

Tobacco Advertising and Promotion Bill [HL]

EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Department of Health, will be published separately as Bill 112 – EN.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Mr Secretary Milburn has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Tobacco Advertising and Promotion Bill [HL] are compatible with the Convention rights.

Tobacco Advertising and Promotion Bill [HL]

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B I L L

TO

Control the advertising and promotion of tobacco products; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Meaning of “tobacco advertisement” and “tobacco product”

In this Act—

“tobacco advertisement” means an advertisement—

- (a) whose purpose is to promote a tobacco product, or
- (b) whose effect is to do so, and

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“tobacco product” means a product consisting wholly or partly of tobacco and intended to be smoked, sniffed, sucked or chewed.

2 Prohibition of tobacco advertising

- (1) A person who in the course of a business publishes a tobacco advertisement, or causes one to be published, in the United Kingdom is guilty of an offence. 10
- (2) A person who in the course of a business prints, devises or distributes in the United Kingdom a tobacco advertisement which is published in the United Kingdom, or causes such a tobacco advertisement to be so printed, devised or distributed, is guilty of an offence.
- (3) Distributing a tobacco advertisement includes transmitting it in electronic form, participating in doing so, and providing the means of transmission. 15
- (4) It is not an offence under subsection (1) for a person who does not carry on business in the United Kingdom to publish or cause to be published a tobacco advertisement by means of a website which is accessed in the United Kingdom; and, in that case, devising the advertisement or causing it to be devised is not an offence under subsection (2). 20

3 Advertising: newspapers, periodicals etc

If a newspaper, periodical or other publication (“the publication”) containing a tobacco advertisement is in the course of a business published in the United Kingdom—

- (a) any proprietor or editor of the publication is guilty of an offence, 5
- (b) any person who (directly or indirectly) procured the inclusion of the advertisement in the publication is guilty of an offence, and
- (c) any person who sells the publication, or offers it for sale, or otherwise makes it available to the public, is guilty of an offence.

4 Advertising: exclusions

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(1) No offence is committed under section 2 or 3 in relation to a tobacco advertisement—

- (a) if it is, or is contained in, a communication made in the course of a business which is part of the tobacco trade, and for the purposes of that trade, and directed solely at persons who— 15
 - (i) are engaged in, or employed by, a business which is also part of that trade, and
 - (ii) fall within subsection (2),
in their capacity as such persons,
- (b) if it is, or is contained in, the communication made in reply to a particular request by an individual for information about a tobacco product, or 20
- (c) if it is contained in a publication (other than an in-flight magazine) whose principal market is not the United Kingdom (or any part of it), or if it is contained in any internet version of such a publication. 25

(2) A person falls within this subsection if—

- (a) he is responsible for making decisions on behalf of the business referred to in subsection (1)(a)(i) about the purchase of tobacco products which are to be sold in the course of that business,
- (b) he occupies a position in the management structure of the business in question which is equivalent in seniority to, or of greater seniority than, that of any such person, or 30
- (c) he is the person who, or is a member of the board of directors or other body of persons (however described) which, is responsible for the conduct of the business in question. 35

(3) The appropriate Minister may provide in regulations that no offence is committed under section 2 in relation to a tobacco advertisement which—

- (a) is in a place or on a website where tobacco products are offered for sale, and
- (b) complies with requirements specified in the regulations. 40

(4) The regulations may, in particular, provide for the meaning of “place” in subsection (3)(a).

5 Advertising: defences

(1) A person does not commit an offence under section 2 or section 3(a) or (b), in connection with an advertisement whose purpose is to promote a tobacco 45

