have previously been addressed by the Board for Consumer Policies to the tobacco companies.

The tobacco companies are obliged to follow the new guidelines. Naturally the Board for Consumer Policies is also obliged to loyally observe the terms of the agreement with the tobacco industry instead of, as in the present Brochure, accusing the tobacco companies of systematically circumventing the currently applicable rules.

- 1.3 Chap. 1, § 9 of the Swedish Constitution states the basic principle that administrative authorities and others in the course of their duties shall treat all parties as equals before the law and use a factual and impartial approach.

The Swedish National Board for Consumer Policies and the Board of Health and Social Welfare accuse the tobacco companies, in general, of circumventing the law and the current rules by means of surreptitious advertising of tobacco, without giving the tobacco companies a chance of stating

they thereby contravene the standards laid down by the

absence of impar

attitude to the tobacco companies.

- 1.4 It should further be noted that the Brochure—which is financed by two Swedish public authorities, is published in a Swedish edition of 10 000 copies and is intended to serve as a basis of discussion, etc., in Swedish schools and organisations - is obviously attacking the behaviour of the tobacco companies in Sweden. However, the Brochure says nothing about the substance of the rules concerning tobacco advertising in Sweden; no example is given of the advertising as it factually exists in Sweden and which, as mentioned above, is in agreement with the rules. The many examples of tobacco advertisements, etc., that are given are either taken from abroad or, as on page 5, from an advertisement in the Swedish press in the year 1966. The examples from abroad are probably all in agreement with the current rules in the respective countries. In view of this also, the programme declaration on page 1 of the Brochure " 'Smart Promotion', containing examples of how the tobacco industry finds new forms and channels for its advertising ...", is grossly irresponsible and misleading.

Although the Brochure criticises the tobacco companies' advertising in general - that is, also abroad - the programme declaration is grossly irresponsible and misleading, since the rules currently applicable to advertising in those countries are also being observed. Moreover, it must be beyond all doubt that the Swedish authorities have no business thus to attack advertising which is carried on abroad by Swedish or foreign companies and which is addressed to a foreign public. On pp. 30-33 in the

Brochure, for instance, Svenska Tobak AB's export of snuff is referred to in a way that throws suspicion on that company's completely lawful work abroad. As stated in <sup>27</sup>opinion from Gustaf Petré dated 20 April, 1989 (Appendix 5), the Swedish National Board for Consumer Policies and the Board of Health and Social Welfare in behaving thus must undoubtedly be exceeding their powers.

2. Assertions concerning criminal activities and dishonesty, etc.

2.1 The Brochure, on page 11, makes the untrue assertion that R J Reynolds and Philip Morris, inter alia, "have been forced to admit to bribes and payoffs of officials of foreign governments ..."

On page 36 it is hinted concerning an employee of Philip Morris A<sup>2</sup>, Stig G. Carlsson, that his remarks about Marlboro Classics being a clothes collection are mendacious. This impression is conveyed by the statement that Stig G. Carlson expressed a different view "when he talked more openly". Concerning Stig G. Carlson it is further stated, on page 39, that he "works on surreptitious advertising" for Philip Morris. On the same page there are also some remarks supposed to have been made by Stig G. Carlson at an employment interview. The main aim of printing these supposed remarks is apparently to hint that Philip Morris gives bribes and uses "friendship corruption". These assertions about Stig Carlson are not true either.

2.2. As previously made clear to the Swedish National Board for Consumer Policies, Marlboro Classics and Marlboro Leisure Wear are clothes produced by Italy's largest clothes manufacturer, Marzotto.

The clothes are sold not by Philip Morris but by Marzotto's Swedish agent, Red Arrow, in Sweden. The sales of clothes have taken place for about ten years in Sweden; they have nothing to do with tobacco advertising but represent an independent licensing of the Marlboro brand name. According to Professor Bernitz' legal opinion (Appendix 6), such a use of a tobacco brand name is quite permissible and does not contravene the guidelines. This is known to the Swedish National Board for Consumer Policies and the Board of Health and Social Welfare, since the legal opinion was delivered to the Board for Consumer Policies in connection with the negotiations in 1986 about the new guidelines, and the opinion has been quoted by the Board for Consumer Policies and the Board of Health and Social Welfare in other connections.

