

**EXPLANATORY MEMORANDUM TO THE  
TOBACCO ADVERTISING AND PROMOTION ACT 2002 ETC.  
(AMENDMENT) REGULATIONS**

**2006 No. [2369]**

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

These Regulations implement Directive 2003/33/EC<sup>1</sup>, which requires Member States of the European Economic Area (“EEA”) to ban the advertising of tobacco products and their promotion. They amend the Tobacco Advertising and Promotion Act 2002 (“the Act”) to include measures relating to the publication of tobacco advertisements by electronic means, to the extent that the Act does not already do so. The Act contains bans on advertising and promotion (including sponsorship) of tobacco products, with certain limited exceptions, in the United Kingdom.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 It has been necessary to make and lay these Regulations during the Parliamentary recess to ensure that the United Kingdom complies with its obligations under European Community law.

- 3.2 A legitimate challenge to Directive 2003/33/EC has been brought by Germany, seeking its annulment, which led to a hearing before the European Court of Justice. On 13 June 2006, the Advocate General delivered his opinion rejecting the arguments made by Germany<sup>2</sup>.

- 3.3 On 28 June 2006, soon after the Advocate General’s opinion was delivered, the Commission of the European Communities addressed a Reasoned Opinion to the United Kingdom, under Article 226 of the EC Treaty, giving it until 1 September 2006 to adopt the measures necessary to complete implementation of Directive 2003/33/EC.

- 3.4 The making of these Regulations has also been delayed for the following reasons: the inter-relationship between Directive 2003/33/EC and

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<sup>1</sup> Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L No. 152, 20.6.2003, p. 16).

<sup>2</sup> Case C-380/03 *Federal Republic of Germany v European Parliament and Council of the European Union*, opinion of Advocate General Léger, 13 June 2006: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaf=C-380/03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>.

Directive 2000/31/EC<sup>3</sup>, which regulates electronic commerce, was unclear, necessitating discussions between the Department of Health, the Department for Trade and Industry, and the Cabinet Office; concerns expressed by specialist tobacco retailers, that the Regulations should not prevent the legitimate sale of tobacco products by them over the internet, which needed to be addressed; and, the Department of Health's work on the adoption of the Health Act 2006, which prohibits smoking in public places.

3.5 As a result of the European Commission's Reasoned Opinion, given soon after the Advocate General's opinion, the Department of Health believes that there are exceptional reasons requiring these Regulations to be laid during the Parliamentary recess.

3.6 Whilst section 2 (prohibition of tobacco advertising) of the Act also applies to publication and distribution of tobacco advertisements by electronic means, it had not previously been commenced in relation to website advertising. Article 3.2 of Directive 2003/33/EC, which was published on 20 June 2003, requires Member States to prohibit tobacco advertising by certain electronic means ("information society services"), including via the internet, to the same extent that it is prohibited in printed media. The Department of Health has kept the tobacco industry informed of its proposals to implement this prohibition on tobacco advertising by information society services and has received comments from it on an earlier draft of these Regulations. The industry has therefore had sufficient notice of these Regulations to ensure it is compliant with them when they come into force.

#### **4. Legislative Background**

4.1 These Regulations have been made under section 2(2) of the European Communities Act 1972. Their purpose is to complete implementation of Directive 2003/33/EC, which sets down common rules for Member States of the EEA relating to the advertising of tobacco products and their promotion. The Regulations amend the Act, which already lays down a general prohibition on tobacco advertising in printed means, to include provision about advertising by information society services to the extent that the Act does not already do so. A Transposition Note in respect of Directive 2003/33/EC is shown in the Annex to this Explanatory Memorandum.

4.2 Commencement Orders (SI 2006/[ ] [and SSI 2006/[ ]]) were also made at the same time as these Regulations for the purpose of commencing section 2 of the Act in so far as it applies to website advertising.

4.3 In making amendments to the Act, the Regulations take account of the provisions of Directive 2000/31/EC. For example, the offences applying to the advertising of tobacco products by means of information society services do not apply to the mere conduit, caching or hosting of the information containing the tobacco advertisement if certain conditions are met.

