

These notes refer to the Tobacco Advertising and Promotion Act 2002 (c.36) which received Royal Assent on 7 November 2002

TOBACCO ADVERTISING AND PROMOTION ACT 2002

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Tobacco Advertising and Promotion Act 2002¹ which received Royal Assent on 7 November 2002. They have been prepared by the Department of Health in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

SUMMARY

3. The Act bans advertising and promotion (including sponsorship) of tobacco products, with certain limited exceptions. Most of it will come into force on a date or dates to be appointed by the Secretary of State or, in relation to Scotland, the Scottish Ministers. The Act will apply to England, Scotland, Wales and Northern Ireland.

BACKGROUND

4. The United Kingdom Government entered office in 1997 with a manifesto commitment to ban tobacco advertising. Initially the government proposed to fulfil its commitment through implementing Directive 98/43/EC² banning tobacco advertising, promotion and sponsorship. Two consultation documents on implementing the tobacco advertising ban were published, on 10 December 1998 (at the same time as the White Paper "Smoking Kills"³) and 17 June 1999⁴. The latter consultation document included draft regulations to implement the Directive. However, the Directive was annulled by the European Court of Justice⁵ on the grounds of an incorrect legal (treaty) base. A Government Bill to fulfil the manifesto commitment was introduced in the 2000/2001 Parliamentary session but fell when the 2001 election was called. This measure, in identical terms, was then introduced in the House of Lords as a Private Members Bill by Lord Clement-Jones and on completing progress through the House of Lords was adopted as a Government Bill.
5. An advertising ban is part of the Government's tobacco control strategy, as set out in "Smoking Kills", published on 10 December 1998. The Government believes that such a ban could reduce tobacco consumption in the longer term by 2.5%. This would translate into an estimated 3000 lives per year saved.

1 For Copies: postal address: PO Box 29, Norwich NR3 1GN, phone 020-7873-0011
Website: <http://www.legislation.hmso.gov.uk/acts/acts2002/>

2 http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_213/l_21319980730en00090012.pdf

3 For copies - postal address: PO Box 29, Norwich, NR3 1GN, phone 020-7873-0011 (ISBN 0-10-141772-1)

4 For copies contact the Department of Health, Tobacco Policy Unit, Wellington House, Waterloo Rd, London SE1 8UG

5 http://www.europa.eu.int/eur-lex/en/search/search_case.html (search by case number 1998 376)

THE ACT

6. The Act defines "tobacco advertisement" as an advertisement whose purpose or whose effect is to promote a tobacco product. The term "advertisement" is not defined and bears its natural meaning. The Act covers direct advertising (for example, posters, billboards and press advertising) and other forms of promotion, such as direct marketing. It also covers so-called brandsharing, a form of indirect advertising whereby non-tobacco products use the branding of a particular tobacco product as a means of promoting that tobacco product (and thereby widen the promotion of the tobacco product) (or vice versa). The Act also covers media other than paper, eg electronic communications (such as the internet) and video. It does not cover television and radio which are already subject to regulation under the Broadcasting Acts 1990 and 1996 or other means.
7. The Act sets out in separate sections prohibitions on tobacco advertising, free distributions (including coupons) and sponsorship and provides for regulations prohibiting brandsharing. The reason for such a comprehensive ban is that anything less far-reaching would leave considerable scope for promotion of tobacco products, as has been demonstrated in other countries.

COMMENTARY ON SECTIONS

Section 2: Prohibition of tobacco advertising

8. This section makes it an offence in the course of a business to publish a tobacco advertisement in the United Kingdom. The section also covers advertising of brandshare products. Essentially anyone who is involved in the commissioning, design, printing, publishing, sale or distribution of such an advertisement could be guilty of an offence. This makes each member of the chain potentially liable, subject to the available exclusions and defences in sections 4, 5 and 6, from the tobacco manufacturer down to those who distribute or sell an advertisement.
9. The Act does not make incidental commentary on smoking or tobacco products an offence. It is not intended that the public at large, journalists etc should be prevented from commenting on tobacco products or that the representation of smoking and tobacco products by those engaged in creative or artistic pursuits (actors, painters, producers etc) should be prohibited.
10. *Subsections (1) and (2)* include the phrase "in the course of a business" to make it clear that the Act does not apply to individuals acting in a private capacity.
11. *Subsection (3)* provides that the offence of distributing may be committed by anyone involved in the transmission of a tobacco advertisement by electronic means.
12. *Subsection (4)* exempts persons who do not carry on business in the United Kingdom from the offence of publishing (or causing publication) where they do so via the internet. This reflects the fact that access to a website cannot be controlled by its originator.

