

TOBACCO ADVERTISING AND PROMOTION ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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 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.