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<sup>3</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1).

Consideration of the inter-relationship between these two Directives has also led to a number of complicated issues, including the extent of the new offences being adopted by the Regulations, needing to be resolved.

4.4 Directive 2003/33/EC was considered by the EU Scrutiny Committees on 10 December 2002.

## 5. Extent

5.1 This instrument applies to all of the United Kingdom.

5.2 Directive 2003/33/EC also applies to Gibraltar, which has adopted [*do we know the date?*] the Tobacco (Advertisement and Sponsorship) Ordinance, 2006 for the purpose of implementing it.

## 6. European Convention on Human Rights

The Minister of State for Public Health has made the following statement regarding Human Rights:

In my view the provisions of the Tobacco Advertising and Promotion Act 2002 etc. (Amendment) Regulations 2002 are compatible with the Convention rights.

## 7. Policy background

7.1 These Regulations implement Directive 2003/33/EC, which sets down common rules for Member States of the EEA relating to the advertising of tobacco products and their promotion. Directive 2003/33/EC provides for general prohibitions on the advertising of tobacco products and their promotion in printed and other media, as well as in relation to tobacco related sponsorship, with limited exceptions. Its aim is to ensure that differences in the laws of the Member States do not restrict the free movement of the media concerned and to eliminate obstacles to the operation of the Internal Market in the EEA.

7.2 Directive 2003/33/EC was adopted by the European Parliament and the Council after Directive 98/43/EC, which also set down common rules relating to the advertising and sponsorship of tobacco products, was annulled by the European Court of Justice<sup>4</sup> on the grounds of an incorrect (treaty) base.

7.3 The United Kingdom Government entered office in 1997 with a manifesto commitment to ban tobacco advertising. Following annulment of Directive 98/43/EC, a Government Bill to fulfil the manifesto commitment was introduced in the 2000/2001 Parliamentary session but fell when the 2001 election was called. The Act was then introduced in the House of Lords as a

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<sup>4</sup> Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union*, judgment of 5 October 2000: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaf=C-376/98&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>.

Private Members Bill, in identical terms to the previous Government Bill, by Lord Clement-Jones and on completing progress through the House of Lords was adopted as a Government Bill. The Act bans advertising and promotion (including sponsorship) of tobacco products, with certain limited exceptions, in the United Kingdom. These Regulations will extend that ban to information society services to the extent not already covered by the Act.

7.4 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.

7.5 A brief analysis of consultation which has taken place is set out in the attached Regulatory Impact Assessment (paragraphs 8-11).

## **8. Impact**

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 The impact on the public sector is limited. These Regulations are not expected to increase enforcement costs for Trading Standards Departments.

## **9. Contact**

**Anne Grosskurth:** 0207 972 1322 or e-mail: [anne.grosskurth@dh.gsi.gov.uk](mailto:anne.grosskurth@dh.gsi.gov.uk) can answer any queries regarding the instrument.

**Transposition Note for Tobacco Advertising and Promotion Act 2002 etc. (Amendment) Regulations 2006**

Directive
Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 – on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products
These Regulations give effect to Directive 2003/33/EC to the extent that the Tobacco Advertising and Sponsorship Act 2002 (“the Act”) does not yet do so.