Here we would also refer to a recent decision by the Swedish Market <sup>the</sup> Court (1989: 10) in the case of /Swedish National Board for Consumer Policies vs. R. J Reynolds Scandinavia AB and others concerning alleged circumvention of the law and guidelines with regard to tobacco advertising, Appendix 7. The Market Court refused to grant the Consumer Ombudsman's action, stating, inter alia, that a prohibition of products other than tobacco products under, in this case, the brand name of Camel would hardly be in agreement with the constitutional rules governing freedom of expression and freedom of the press and would be contrary to the basic principles of brand copyright law.

2.3 The above-mentioned allegations and intimations concerning R J Reynolds, Philip Morris and one of Philip Morris AB's employees have probably very seriously contravened the rule in the Swedish Constitution (EF 1:9), according to which authorities in the course of their work shall maintain a factual and impartial attitude.

2.4 Stig G. Carlson holds the post of Manager of Corporate Affairs. This means that his principal duty is to represent Philip Morris in contacts with the public, with authorities and so on.

With regard to the untrue assertions about Stig G. Carlson, who

is a member of the Examining Committee of the Tobacco Industry and does not work with the marketing and advertising of tobacco, it can, moreover, be seriously questioned whether these assertions do not constitute libel under the criminal law, Chap. 5, § 1, and an offence under the Freedom of the Press Act, Chap. 7, § 14, para. 14. The disparaging intimations about corruption and "friendship corruption" on pp. 11 and 36 and the assertions that Stig G. Carlson lies and engages in advertising in contravention of the guidelines laid down by the Swedish National Board for Consumer Policies thus seem calculated to expose him to the disapproval of others and, with regard to his position and his work, to cause him considerable suffering and non-material injury. Gustaf Petré states in his legal opinion <sup>that</sup> it can hardly be compatible with the Swedish rules governing information from public authorities to thus accuse a private individual (Appendix 5, page 4).

- 2.5 We wish to point out, moreover, that, in general, it can hardly be among the duties of the Board for Consumer Policies to try to attack, through assertions about "surreptitious advertising", marketing which is disapproved of by the Board but which is lawful. As Petré says, The Board for Consumer Policies should either have requested the Market Court to consider the marketing procedures concerned or else allow that marketing to continue. (Appendix 5, pp. 3 and 5). The Board has no powers beyond this.

### 3. Encouragement of Criminal Actions

- 3.1 On page 12 in the Brochure, under the heading "A Course in Self-defence", there are various suggestions for protesting against tobacco advertising. One possibility mentioned is to attack smokers by engaging in what can almost be called insulting behaviour. Non-smokers are encouraged to use "self-defence" against smokers as follows: "If you light up while I'm eating, you won't mind me putting a dog turd on your table while you are eating, will you?" They are encouraged to "distort tobacco ad slogans and change brand names". A reference to "BUGA-UP" in Australia (described in detail on pp. 14-15 in the Brochure) makes it clear that the activities recommended consist of malicious damage and vandalism on advertising material and interference with pictures protected by copyright.

- 3.2 In a bill (1987/88:143), the Government has proposed certain changes in, inter alia, the criminal law in order to make it easier to deal with vandalism in the form of scrawls, graffiti and so on. On the 21 March 1989 the bill was considered by the Justice Committee (Justice Committee report 1988/89: JuU 13) which stated, inter alia, that scrawls and graffiti, etc. constitute a serious and many-sided problem and that in this connection one cannot ignore "the prejudicial effects on the maintenance of good public order in this respect, which in the longer run may have unfortunate consequences for public respect for the law",
- s. 9. Bill 1987/88:143 has resulted in, inter alia, a change in the criminal law (SFS 1989:136) which was published on 13 April 1989 and enters into force on 1 July 1989.
- 7.3 The indirect encouragement given by the Board for Consumer Policies and the Board of Health and welfare to vandalise the tobacco companies' advertisements are obviously contrary to the very negative view which the community otherwise takes of graffiti, etc. and it seems that the negative effects/in the longer run feared on public respect for the law by the Justice Committee already have become a reality in the public authorities mentioned here.
- 5.4 We therefore wish to point out that the Swedish Constitution (Chap. 1: 1, para. 3) states that public power shall be exercised in accordance with the laws. In Bolmberg and Stjernequist's commentary, "The Constitution", 1980, a reference is made on page 44,