- product, if he did not know, and had no reason to suspect, that the purpose of the advertisement was to promote a tobacco product.
- (2) A person does not commit such an offence in connection with an advertisement whose effect is to promote a tobacco product if he could not reasonably have foreseen that that would be the effect of the advertisement. 5
- (3) A person does not commit an offence under section 2(2) or 3(a) or (b) if he did not know, and had no reason to suspect, that the tobacco advertisement would be published in the United Kingdom.
- (4) A person does not commit an offence under section 2(2) of distributing or causing the distribution of a tobacco advertisement, otherwise than as mentioned in section 2(3), if he did not know, and had no reason to suspect, that what he distributed or caused to be distributed was, or contained, a tobacco advertisement. 10
- (5) In relation to a tobacco advertisement which is distributed as mentioned in section 2(3), a person does not commit an offence under section 2(2) of distributing it or causing its distribution if— 15
- (a) he was unaware that what he distributed or caused to be distributed was, or contained, a tobacco advertisement,
 - (b) having become aware of it, it was not reasonably practicable for him to prevent its further distribution, or 20
 - (c) he did not carry on business in the United Kingdom at the relevant time.
- (6) A person does not commit an offence under section 3(c) if he did not know, and had no reason to suspect, that the publication contained a tobacco advertisement. 25
- 6 Specialist tobacconists**
- (1) A person does not commit an offence under section 2 if the tobacco advertisement—
- (a) was in, or fixed to the outside of the premises of, a specialist tobacconist, 30
 - (b) was not for cigarettes or hand-rolling tobacco, and
 - (c) complied with any requirements specified by the appropriate Minister in regulations in relation to tobacco advertisements on the premises of specialist tobacconists.
- (2) A specialist tobacconist is a shop selling tobacco products by retail (whether or not it also sells other things) more than half of whose sales on the premises in question derive from the sale of cigars, snuff, pipe tobacco and smoking accessories. 35
- (3) The sales referred to in subsection (2) are to be measured by sale price—
- (a) during the most recent period of twelve months for which accounts are available, or 40
 - (b) during the period for which the shop has been established, if it has not been established long enough for twelve months' accounts to be available.

- (4) “Shop”, in subsections (2) and (3), includes a self-contained part of a shop; and, in that case, “premises” in subsections (1) and (2) means that self-contained part of the shop.

7 Developments in technology

The Secretary of State may by order amend any provision of this Act if he considers it appropriate to do so in consequence of any developments in technology relating to publishing or distributing by electronic means. 5

8 Displays

- (1) A person who in the course of a business displays or causes to be displayed tobacco products or their prices in a place or on a website where tobacco products are offered for sale is guilty of an offence if the display does not comply with such requirements (if any) as may be specified by the appropriate Minister in regulations. 10
- (2) It is not an offence under subsection (1) for a person who does not carry on business in the United Kingdom to display or cause to be displayed tobacco products or their prices by means of a website which is accessed in the United Kingdom. 15
- (3) The regulations may, in particular, provide for the meaning of “place” in subsection (1).
- (4) The regulations must make provision for a display which also amounts to an advertisement to be treated for the purpose of offences under this Act – 20
- (a) as an advertisement and not as a display, or
 - (b) as a display and not as an advertisement.

9 Prohibition of free distributions

- (1) A person is guilty of an offence if in the course of a business he – 25
- (a) gives any product or coupon away to the public in the United Kingdom, or
 - (b) causes or permits that to happen,
- and the purpose or effect of giving the product or coupon away is to promote a tobacco product. 30
- (2) It does not matter whether the product or coupon accompanies something else, or is given away separately.
- (3) No offence is committed under subsection (1) if –
- (a) the business referred to in subsection (1) is part of the tobacco trade,
 - (b) the product or coupon is given away for the purposes of that trade, 35
 - (c) each person to whom it is given –
 - (i) is engaged in, or employed by, a business which is also part of the tobacco trade, and
 - (ii) falls within subsection (4), and
 - (d) the product or coupon is given to each such person in his capacity as such a person. 40
- (4) A person falls within this subsection if –

- (a) he is responsible for making decisions on behalf of the business referred to in subsection (3)(c)(i) about the purchase of tobacco products which are to be sold in the course of that business,
 - (b) he occupies a position in the management structure of the business in question which is equivalent in seniority to, or of greater seniority than, that of any such person, or 5
 - (c) he is the person who, or is a member of the board of directors or other body of persons (however described) which, is responsible for the conduct of the business in question.
- (5) A person does not commit an offence under this section – 10
- (a) where it is alleged that the purpose of giving the product or coupon away was to promote a tobacco product, if he did not know and had no reason to suspect that that was its purpose, or
 - (b) where it is alleged that the effect of giving the product or coupon away was to promote a tobacco product, if he could not reasonably have foreseen that that would be its effect. 15
- (6) “Coupon” means a document or other thing which (whether by itself or not) can be redeemed for a product or service or for cash or any other benefit.
- (7) The Secretary of State may make regulations providing for this section to apply to making products or coupons available for a nominal sum or at a substantial discount as it applies to giving them away. 20
- (8) If regulations under subsection (7) provide for this section to apply to making products or coupons available at a substantial discount, the regulations must provide for the meaning of “substantial discount”.
- (9) The regulations may provide that this section is to apply in that case with such modifications (if any) specified in the regulations as the Secretary of State considers appropriate. 25
- 10 Prohibition of sponsorship**
- (1) A person who is party to a sponsorship agreement is guilty of an offence if the purpose or effect of anything done as a result of the agreement is to promote a tobacco product in the United Kingdom. 30
- (2) A sponsorship agreement is an agreement under which, in the course of a business, a party to it makes a contribution towards something, whether the contribution is in money or takes any other form (for example, the provision of services or of contributions in kind). 35
- (3) A person does not commit an offence under this section –
- (a) where it is alleged that the purpose of what was done as a result of the agreement was to promote a tobacco product in the United Kingdom, if he did not know, and had no reason to suspect, that that was its purpose, or 40
 - (b) where it is alleged that the effect of what was done as a result of the agreement was to promote a tobacco product in the United Kingdom, if he could not reasonably have foreseen that that would be its effect.
- (4) A person does not commit an offence under this section if he did not know and had no reason to suspect that the contribution referred to in subsection (2) was made in the course of a business. 45