Directive 2003/33/EC			
Article	Objectives	Implementation	Responsibility
1	Subject matter and scope of the Directive	The Act, as amended by the Regulations, implement Directive 2003/33/EC. The Regulations extend the provisions of the Act to cover information society services to the extent that the Act does not already do so.	The Regulations are made by the Secretary of State for Health.
2	Definitions	Section 21 of the Act provides relevant definitions. Regulation 8 of the Regulations amends section 21 to include a definition of ‘information society services’, which is consistent with Article 2 (d) of the Directive, as well as a related definition of ‘service provider’. An information society service can be summarised as ‘any service normally provided for remuneration at a distance, by means of electronic equipment for the processing and storage of data and at the individual request of a recipient of a service’.	The Regulations are made by the Secretary of State for Health.
3	Advertising in printed media and information society services.	Section 2 of the Act makes it an offence for tobacco advertisements to be published, printed, devised or distributed in the UK. The restrictions on publishing and distributing include by electronic means. This is extended by the Regulations to capture publishing of tobacco advertisements by information society service in other EEA States by persons established in the UK.  Section 3 of the Act creates offences in respect of editors, proprietors, advertising agencies, or vendors in relation to printed media containing tobacco advertisements. Regulation 3 of the Regulations inserts a new section 3A into the Act to provide for similar offences in respect of proprietors and editors of information society services, as well as for persons who procure the inclusion of tobacco advertisements in such media (e.g. advertising agencies).  Regulation 4 amends section 4 of the Act (which provides certain exclusions from the offences in sections 2 and 3) to extend these exclusions to the new offences in relation to information society services. It also brings these exclusions into line with the exemptions contained in Article 3(1) of the Directive.	The Regulations are made by Secretary of State for Health.
4	Radio advertising and	Section 319 of the Communications Act	Secretary of State/

	sponsorship	<p>2003 places a duty on OFCOM to set standards for the content of programmes to be included in radio services. Such duty includes ensuring the UK's international obligations in relation to radio advertising are complied with. Section 325 of that Act then requires OFCOM to ensure that licences include conditions requiring compliance with advertising standards.</p> <p>The 'Radio Advertising Standards Code' (issued by the Broadcast Committee of Advertising Practice (BCAP) under contract with OFCOM) prohibits advertisements for tobacco products (rule 10 of Section Three). If a Code rule is breached OFCOM may impose sanctions ranging from a warning to revocation of a licence, including a power to impose a fine.</p>	OFCOM
5	Sponsorship of events	<p>Section 9 of the Act prohibits the giving away of any free product or coupon the purpose or effect of which is to promote a tobacco product.</p> <p>Section 10 of the Act makes it an offence to be party to a sponsorship agreement, the purpose or effect of which is to promote tobacco in the UK.</p>	Secretary of State
6	Report (to be submitted by the Commission)	No implementation required.	
7	Penalties and enforcement	<p>Section 16 of the Act, as amended by Regulation 7 of the Regulations in relation to the new offences covering information society services, provides maximum penalties for breach of the offences created by sections 2 and 3 and the new section 3A. The new offences in relation to information society services carry maximum penalties: on summary conviction of a term of imprisonment up to three months and/or a fine not exceeding the statutory maximum; and, on conviction on indictment, of imprisonment up to two years, or a fine or both.</p> <p>Section 13 of the Act provides for enforcement authorities, which are given powers of enforcement by section 14 of the Act (powers of entry, etc.).</p> <p>Persons or organisations with a legitimate interest may make complaints to the enforcement authorities or seek judicial review of decisions by them in relation to enforcement. The possibility also exists in the UK for persons to commence a private prosecution.</p>	<p>Secretary of State for Health.</p> <p>The relevant enforcement authorities are:</p> <ul style="list-style-type: none"> <li>- in England &amp; Wales, a weights and measures authority;</li> <li>- in Scotland, a local weights and measures authority; and</li> <li>- in Northern Ireland, a district council.</li> </ul>
8	Free movement of products and services	No implementation measures required	Secretary of State for Health

## **ANNEX G: REGULATORY IMPACT ASSESSMENT**

### **Tobacco Advertising and Promotion Act 2002 (Amendment) Regulations 2006**

#### **FULL FINAL REGULATORY IMPACT ASSESSMENT**

##### **Objective**

To contribute to a reduction in smoking prevalence by prohibiting the advertisement of tobacco products on the internet.

##### **Introduction**

1. The Government set out a comprehensive ban on advertising tobacco products in the Tobacco Advertising and Promotion Act 2002 as part of its strategy to reduce smoking levels in the UK. Legislation has since been added to cover restrictions on point of sale advertising and the prohibition of brandsharing.
2. To complete this package of measures and to bring the UK in line with Directive 2003/33/EC (the EC Tobacco Advertising Directive), regulations are required to prohibit the advertisement of tobacco products on the internet.
3. These regulations would be an amendment to the Tobacco Advertising and Promotion Act 2002.

