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STATUTORY INSTRUMENTS

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**2006 No. 2369**

**CONSUMER PROTECTION  
ELECTRONIC COMMUNICATIONS**

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

*Made* - - - - *24th August 2006*  
*Laid before Parliament* *7th September 2006*  
*Coming into force* - - *28th September 2006*

The Secretary of State for Health makes these Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(1).

The Secretary of State has been designated(2) for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures relating to the direct or indirect promotion of tobacco products and in relation to information society services.

**Citation, commencement and interpretation**

1.—(1) These Regulations may be cited as the Tobacco Advertising and Promotion Act 2002 etc. (Amendment) Regulations 2006 and shall come into force on 28th September 2006.

(2) In these Regulations “the Act” means the Tobacco Advertising and Promotion Act 2002(3).

**Amendment of section 2 of the Act**

2.—(1) Section 2 (prohibition of tobacco advertising) of the Act is amended as follows.

(2) For subsection (4) substitute—

“(4) A service provider established in the United Kingdom who, in the course of providing information society services, does anything in an EEA State other than the

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- (1) [1972 c.68](#). By virtue of the amendment to section 1(2) of the European Communities Act 1972 by section 1 of the European Economic Area Act [1993 \(c.51\)](#), regulations may be made under section 2(2) of the European Communities Act to implement obligations of the United Kingdom created or arising by or under the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (Cm 2073) and the Protocol adjusting the Agreement signed at Brussels on 17th March 1993 (Cm 2183).
- (2) *See* [SI 1999/654](#) and [SI 2001/2555](#). In relation to measures in these Regulations relating to the direct or indirect promotion of tobacco products, the power of the Secretary of State under section 2(2) of the European Communities Act 1972 is exercisable in relation to Scotland by virtue of section 57(1) of the Scotland Act [1998 \(c.46\)](#).
- (3) [2002 c.36](#).

United Kingdom which, if done in the United Kingdom, would constitute an offence under subsection (1) or (2) is guilty of an offence.”

### **Advertising by information society services**

3. After section 3 (advertising: newspapers, periodicals etc) of the Act insert—

#### **“Advertising: information society services**

**3A.**—(1) This subsection applies where by means of an information society service, provided in the course of a business, a tobacco advertisement is published—

- (a) in the United Kingdom, or
- (b) in an EEA State other than the United Kingdom, by a service provider established in the United Kingdom.

(2) Where subsection (1) applies—

- (a) any proprietor of the information society service or any editor of the information contained in the information society service is guilty of an offence, and
- (b) any person who (directly or indirectly) procured the inclusion of the tobacco advertisement in the information contained in the information society service is guilty of an offence.”.

### **Amendment of section 4 of the Act**

4.—(1) Section 4 (advertising: exclusions) of the Act is amended as follows.

(2) In subsection (1), for the words “section 2 or 3” substitute “section 2, 3 or 3A”.

(3) For subsection (1)(c) substitute—

- “(c) if it is contained in a publication (other than in an in-flight magazine)—
- (i) which is printed in a country which is not an EEA State, and
  - (ii) whose principal market is not one or more of the EEA States (or any part of them).”.

(4) After subsection (1)(c), insert—

- “(d) if it is published by means of an information society service by a person who does not carry on business in an EEA State and it is not intended to be accessed principally by persons in one or more EEA States (or any part of them).”.

(5) After subsection (1), insert—

“(1A) Subsection (1)(b) applies to a communication made by means of an information society service only if the request was made—

- (a) by means of an information society service which does not advertise any tobacco product to persons—
  - (i) who have not made such a request, or
  - (ii) who have not initiated a process by which a tobacco product may be purchased by means of that service; or
- (b) without using an information society service.

(1B) The supply of information to an individual is not a tobacco advertisement if—

- (a) an information society service provides a means by which tobacco products may be purchased which includes the provision of information about a tobacco product, and

- (b) the information becomes available only after the individual has initiated the process of making the purchase.”.
- (6) In subsection (3), omit the words “on a website”.
- (7) After subsection (4), insert—
  - “(5) The Schedule has effect in relation to the liability of information society service providers.”.

#### **Amendment of section 5 of the Act**

5.—(1) Section 5 (advertising: defences) of the Act is amended as follows.

(2) In subsection (1), for the words “or section 3(a) or (b)” substitute “, section 3(a) or (b) or section 3A(1)(a) or (b)”.

(3) In subsection (3), for the words “or 3(a) or (b)” substitute “, 3(a) or (b) or 3A(1)(a)”.