11 Brandsharing

- (1) The Secretary of State may by regulations make provision prohibiting or restricting, in such circumstances and subject to such exceptions as may be specified in the regulations, the use—
 - (a) in connection with any service or product (other than a tobacco product), of any name, emblem or other feature of a description specified in the regulations which is the same as, or similar to, a name, emblem or other feature so specified which is connected with a tobacco product, or 5
 - (b) in connection with any tobacco product, of any name, emblem or other feature of a description specified in the regulations which is the same as, or similar to, a name, emblem or other feature so specified which is connected with any service or product other than a tobacco product. 10
- (2) Provision made by virtue of subsection (1) may prohibit or restrict only that use whose purpose is to promote a tobacco product, or whose effect is to do so. 15
- (3) If regulations under this section provide for a prohibition or restriction to be subject to an exception, the regulations may also make such provision as the Secretary of State considers appropriate for a corresponding exception to have effect for the purposes of offences under section 2, 3, 8, 9 or 10.
- (4) A person who contravenes a prohibition or restriction contained in regulations made under this section is guilty of an offence. 20

12 Television and radio broadcasting

- (1) In this section “the 1990 Act” means the Broadcasting Act 1990 (c. 42) and “the 1996 Act” means the Broadcasting Act 1996.
- (2) This Act does not apply in relation to anything included in a service to which any of subsections (3) to (6) apply. 25
- (3) This subsection applies to a service which—
 - (a) falls within section 2(1) of the 1990 Act (television services, etc. regulated under Part I of the 1990 Act or Part I of the 1996 Act), and
 - (b) is not an additional service within the meaning of section 48(1) of the 1990 Act other than a teletext service. 30
- (4) This subsection applies to a local delivery service within the meaning of section 72 of the 1990 Act.
- (5) This subsection applies to a service falling within section 84 of the 1990 Act (independent radio services regulated under Part III of the 1990 Act or Part II of the 1996 Act) other than a digital additional service within the meaning of section 63(1) of the 1996 Act. 35
- (6) This subsection applies to a service provided by the British Broadcasting Corporation or Sianel Pedwar Cymru (the Welsh Authority referred to in section 56 of the 1990 Act). 40

13 Enforcement

- (1) For the purposes of this Act “enforcement authority” means—
 - (a) in England and Wales, a weights and measures authority;
 - (b) in Scotland, a local weights and measures authority; and

- (c) in Northern Ireland, a district council.
- (2) It is the duty of an enforcement authority to enforce within its area the provisions of this Act and regulations made under it.
- (3) The appropriate Minister may direct, in relation to cases of a particular description or a particular case, that any duty imposed on an enforcement authority in England and Wales or Scotland by subsection (2) shall be discharged by the appropriate Minister and not by the enforcement authority. 5
- (4) The Department of Health, Social Services and Public Safety may direct, in relation to cases of a particular description or a particular case, that any duty imposed on an enforcement authority in Northern Ireland by subsection (2) shall be discharged by the Department and not by the enforcement authority. 10
- (5) The Secretary of State may take over the conduct of any proceedings instituted in England and Wales by another person under any provision of this Act or regulations made under it.
- (6) The Department of Health, Social Services and Public Safety may take over the conduct of any proceedings instituted in Northern Ireland by another person under any provision of this Act or regulations made under it. 15
- (7) For the purposes of the trying of offences under this Act or regulations made under it—
- (a) any such offence committed in England or Wales may be treated as having been committed in any place in England or Wales, so that any magistrates' court in England or Wales has jurisdiction to try the offence; and 20
- (b) any such offence committed in Northern Ireland may be treated as having been committed in any place in Northern Ireland, so that any magistrates' court in Northern Ireland has jurisdiction to hear and determine a complaint charging the offence. 25