##### **Background**

###### **The Tobacco Advertising and Promotion Act 2002**

4. The Tobacco Advertising and Promotion Act 2002 received Royal Assent on 7 November 2002. The Act bans the advertising and promotion of tobacco products with limited exceptions. The Act applies to England, Scotland, Wales and Northern Ireland.
5. The Act did not extend to the internet, though elements of advertising on the internet were debated during the Act's passage through Parliament.

###### **Directive 2003/33/EC - The European Tobacco Advertising Directive**

6. The European Tobacco Advertising Directive 2003 came into force on 31 July 2005. This Directive requires Member States to prohibit advertising of tobacco products and their promotion:

- in the press and other printed publications;
  - in radio broadcasting;
  - in information society services (including the internet); and
  - through tobacco related sponsorship, including the free distribution of tobacco products.
7. Through the Tobacco Advertising and Promotion Act 2002, the UK is compliant on the Directive in all areas other than the internet.

## **Negative Resolution**

8. Regulations governing tobacco advertising on the internet are subject to the negative resolution procedure.

## **Consultation**

9. The UK Government and the Executives consulted publicly on plans to ban tobacco advertising and promotion. A consultation document that included a draft Regulatory Impact Assessment (RIA) was published at the same time as the White Paper "Smoking Kills" in December 1998. A second draft RIA was published on 17 June 1999 alongside draft regulations. A full RIA for the first Tobacco Advertising and Promotion Bill was published in December 2000.
10. Key stakeholders from the public and private sector have been consulted in detail during the development of these regulations and accompanying guidance.
11. It was not deemed necessary to have a formal consultation period for this addition to the advertising ban for the following reasons:
- the Government has already consulted on the general principles;
  - detailed consultation has occurred with key stakeholders during development of the policy; and
  - the regulations are expected to have very little impact.

## **Rationale for Government Intervention**

12. Tobacco is a uniquely dangerous product. Smoking is the greatest single cause of preventable illness and premature death and kills 106,000 people in the UK each year. There is a significant body of research connecting tobacco advertising with children's smoking, both in predisposing children to start smoking and reinforcing the habit in those who have already started. Studies have repeatedly shown that children who smoke choose the brands that are most heavily advertised.



13. Tobacco advertising also affects adult consumption. The latest adult smoking prevalence figures for the UK showed 26% prevalence in 2003. If we are to continue to reduce rates of smoking prevalence we need to maintain a comprehensive programme of tobacco control measures.
14. The Government expects that the long term impact of the Tobacco Advertising and Promotion Act 2002 will be to reduce the consumption of tobacco products by about 2.5%. It would be extremely difficult to isolate the added effect of prohibiting internet advertising. However, evidence suggests that advertising bans are much more effective when they are comprehensive. The World Bank concluded that:

“bans on advertising and promotion prove effective, but only if they are comprehensive, covering all media and all uses of brand names and logos.”

*(“Curbing the Epidemic – Governments and the Economics of Tobacco Control”, The International Bank for Reconstruction and Development, 1999).*
15. The internet has quickly become a key environment for retail, marketing and communication. Without regulation, and without other possibilities for advertising and promotion, the potential exists for the internet to become a key environment for the marketing of tobacco products.

## Options

16. The only option for prohibiting tobacco advertising on the internet in the UK is to transpose the minimum requirements of Directive 2003/33/EC.
17. These Regulations seek to prohibit the advertisement of tobacco products on the internet.
18. Tobacco Products are those consisting wholly or partly of tobacco and intended to be smoked, sniffed, sucked or chewed.
19. The Tobacco Advertising and Promotion Act 2002 defines a tobacco advertisement as “an advertisement whose purpose is to promote a tobacco product, or whose effect is to do so.”
20. Activities falling into these definitions will therefore be prohibited in the Regulations. This will include, for example: direct advertisements, e-mailing activity, SPAM and pop-ups. Information on the internet such as tobacco product lists could be construed as adverts if persons do not consciously access the page on which they are located. Internet traders will have to be cautious about how information on tobacco products is provided on the web by putting access restrictions or security measures in place.