Section 3: Advertising in newspapers, periodicals, etc

13. This section provides that in the case of advertising in the press, anyone in the chain from commissioning to selling an offending publication could also be guilty of an offence. This includes proprietors, editors and advertising agencies. The section also applies where publication is by electronic means. Certain exclusions are set out in section 4 and defences in section 5.

Section 4: Advertising: Exclusions

14. This section sets out the exceptions to the advertising ban set out in sections 2 and 3.

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15. *Subsection (1)(a)* deals with communications between those engaged in the sale of tobacco products. As the sale of tobacco products to adults is lawful, appropriate commercial communications are not prohibited. So long as these communications do not reach the wider public they will be excluded from the ban. Those to whom communications may be sent are defined in subsection (2).
16. *Subsection (1)(b)* allows information on tobacco products to be sent to individuals who request that information. However, this does not permit tobacco advertisements to be sent to all consumers on a database; each must individually request that information on each and every occasion. A request for information cannot be considered as a request for further information in the future.
17. *Subsection (1)(c)* deals with publications whose principal market is not the UK market which are exempted from the general ban. In the final analysis, the courts would decide the meaning of "principal market" in any particular case. Internet versions of foreign publications are also covered by this exemption. In-flight magazines are not covered by the exemption.

18 *Subsection (2)* sets out those engaged in the tobacco trade who are covered by the exemption in subsection (1)(a). It makes it clear that the exemption extends only to communications specifically directed at those who are responsible for making decisions on purchasing tobacco products as well as their managers and to those, including directors, who are responsible for the conduct of the business.
19. *Subsection (3)* provides that advertising where tobacco products are offered for sale is allowed as long as it is in accordance with regulations to be made by the Secretary of State or the Scottish Ministers. This covers shops and sales over the internet. In shops, the intention is to allow some advertising of the products around the till area, typically on a gantry in a corner shop or in a kiosk in a supermarket, but to ban the advertising material elsewhere on the premises, for example in window displays. It is intended that the regulations will also clarify how the exemption applies to sales over the internet to ensure that responsible e-commerce in this area is not hindered.
20. *Subsection (4)* provides that the regulations referred to in subsection (3)(a) may define the meaning of "place", to make clear the limit of permissible advertising; for example the place where tobacco products are sold would not mean the whole of a large supermarket.

Section 5: Advertising : Defences

21. This section sets out the various possible defences for anyone charged with an offence under sections 2 or 3.
22. *Subsection (1)* provides a defence in relation to an advertisement whose purpose is to promote a tobacco product where the defendant did not know and had no reason to suspect that the purpose of the advertisement was to promote a tobacco product. In most cases it would be expected that this would only function as a defence once, as the purpose would be known thereafter.
23. *Subsection (2)* provides a defence in relation to an advertisement whose effect is to promote a tobacco product where it could not reasonably be foreseen by the defendant that it would have that effect. Again in most cases it would be expected that this would only function as a defence once.
24. *Subsection (4)* provides a specific defence for distributors who did not know and had no reason to suspect that what they distributed infringed the ban. It applies only to distribution other than by electronic means - the defence for electronic distribution is in subsection (5).
25. *Subsection (5)* provides a defence for someone involved in the electronic transmission of a tobacco advertisement who adduces sufficient evidence to raise an issue that

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he was unaware that what he distributed or caused to be distributed was a tobacco advertisement, or that once aware of it, it was not reasonably practicable for him to prevent the further distribution of the tobacco advertisement, or that he did not carry on business in the UK. The first two defences reflect the reality of electronic distributors such as providers of telephone lines who might be unaware that they are distributing an advertisement and cannot prevent its further distribution without closing down an entire network. The third is an equivalent to the defence in section 2(4) for publishing.