(4) After subsection (3), insert—

“(3A) A person does not commit an offence under section 2(4) or 3A(1)(b) if he did not know, and had no reason to suspect, that the tobacco advertisement would be published in another EEA State.”.

(5) In subsection (5)—

(a) after paragraph (b), omit the word “or”; and

(b) for paragraph (c), substitute—

“(c) in relation to transmission by means of information society services, he did not carry on business in an EEA State at the relevant time, or

(d) in relation to transmission by any other means of electronic transmission, he did not carry on business in the United Kingdom at the relevant time.”.

(6) After subsection (5), insert—

“(5A) A person does not commit an offence under section 2(4) of distributing or causing the distribution of a tobacco advertisement if—

(a) he was unaware that what he distributed or caused to be distributed was, or contained, a tobacco advertisement, or

(b) having become aware of it, it was not reasonably practicable for him to prevent its further distribution.”.

#### **Amendment of section 8 of the Act**

6.—(1) Section 8 (displays) of the Act is amended as follows.

(2) In subsection (2), for the words “the United Kingdom”, in the first place they appear, substitute “an EEA State”.

#### **Amendment of section 16 of the Act**

7.—(1) Section 16 (penalties) of the Act is amended as follows.

(2) After subsection (1), insert—

“(1A) A person guilty of an offence under section 2(4) or 3A(1), is liable—

(a) on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding the statutory maximum, or both, or

- (b) on conviction on indictment to imprisonment for a term not exceeding 2 years, or a fine, or both.”.

### **Amendment of section 21 of the Act**

8.—(1) Section 21 (interpretation) of the Act is amended as follows.

(2) Section 21 is renumbered as subsection (1) of that section.

(3) In that provision, in the appropriate place insert—

““the Directive” means Directive [2000/31/EC](#) of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce);

“EEA State” means a member State, Norway, Iceland or Liechtenstein;

“information society services”—

(a) has the meaning set out in Article 2(a) of the Directive (which refers to Article 1(2) of Directive [98/34/EC](#) of the European Parliament and of the Council of 22nd June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive [98/48/EC](#) of 20th July 1998); and

(b) is summarised in recital 17 of the Directive as covering ‘any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service’;

“service provider” means a person providing an information society service;”.

(4) After that provision insert—

“(2) For the purposes of this Act—

(a) an establishment, in connection with an information society service, is the place at which the service provider effectively pursues an economic activity for an indefinite period;

(b) the presence or use in a particular place of equipment or other technical means of providing an information society service does not, of itself, constitute that place as an establishment of the kind mentioned in paragraph (a);

(c) where it cannot be determined from which of a number of establishments a given information society service is provided, that service is to be regarded as provided from the establishment where the service provider has the centre of his activities relating to the service,

and references to a person being established in any place must be construed accordingly.”.

### **Information society service providers**

9. After section 22 of the Act insert the following Schedule—

“SCHEDULE

Section 4(5)

#### **INFORMATION SOCIETY SERVICE PROVIDERS**

##### *Interpretation*

1. In this Schedule—

“recipient of the service” means any person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible; and

“relevant offence” is an offence under section 2, 3A or 9.

#### *Exceptions for mere conduits*

2.—(1) A service provider is not capable of being guilty of a relevant offence in respect of anything done in the course of providing so much of an information society service as consists in—

- (a) the provision of access to a communication network, or
- (b) the transmission in a communication network of information provided by a recipient of the service,

if the transmission condition is satisfied.

(2) The transmission condition is that the service provider does not—

- (a) initiate the transmission,
- (b) select the recipient of the transmission, or
- (c) select or modify the information contained in the transmission.

(3) Sub-paragraph (1)(b) does not apply if the information is information to which paragraph 3 applies.

(4) For the purposes of this paragraph, the provision of access to a communication network and the transmission of information in the network includes automatic, intermediate and transient storage of information for the purpose of carrying out the transmission in the network.

(5) Sub-paragraph (4) does not apply if the information is stored for longer than is reasonably necessary for the transmission.

#### *Exception for caching*

3.—(1) This paragraph applies to information which—

- (a) is provided by a recipient of an information society service, and
- (b) is the subject of automatic, intermediate and temporary storage which is solely for the purpose of making the onward transmission of the information to other recipients of the service at their request more efficient.

(2) A service provider is not capable of being guilty of a relevant offence in respect of anything done in the course of providing so much of an information society service as consists in the transmission in a communication network of information to which this paragraph applies if—

- (a) the service provider does not modify the information;
- (b) he complies with any conditions attached to having access to the information;
- (c) in a case to which sub-paragraph (3) applies, the service provider expeditiously removes the information or disables access to it.