14 Powers of entry, etc

- (1) A duly authorised officer of an enforcement authority has the right, on producing, if so required, his written authority— 30
- (a) at any reasonable hour to enter any premises, other than premises used only as a private dwelling house, which he considers it is necessary for him to enter for the purpose of the proper exercise of his functions under this Act;
- (b) to carry out on those premises such inspections and examinations as he considers necessary for that purpose; 35
- (c) where he considers it necessary for that purpose, to require the production of any book, document, data, record (in whatever form it is held) or product and inspect it, and take copies of or extracts from it;
- (d) to take possession of any book, document, data, record (in whatever form it is held) or product which is on the premises and retain it for as long as he considers necessary for that purpose; 40
- (e) to require any person to give him such information, or afford him such facilities and assistance, as he considers necessary for that purpose.
- (2) A duly authorised officer of an enforcement authority may make such purchases and secure the provision of such services as he considers necessary for the purpose of the proper exercise of his functions under this Act. 45

- (3) A person is not obliged by subsection (1) to answer any question or produce any document which he would be entitled to refuse to answer or to produce –
- (a) in or for the purposes of proceedings in a court in England and Wales, where the question is asked or the document is required by a duly authorised officer of an enforcement authority in England and Wales; 5
 - (b) in or for the purposes of proceedings in a court in Northern Ireland, where the question is asked or the document is required by a duly authorised officer of an enforcement authority in Northern Ireland;
 - (c) in or for the purposes of proceedings in a court in Scotland, where the question is asked or the document is required by a duly authorised officer of an enforcement authority in Scotland. 10
- (4) If a justice of the peace is satisfied by any written information on oath that for the purpose of the proper exercise of the functions of an enforcement authority under this Act there are reasonable grounds for entry into any premises, other than premises used only as a private dwelling house, and – 15
- (a) that admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant under this subsection has been given to the occupier; or
 - (b) that an application for admission, or the giving of such notice, would defeat the object of the entry or that the premises are unoccupied or that the occupier is temporarily absent and it might defeat the object of the entry to await his return, 20
- the justice may by warrant signed by him, which shall continue in force until the end of the period of one month beginning with the date on which he signs it, authorise any duly authorised officer of an enforcement authority to enter the premises, if need be by force. 25
- (5) A duly authorised officer entering any premises by virtue of subsection (1) or of a warrant under subsection (4) may take with him when he enters those premises such other persons and such equipment as he considers necessary.
- (6) On leaving any premises which a duly authorised officer is authorised to enter by a warrant under subsection (4), that officer shall, if the premises are unoccupied or the occupier is temporarily absent, leave the premises as effectively secured against trespassers as he found them. 30
- (7) Where by virtue of subsection (1)(d) a duly authorised officer takes possession of any item, he shall leave on the premises from which the item was removed a statement giving particulars of what he has taken and stating that he has taken possession of it. 35
- (8) In the application of this section to Northern Ireland, the reference in subsection (4) to any information on oath shall be construed as a reference to any complaint on oath. 40
- (9) In the application of this section to Scotland, the reference in subsection (4) to a justice of the peace shall be construed as a reference to a sheriff.
- (10) Where a direction of the appropriate Minister has effect under section 13(3), this section and section 15 have effect, in relation to any case or case of a description specified in the direction, as if references to a duly authorised officer of an enforcement authority were references to a person acting on behalf of the appropriate Minister. 45
- (11) Where a direction of the Department of Health, Social Services and Public Safety has effect under section 13(4), this section and section 15 have effect, in

relation to any case or case of a description specified in the direction, as if references to a duly authorised officer of an enforcement authority were references to a person acting on behalf of the Department.

- (12) Where –
- (a) the Secretary of State takes over any proceedings by virtue of section 13(5), or
 - (b) the Department of Health, Social Services and Public Safety take over the conduct of any proceedings by virtue of section 13(6),
- this section and section 15 have effect, in relation to any case which is the subject of such proceedings, as if references to a duly authorised officer of an enforcement authority were references to a person acting on behalf of the Secretary of State or (as the case may be) the Department.