26. *Subsection (6)* provides a defence for a seller of a publication where he did not know and had no reason to suspect that the publication contained a tobacco advertisement. This is to protect a seller such as a newsagent from having to look through all the publications he might sell to ensure that no such advertisement appeared. Again once the seller's attention is drawn to the advertisement he would need to remove the publication from sale to avoid committing an offence.

Section 6: Specialist tobacconists

27. Specialist tobacconists may continue to advertise specialist products (ie other than cigarettes and hand-rolling tobacco) within, and on the outside of, their premises. This reflects the fact that they sell products which are generally not bought or used by children and young people. There are some 350 such shops in the country.
28. *Subsection (1)* permits advertisements of specialist products (not cigarettes or hand-rolling tobacco). It also enables the Secretary of State and the Scottish Ministers to make regulations to specify further conditions in relation to advertising in specialist shops to ensure that this exemption is not used inappropriately.
29. *Subsection (2)* sets out a definition of specialist tobacconists. These are retailers who specialise in tobacco products other than cigarettes and hand-rolling tobacco, specifically, cigars, snuff, pipe tobacco and smoking accessories. These are products which do not appeal to children. The sale of these goods must account for the principal part of the specialist's income; those who merely sell cigars, snuff, pipe tobacco and smoking accessories as a sideline will not qualify.
30. *Subsection (3)* sets out the basis for determining whether a shop falls within the definition of specialist tobacconist in subsection (2). *Subsection (3)(b)* ensures that new specialist tobacconists may benefit from the defence in section 6(1).
31. *Subsection (4)* clarifies the meaning of "shop". Some specialist tobacconists operate from shops within shops, for example in a department store. Such shops within shops may comprise a self-contained cigar room and a counter area which is not physically marked off from the remainder of the store; where this happens advertising for cigars and other specialised products may only take place within or immediately outside the self-contained area. The display elsewhere of all tobacco products will be subject to section 4(3) and the regulations pursuant to it. This does not prevent there being signposting for customers elsewhere in the store to indicate where the specialist tobacconist is located, so long as that signposting does not itself constitute a tobacco advertisement (eg if it is covered in branding).

Section 7: Developments in technology

32. This section enables the Secretary of State to make an order to amend the provisions of the Act concerning publication or distribution of tobacco advertisements by electronic means in the light of technological developments if he considers this to be appropriate. The reason for taking this power is that the pace of technological change in this area makes it very difficult to predict what new means of publishing or distributing may emerge.

Section 8: Displays

33. This section provides that the Secretary of State may make regulations concerning the permissible display of tobacco products and their prices at places or websites where they are offered for sale. The Government regards the current practice of storing tobacco products for the most part in a gantry with minimal advertising as perfectly satisfactory and has no current plans to make regulations under this section. However, the Government feels that it is important to have the power to control displays if displays of tobacco products start to become quasi-advertisements.
34. *Subsection (1)* makes it an offence to display tobacco products if the display does not comply with any requirements as may be specified in regulations. This includes electronic displays on websites.
35. *Subsection (2)* exempts persons who do not carry on business in the United Kingdom from the offence of displaying tobacco products (or causing them to be displayed) where they do so via the internet. This reflects the fact that access to a website cannot be controlled by its originator.
36. *Subsection (3)* provides that the regulations may set out the meaning of 'place'. This is a parallel provision to section 4(4).
37. *Subsection (4)* requires that any regulations made under this section must clarify how displays which amount to advertisements are to be regulated. Given that the Government would be regulating both for advertising and displays at points of sale, it would be essential to specify under which regulatory regime displays which also amounted to advertisements were to be treated.