in connection with the provisions of RF 1:1, para. 3, to a statement made during the legislative work which means that "it should be a distinguishing feature of the Swedish system of representative government that it is subordinated to the rules of law". It is obvious that the encouragements expressed by the Swedish National Board for Consumer Policies and the Board of Health and Social Welfare in the Brochure are not in agreement with this statement or with the provisions of the Constitution (RF 1:1, para. 3).

As Petren found (Appendix 5, page 4), the encouragements to commit criminal actions are also clearly in contravention of the duties assigned to civil service departments and the instruction in RF 1:9 to maintain an impartial and factual approach. It is particularly noteworthy that public authorities encourage school-children to use colour spray boxes to damage advertisement boardings, in view of the serious problem that scrawls and graffiti constitute for the community.

- 3.5 It should also be mentioned that, according to a report in the publication Konsumenträtt & Ekonomi, 6/88, the Swedish National Board for Consumer Policies considered that it was not compatible with good advertising ethics for a company to show photo-models spraying house walls, particularly with regard to advertisements which - like the Brochure - are targeted to children and young persons (Appendix 8). The "social responsibility" which in the above mentioned case the Board for Consumer Policies demanded of the Company was apparently not to be assumed by the Board itself when it concerned teaching material for young persons.

#### 4. Untrue and one-sided assertions about tobacco advertising

- 4.1 In the guidelines laid down for the Swedish National Board for Consumer Policies and in the preparatory work for the Tobacco Advertising Law (LU 1985/86:13) emphasis is laid on the two main principles underlying the Tobacco Advertising Law :

"As regards the behaviour of the companies on the market it is required that the large groups in the population who use tobacco should, in suitable ways be given access to relevant information about the product and that, with regard to the health risks resulting from the use of tobacco, there should be strict limitations and strict restraints."

The National Swedish Board for Consumer Policies and the National Board of Health and Social Welfare have in no way concerned themselves with the main principle - namely, the Tobacco consumers' right, by means of advertising in accordance with the Board for Consumer Policies' guidelines, obtain access to relevant product information about tobacco. Instead, the Board for Consumer Policies and the National Board of Health and Social Welfare make false and incorrect assertions about tobacco advertising.

4.2 (a) One basic point in the Brochure is obviously that tobacco advertising leads to an increase in the use of tobacco or, in any case, to a limitation of the decrease - see, for instance, page 9, where it is asserted that the tobacco companies have increased their share of the market, as regards a particular tobacco brand, through a particular kind of advertising. The Brochure does not mention the investigations which show that advertising leads neither to an increase in the use of tobacco nor to a maintenance of the current consumption. Instead, the effect is that the tobacco companies' advertising helps the companies to take shares of the market and consumers from one another. Copies of reports concerning such an investigation, carried out by M J Waterson, are enclosed as Appendix 9 (see page 1).

(b) The aim of the Brochure is to be an instrument providing support for "influencing public opinion" in, inter alia, schools (page 1). The above-mentioned (a) paragraph in the Brochure, inter alia, intimates that children and young persons constitute a suitable and malleable target group for tobacco advertising. The Brochure does not mention that the investigations which show that advertising plays a very small role in explaining why someone begins to smoke (a copy of such an investigation is enclosed as Appendix 10 - see particularly page 13), and why the tobacco industry follows the guidelines and does not target its advertising to children.