15 Obstruction, etc. of officers

- (1) A person who –
- (a) intentionally obstructs a duly authorised officer of an enforcement authority who is acting in the proper exercise of his functions under this Act; or
 - (b) without reasonable cause fails to comply with any requirement made of him by such an officer who is so acting,
- is guilty of an offence.
- (2) A person who, in giving any information which is properly required of him by a duly authorised officer of an enforcement authority, makes a statement which is false in a material particular is guilty of an offence.
- (3) A person does not commit an offence under subsection (2) if –
- (a) he did not know the material particular was false; and
 - (b) he had reasonable grounds to believe that it was true.

16 Penalties

- (1) A person guilty of an offence under section 15(1) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.
- (2) A person guilty of an offence under or by virtue of any other provision of this Act is liable –
- (a) on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both; or
 - (b) on conviction on indictment to imprisonment for a term not exceeding 2 years, or a fine, or both.

17 Defences: burden of proof

- (1) This section applies where a person charged with an offence under this Act relies on a defence under any of sections 5(1) to (6), 6(1), 9(5), 10(3) and (4) and 15(3).
- (2) Where evidence is adduced which is sufficient to raise an issue with respect to that defence, the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

18 Offences by bodies corporate and Scottish partnerships

- (1) If an offence under any provision of this Act committed by a body corporate is proved—
- (a) to have been committed with the consent or connivance of an officer, or
 - (b) to be attributable to any neglect on his part,
- the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly. 5
- (2) In subsection (1) “officer”, in relation to a body corporate, means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity. 10
- (3) If the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.
- (4) If an offence under any provision of this Act committed by a partnership in Scotland is proved—
- (a) to have been committed with the consent or connivance of a partner, or
 - (b) to be attributable to any neglect on his part,
- the partner as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly. 15
- (5) In subsection (4) “partner” includes a person purporting to act as a partner. 20

19 Regulations

- (1) Powers to make regulations and orders under this Act are exercisable by statutory instrument.
- (2) Regulations, and orders under section 7, may make—
- (a) different provision for different cases or circumstances, and
 - (b) any supplementary, consequential or transitional provision which the appropriate Minister (or the Secretary of State) considers necessary or desirable.
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- (3) No statutory instrument containing an order under section 7 or regulations under section 9 or 11 is to be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House of Parliament. 30
- (4) No statutory instrument containing regulations under section 8 is to be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House of Parliament, or laid before the Scottish Parliament and approved by a resolution of that Parliament. 35
- (5) A statutory instrument containing regulations under any other provision of this Act shall be subject to annulment in pursuance of a resolution of either House of Parliament or of the Scottish Parliament.

20 Transitional provisions: sponsorship 40

- (1) The appropriate Minister may make regulations providing that, subject to the satisfaction (or continuing satisfaction) of any conditions specified in the

regulations, section 10 is not to apply before a date so specified to a sponsorship agreement of a description so specified.

- (2) The date specified may not be later than 1st October 2006.
- (3) If, by virtue of regulations under this section, section 10 does not apply to a sponsorship agreement, the doing of anything as a result of that agreement is not an offence under any provision of this Act. 5

21 Interpretation

In this Act—

“appropriate Minister” means—

- (a) in relation to England, Wales and Northern Ireland, the Secretary of State, and 10
- (b) in relation to Scotland, the Scottish Ministers,

“public” means the public generally, any section of the public or individually selected members of the public,

“purpose” includes one of a number of purposes, and 15

“tobacco advertisement” and “tobacco product” have the meaning given in section 1,

and references to publishing include any means of publishing (and include, in particular, publishing by any electronic means, for example by means of the internet). 20

22 Commencement, short title and extent

- (1) Apart from this section, this Act comes into force on such day as the appropriate Minister may by order appoint.
- (2) Different days may be appointed under subsection (1) for different provisions and for different purposes. 25
- (3) Such an order may include such transitional provisions and savings as the appropriate Minister considers appropriate.
- (4) This Act may be cited as the Tobacco Advertising and Promotion Act 2002.
- (5) This Act extends to Northern Ireland.
- (6) **Nothing in this Act shall impose any charge on the people or on public funds, or vary the amount or incidence of or otherwise alter any such charge in any manner, or affect the assessment, levying, administration or application of any money raised by any such charge.** 30

Tobacco Advertising and Promotion Bill [HL]

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B I L L

To control the advertising and promotion of tobacco products; and for connected purposes.

Brought from the Lords, 18th March 2002.

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