Section 9: Prohibition of free distributions

38. This section bans any free distribution carried out in the course of a business whose purpose or effect is to promote a tobacco product. Experience elsewhere has been that where other areas of marketing are banned, the focus of tobacco marketing moves to direct marketing techniques such as free distributions, for example in clubs and bars. The effect of the section will be a ban on the giving away of branded products such as cigarette lighters so as to reduce the amount of tobacco branding on display to the public as much as possible. The section also bans the use of coupons such as the schemes whereby coupons inserted into cigarette packs are collected by customers and can later be redeemed for tobacco or other goods.
39. *Subsection (3)* allows for products to be given away free to persons in the tobacco trade for the purposes of that trade. Those persons in the tobacco trade to whom products may be given are defined in subsection (4).
40. *Subsection (4)* sets out those engaged in the tobacco trade who are covered by the exemption in subsection (3). It makes it clear that the exemption extends only to the giving of products or coupons to those who are responsible for making decisions on purchasing tobacco products as well as their managers and to those including directors who are responsible for the conduct of the business.
41. *Subsection (5)* provides a defence for someone who can adduce sufficient evidence to raise an issue that he did not know and had no reason to suspect that the purpose of the distribution was to promote a tobacco product, or that he could not reasonably have foreseen the effect of the distribution would be the promotion of a tobacco product. Once again this is a defence which could not be relied on once the effect of the distribution had been pointed out.
42. *Subsection (6)* defines "coupon". It would include, for example, tear-off strips of a cigarette packet which allows the consumer money off their next purchase.

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43. *Subsections (7) and (8)* enable the Secretary of State to make regulations covering distributions at a nominal price or at a substantial discount. The intention is that this power would only be used if it emerged that products were being offered to consumers at nominal sums or at a substantial discount to promote tobacco products. For example, branded clothing might be sold for two thirds or more off the usual price. In the Government's view such a discount would amount to a substantial discount which went beyond normal marketing practice. Any such regulations would be preceded by a consultation process (and be subject to the affirmative resolution procedure).

Section 10: Prohibition of sponsorship

44. *Subsection (1)* prohibits anything done pursuant to a sponsorship agreement if the purpose or effect of what is done is to promote a tobacco product. It applies to both the sponsor and the recipient. The contribution made by the sponsor must be made in the course of a business; there is no intention to catch the private individual who uses his own money to sponsor an event or activity so as to promote smoking. The Act does not specify that the sponsorship agreements have to relate to any particular thing; typically sponsorship relates to an event or activity, such as a sporting competition or an artistic performance, but it could include sponsorship of a building or institution or service. These examples are not an exhaustive list.
45. *Subsection (2)* defines a sponsorship agreement to include any form of promotion, whereby an event etc receives help in monetary or other form from an individual or organisation. An offence will be committed by both parties to the agreement when something is done as a result of the agreement to promote tobacco products in the UK. This section does not prevent a tobacco company from giving money to support an event or activity, so long as the company's products are not given any promotion in return. For example, it is not intended to prevent a tobacco company supporting a theatrical production and being acknowledged for so doing, provided that the acknowledgement mentioned solely the name of the company and not any of its products, and did not involve any special treatment of the tobacco company over and above other sponsors, the purpose or effect of which was promotion of tobacco products.
46. *Subsection (3)* sets out defences, subsection (3)(a) where the defendant did not know and had no reason to suspect that the purpose of what was done as a result of the agreement was to promote a tobacco product and subsection 3(b) where he could not reasonably foresee that that would be the effect.
47. *Subsection (4)* provides a defence for the person sponsored where he did not know and had no reason to suspect that the contribution was made in the course of a business. This is to ensure that someone who could not have been expected to know that an apparently innocent contribution was in fact made in the course of a business would have an appropriate defence.

Section 11: Brandsharing

48. Brandsharing, or brandstretching as it is sometimes known, is a form of indirect advertising involving the use of tobacco branding on non-tobacco products or services, or vice versa. The rationale for taking action against this form of advertising is that it also increases consumption of tobacco.
49. *Subsection (1)* enables the Secretary of State to make regulations concerning the use of such branding. It is intended that the regulations will set out limited circumstances in which brandsharing will be permissible. There has been full consultation on the scope of these regulations. *Paragraphs (a) and (b)* indicate that the regulations will apply to shared branding both in tobacco and non-tobacco products and services.
50. *Subsection (2)* provides that, consistently with the rest of the Act's provisions, the regulations may be made only in relation to brandsharing where the purpose or effect is to promote a tobacco product.