(3) This sub-paragraph applies if the service provider obtains actual knowledge that—

- (a) the information at the initial source of the transmission has been removed from the network, or
- (b) access to it has been disabled.

*Exception for hosting*

4.—(1) A service provider is not capable of being guilty of a relevant offence in respect of anything done in the course of providing so much of an information society service as consists in the storage of information provided by a recipient of the service if—

- (a) the service provider did not know when the information was provided that it contained offending material, or
  - (b) upon obtaining actual knowledge that the information contained offending material, the service provider expeditiously removed the information or disabled access to it.
- (2) Offending material is material the storage of which would constitute a relevant offence.”.

**Amendment of the Electronic Commerce (EC Directive) (Extension) Regulations 2003**

10. Paragraph 2 to the Schedule to the Electronic Commerce (EC Directive) (Extension) Regulations 2003(4) is omitted.

Signed by authority of the Secretary of State for Health

24th August 2006

*Caroline Flint*  
Minister of State for Health  
Department of Health

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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations give effect to Directive [2003/33/EC](#) of the European Parliament and Council of 26th 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 (“the Directive on tobacco advertising and sponsorship”). They do so by amending the Tobacco Advertising and Promotion Act 2002 (“the Act”) to include provision about information society services (“ISS”) to the extent that the Act does not yet do so. In doing so, these Regulations also give effect to Directive [2000/31/EC](#) of the European Parliament and Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (“the electronic commerce Directive”).

Regulation 2 amends section 2 (prohibition of tobacco advertising) of the Act. Regulation 2(2) replaces subsection (4) to create new offences in relation to publishing, devising or distributing a tobacco advertisement in the EEA<sup>(5)</sup> by ISS from an establishment in the United Kingdom. The old subsection (4) provided that it was not an offence under subsection (1) for persons not carrying on business in the United Kingdom to publish, etc. a tobacco advertisement on a website which is accessible in the United Kingdom. This exclusion has been moved to create a new section 4(1)(d) of the Act, which is now limited to persons carrying on business outside the EEA.

Regulation 3 inserts a new section 3A (advertising: information society services) to provide for new offences in relation to any proprietor or editor of an ISS which contains a tobacco advertisement and any person who directly or indirectly commissioned the offending advertisement, e.g. advertising agencies.

Regulation 4 amends section 4 (advertising: exclusions) of the Act. It limits the exclusion in section 4(1)(c) of the Act to publications printed outside the EEA which do not have the EEA (or any part of it) as its principal market. It also inserts new subsections (1A) and (1B) to exclude from the offences under sections 2, 3 and 3A information on tobacco products provided by ISS only in reply to a particular request by a person for such information (provided certain conditions are met), or to persons who have initiated a purchase of a tobacco product from an ISS. Regulation 4 also inserts a new section 4(5) to give effect to a new Schedule which implements Articles 12, 13 and 14 of the electronic commerce Directive. This new Schedule, inserted by regulation 9, excludes from sections 2, 3A and 9 (prohibition of free distributions) ISS providers who act as a mere conduit, or who are caching or hosting information containing a tobacco advertisement, if certain conditions are met.

Regulation 5 amends section 5 (advertising: defences) of the Act to extend the defences contained in this section to the new offences created by the new sections 2(4) and 3A. Regulation 6 amends section 8(2) (displays) of the Act, by limiting the persons liable to an offence under subsection (1) to those carrying on business in the EEA.

Regulation 7 amends section 16 (penalties) of the Act to provide for maximum penalties for the new offences created by the new sections 2(4) and 3A. Regulation 8 amends section 21 (interpretation) of the Act by inserting a number of new definitions and by making provision for determining when a person is established in a particular place.

Regulation 10 amends the Electronic Commerce (EC Directive) (Extension) Regulations 2003, by omitting paragraph 2 to the Schedule (which extended the provisions of the Electronic Commerce

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(5) The EEA is comprised of the member States of the European Union, together with Norway, Iceland and Liechtenstein.

**Status:** This is the original version (as it was originally made).

(EC Directive) Regulations 2002 ([SI 2002/2013](#)) to the Act). Such provision is no longer necessary as a result of the amendments to the Act made by these Regulations.

A Regulatory Impact Assessment and a Transposition Note have been prepared for these Regulations and a copy of each has been placed in the library of each House of Parliament. Copies of the Regulatory Impact Assessment and the Transposition Note can be obtained from the Cancer & CVD Protection – Tobacco Policy Team, Department of Health, Room 712, Wellington House, 133-155 Waterloo Road, London SE1 8UG.