21. The Regulations will extend to any business with a place of establishment in the UK.

## **Benefits**

22. The importance of tobacco advertising bans being comprehensive has been covered previously in this document. Prohibiting tobacco advertising and promotion on the internet will add further weight to the UK's pre-existing comprehensive ban.

23. Whilst there is very little advertising of tobacco products on the internet by UK based businesses at the moment, the ban will ensure tobacco companies do not use this opportunity in the future.

## **Costs**

24. These regulations will have little impact in the way of costs.

25. There is very little advertising of tobacco products by UK based businesses on the internet. Prohibiting this form of advertising will not therefore have an impact on smoking levels and will not therefore result in reduced profits within the tobacco industry.

26. Within the tobacco industry, specialist tobacconists are most dependent on internet trade. As these regulations do not prohibit trade of tobacco products on the internet, the costs for specialist tobacconists will be no more than those involving making small changes to websites to ensure content could not be construed as advertising.

27. There are a small number of web-based businesses selling 'cheap' cigarettes online. Some of these are under investigation by HM Revenue and Customs. The activities of such businesses may be restricted, to some extent, by these regulations.

28. Due to the very limited number of businesses with a UK base with websites dealing with tobacco sales on the internet, there will be no costs associated with enforcement. There are less than 100 such websites which equates to less than one per Local Authority. With such little activity, Trading Standards Departments should be able to absorb this work within existing resources. A database of websites will be collated centrally to minimise the impact furthermore.

## **Summary of Costs and Benefits**

29. This policy will prevent tobacco companies from advertising their products on the internet in the future.
30. The costs of this policy will be minimal, confined to very small one off costs to specialist tobacconists who may need to make minor changes to their websites.

## **Risks**

31. This policy is a requirement of European Directive 2003/33/EC. The main risk for not regulating on this issue would therefore be non-compliance with European legislation and associated legal proceedings.
32. Not regulating on this matter would also leave a potential area for advertising and promotion open to the tobacco industry.

## **Impact on Small Businesses**

33. These regulations will have little impact on small businesses. Specialist tobacconists may be affected to some extent (see paragraph 17).

## **Competition Assessment**

34. The Tobacco Advertising and Promotion (Point of Sale) Regulations 2004 allow a strictly limited amount of advertising at the point at which tobacco products are sold in shops. The Tobacco Advertising and Promotion (Specialist Tobacconists) Regulations 2004 legislate for less stringent in-shop advertisements for specialist tobacconists.
35. Point of sale type arrangements are not possible on the internet. This is because the internet advertising ban has to be a complete one due to the requirements of the European Tobacco Advertising Directive (which only focuses on areas, like the internet, with a potentially cross-border effect). Point of sale policy is not covered in the Directive.
36. It could be argued that web-based specialist tobacconists will therefore be at a competitive disadvantage to those with physical shops only. However, most specialist tobacconists now rely on internet sales so will all be affected similarly.
37. As all European Union Member States will have to transpose the Directive, businesses in the UK should not be disadvantaged compared to those in the rest of Europe.

38. Beyond these points, as there is already a UK-wide advertising ban in other mediums, these regulations will generally not put internet traders of tobacco products at an unfair advantage.

### **Securing Compliance**

39. Trading Standards Officers (Environmental Health Officers in Northern Ireland) will monitor compliance and ensure enforcement of the regulations.

### **Equity and Fairness/Rural Proofing**

40. These regulations will have very little impact across the board. There will be no particular impact on any individual population group and the regulations will not have a detrimental effect on rural areas.

### **Summary**

41. This RIA sets out the details and expected impacts of the Tobacco Advertising and Promotion Act 2002 (Amendment) Regulations 2006.

### **Timing**

42. The Regulations come into force on 28 September 2006.

**I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.**

**Signed by the responsible Minister** *Caroline Flint*

**Date** *24<sup>th</sup> August 2006*

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