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51. *Subsection (3)* provides that if regulations made under this section allow for an exception, then that exception may also apply to offences under other sections. This would mean that if the use of branding was allowed under the brandsharing regulations then other uses of that branding, including advertising, would not fall foul of other parts of the Act. This is to avoid the situation where, for example, a company could legally trade their product but might find themselves prosecuted under the advertising prohibition.

Section 12: Broadcasting

52. This section excludes from the scope of this Act the BBC and most of the broadcasting services covered by the Broadcasting Acts 1990 and 1996. Codes of Practice issued by the Independent Television Commission and the Radio Authority under the Broadcasting Acts regulate the advertising and promotion of tobacco products on these services. Other broadcasting media will be subject to the provisions of the Act.

Section 13: Enforcement

53. This section sets out the authorities who will be responsible for enforcing the ban on tobacco advertising. In practice, this means local trading standards officers and their equivalents.
54. *Subsections (3) and (4)* provide a power for Ministers in England and Wales and Scotland and the Department of Health, Social Services and Public Safety in Northern Ireland to direct that any of the enforcement functions be taken over by them in any particular case or class of cases.
55. *Subsections (5) and (6)* provide a similar power for the Secretary of State in England and Wales or the Department of Health, Social Services and Public Safety in Northern Ireland to take over a prosecution. There is no need for this power to apply to Scotland as the Procurator Fiscal decides whether to prosecute (and then deals with any prosecution) once the enforcement authority considers that there should be a prosecution.
56. These powers are intended to ensure that a particularly important or difficult prosecution need not be lost if the enforcement authority involved felt unable to take on or continue with the case, for whatever reason.
57. *Subsection (7)* allows any magistrates in England and Wales, and Northern Ireland, to hear a case brought under this legislation. In general alleged offences will be tried locally but there may be reasons that make it necessary to try an alleged offence elsewhere. Again, there is no equivalent provision for Scotland in the light of the separation of the enforcement and prosecution functions there. An equivalent provision is also not needed for Crown Courts as their jurisdiction is not territorially limited.

Section 14: Powers of entry etc.

58. This section sets out the powers of entry which enforcement officers may exercise. Such powers are based on standard powers for enforcement officers (see for example, some similar provisions in the Consumer Protection Act 1987) tailored to fit the subject matter of this Act.

Section 15: Obstruction of officers

59. This section makes obstructing an officer of an enforcement body, or making false statements to an officer, an offence. There is a defence to the latter charge if the accused adduces sufficient evidence to raise an issue that he did not know that the information was false and had reasonable grounds to believe it was true.

Section 16: Penalties

60. This section sets out the penalties for offences under the Act as being either a fine or imprisonment. "Summary conviction" means that a prosecution is dealt with by magistrates courts (or, in Scotland by the sheriff or district court, without a jury). "Conviction on indictment" means that prosecution is dealt with in the Crown Court (or, in Scotland the sheriff or High Court with a jury). The penalty for obstructing an officer is a fine not exceeding level 3 on the standard scale; any other offences are punishable on summary conviction by a fine not exceeding level 5 on the standard scale, up to six months imprisonment, or both; and on indictment an unlimited fine, up to two year's imprisonment, or both. A fine at level 3 is currently £1000 and at level 5, £5000.
61. The Government would expect most offences to be dealt with summarily, as they would not be of the gravity or seriousness which would merit being tried on indictment. However, the possibility of a longer term of imprisonment and unlimited fines are being made available to ensure that those who might be tempted to breach the legislation repeatedly would face appropriate penalties.

Section 17: Defences: burden of proof

62. This section makes it clear that the burden imposed on a person wishing to rely on a defence in sections 5(1) to (6), 6(1), 9(5), 10(3) and (4) and 15(3) is evidential and not legal. This means that if the defendant wants to rely on one of the defences then he must submit sufficient evidence to raise an issue with respect to the defence rather than prove his defence on the balance of probabilities.