(c) The Brochure intimates (cf., for instance, question and answer 6 on pp. 2-3) that a total prohibition of tobacco advertising would be desirable. The Brochure does not mention the investigations which show that a total prohibition of advertising has no noteworthy effect. Copies of reports on sales statistics in certain countries where advertising is forbidden, as well as an opinion delivered by Associate Prof. Christer Ottander, rector of IHR, are enclosed as Appendix 11. This compilation shows, for instance, that in Norway the total consumption of tobacco did not decline to any noteworthy extent after advertising was forbidden in 1975.

The Brochure's neglect to mention the existence of the Board for Consumer Policies' guidelines for the advertising of tobacco or the investigations mentioned above, the results of which contradict the assertions made in the Brochure, would probably constitute a contravention of the requirement for factuality and impartiality in the Constitution (RF 1:9).

5. English edition

The Swedish National Board for Consumer Policies and the National Board of Health and Social Welfare have financed an English edition of the Brochure with a view to spreading it beyond Sweden's borders. The Brochure contains no information on the conditions in Sweden which would justify the preparation of an English edition. The Complainants question whether it is compatible with the duties of the Board for Consumer Policies and the Board of Health and Social Welfare to use taxpayers' money to finance anti-smoking propaganda which is intended to be used and distributed only in foreign countries. In this regard, see Appendix 5, pp. 3-5.

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## 6. Crime against the copyright laws

The Board for Consumer Policies and the Board of Health and Social Welfare have throughout the Brochure, and without permission, used advertisements belonging to the tobacco companies in contravention of the purposes of the tobacco companies and the creators. The tobacco companies' advertising pictures and texts have been used in the Brochure in a way that contravenes the provisions of, inter alia, § 2 para. 2 in the law (1960:730) concerning the right to photographic pictures and § 3 in the law (1960:729) concerning copyright. The advertising pictures have been used in a way that contravenes the copyright laws, and therefore Philip Morris, R J Reynolds and the creators are considering bringing an action for damages in an ordinary court against the authorities for a breach of the copyright law and the law on the right to a photographic picture.

These breaches of the copyright laws must be in poor agreement with the intentions underlying the Constitution (1:1, para. 3).

## 7. Summary and conclusions

7.1 In summary, the Complainant considers that the Swedish National Board for Consumer Policies and the National Board of Health and Social Welfare have acted in contravention of the basic principles regulating their work, which are contained in the Constitution in chap. 1, § 9, by

- (a) accusing the tobacco companies, particularly Philip Morris, R.J Reynolds and the Svenska Tobaksbolaget, of circumventing the rules concerning tobacco advertising,
- (b) accusing Philip Morris, R J Reynolds and Stig G Carlson of committing criminal and dishonest actions,
- (c) indirectly encouraging the public to commit criminal actions against smokers and the tobacco companies' advertising material, as well as

(d) by giving untrue and one-sided information about the effects of tobacco advertising.

7.2 The Swedish National Board for Consumer Policies and the National Board of Health and Social Welfare have, moreover,

- (a) exceeded their powers by committing the actions described under 7.1 (a) - (d) above and by using public funds to finance anti-smoking propaganda outside the country and have
- (b) contravened the copyright law and the law concerning the right to a photographic picture by using protected material without permission and in contravention of the purposes of the tobacco companies and of the creators

7.3 The Complainant considers that the Swedish National Board for Consumer Policies and the National Board of Health and Welfare by cooperating in selling the Brochure committed a seriously improper action which also contravened the requirements for factuality and impartiality imposed on Swedish authorities. The Complainant considers that the errors in the Brochure are of such a nature that the Board for Consumer Policies and the Board of Health and Social Welfare cannot continue to distribute the Brochure and that it is therefore important that the Justice Ombudsman should act quickly to prevent the Brochure from being further distributed and thereby causing additional damage. The Complainant therefore requests that the Justice Ombudsman should as soon as possible examine the behaviour of the above-mentioned authorities and ensure that a rectification is made.

Stockholm, 17 May, 1989

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cf.