Section 18: Offences by bodies corporate and Scottish partnerships

63. This section provides that officers of companies and partners of Scottish partnerships as well as the companies or partnerships themselves are liable to be prosecuted as appropriate. An officer or partner will be liable if it is proved that an offence was committed by the company or partnership with his consent or connivance or because of his neglect. An officer is defined in subsection (2).

Section 19: Regulations

64. This section sets out further details on regulation and order-making powers. These powers cover the following areas in this Act:
- (i) advertising at point of sale (section 4(3))
 - (ii) advertising within a specialist tobacconist (section 6(1)(c))
 - (iii) developments in technology (section 7)
 - (iv) display at point of sale (section 8(1))
 - (v) distributions at nominal amounts or at a substantial discount (section 9(7))
 - (vi) brandsharing (section 11)
 - (vii) sponsorship (section 20).

Subsections (3) and (4) provide that the order concerning developments in technology (section 7), and the regulations on brandsharing (section 11), display (section 8) and distributions at a nominal cost or substantial discount (section 9) will be subject to the affirmative resolution procedure, which means that they will have to be debated and approved by both the House of Commons and the House of Lords (or, in the case of regulations under section 8, the Scottish Parliament). Other regulations are subject to the negative resolution procedure.

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65. The Scottish Parliament will have power to make regulations covering advertising at point of sale, display, specialist tobacconists and sponsorship.
66. Nothing in this section permits the Scottish Parliament to exercise jurisdiction outside Scotland or for the Westminster Parliament to override the wishes of the Scottish Parliament where it has been agreed that the Scottish Parliament should pass delegated legislation.

Section 20: Transitional provisions: sponsorship

67. This section gives the Secretary of State, or Scottish Ministers, powers to make regulations to specify when the ban on sponsorship in section 10 is to take effect. This may not be later than 1 October 2006.

COMMENCEMENT

68. **Section 22** makes provision for commencement by order of the provisions of the Act. Some technical provisions and the powers to make regulations under it will come into force shortly after Royal Assent. The substantive provisions will be brought into force later. Orders to commence provisions of the Act are to be made by the Secretary of State, or as respects Scotland, the Scottish Ministers. The substantive provisions of the Act will come into force not less than twelve weeks after Royal Assent, save for the following transitional arrangements for which a minimum of a further three months will be allowed:
- advertising within retail outlets
 - in-pack promotion schemes (promotion schemes where coupons inserted into packs, or parts of a pack, are collected by customers who later redeem them for goods)
 - direct marketing contracts (only contracts which were set up before 8 October 1999).

HANSARD REFERENCES

The following table sets out the dates and Hansard references for each stage of the Act’s passage through Parliament.

Stage	Date	Hansard Reference
House of Lords		
Introduction	11 July 2001	Vol 626 Col 1088
Second Reading	2 November 2001	Vol 627 Col 1646-1710
Committee	16 November 2001 7 December 2001 18 January 2002	Vol 628 Col 789-859 Vol 629 Col 1063-1130 Vol 630 Col 1247-1322
Report	1 March 2002	Vol 631 Col 1641-1738
Third Reading	15 March 2002	Vol 632 Col 1043-1090
House of Commons		
Brought from Lords	18 March 2002	
Second Reading	29 April 2002	Vol 384 Col 683-774
Committee	7, 9, 14 May 2002	Standing Committee A
Report	21 October 2002	Vol 391 Col 39-64

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Third Reading	21 October 2002	Vol 391 Col 65-92
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The following table sets out the dates and Hansard references for each stage of passage through Parliament of the earlier Tobacco Advertising and Promotion Bill which was considered in the 2000-01 Session but did not become law.

Stage	Date	Hansard Reference
House of Commons		
Introduction	14 December 2000	Vol 359 Col 823
Second Reading	22 January 2001	Vol 361 Col 654-772
Committee	30 January 2001 1, 6, 8 February 2001	Standing Committee A
Report	13 February 2001	Vol 363 Col 166-229
Third Reading	13 February 2001	Vol 363 Col 229-243
House of Lords		
Introduction	14 February 2001	Vol 622 Col 247
Second Reading	28 March 2001	Vol 624 Col 271-345