

2004 No. 1824

CONSUMER PROTECTION

**The Tobacco Advertising and Promotion (Brandsharing)
Regulations 2004**

Made - - - - - *13th July 2004*
Coming into force - - - *31st July 2005*

Whereas a draft of these Regulations has been approved by resolution of each House of Parliament, pursuant to section 19(3) of the Tobacco Advertising and Promotion Act 2002(a);

Now, therefore, the Secretary of State, in exercise of the powers conferred by sections 11 and 19(2) of that Act, and of all other powers enabling him in that behalf, hereby makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Tobacco Advertising and Promotion (Brandsharing) Regulations 2004 and shall come into force on 31st July 2005.

Interpretation

2. In these Regulations:

“A5 size” means the size of an area of any shape which is equal to the area of size A5 in the A series of paper sizes defined in BS EN ISO 216: 2001(b);

“the Act” means the Tobacco Advertising and Promotion Act 2002;

“advertisement” means a tobacco advertisement;

“the EEA Agreement” means the Agreement on the European Economic Area signed at Oporto on 2nd May 1992(c) as adjusted by the Protocol signed at Brussels on 17th March 1993(d);

“European Economic Area” means the territory of—

(a) the European Community; and

(b) States which are party to, or otherwise bound by, the EEA Agreement;

“feature” means a name, emblem or other feature, whether alone or in combination;

“gantry or display unit” means any gantry, display cabinet, tray or other product in which tobacco products are held pending sale that is—

(a) fixed to one place within fixed or movable premises; and

(b) primarily used for the display of tobacco products to customers;

“group of companies” means a holding company and its subsidiaries within the meaning

(a) 2002 c. 36.

(b) Copies of BS EN ISO 216: 2001 can be obtained from the British Standards Institute, 389 Chiswick High Road, London W4 4AL.

(c) Cmnd 2073.

(d) Cmnd 2183.

of section 736 (interpretation) of the Companies Act 1985^(a) or, as regards Northern Ireland, Article 4 (introductory and interpretation) of Part I of the Companies (Northern Ireland) Order 1986^(b);

“non-tobacco product” means any product other than a tobacco product;

“other feature”, in so far as any of the following features are neither a name nor an emblem, means a logo, trademark, symbol, motto, print, type-face, colour or pattern of colour, picture, artwork, imagery, appearance, message or other indication that constitutes all or part of the recognisable identity of a product or service;

“tobacco producer or promoter” means any producer or promoter engaged in the production or promotion of tobacco products.

Brandsharing

3.—(1) Subject to paragraph (3) and regulations 4(1) to (4) and 5, the use by a person in connection with any non-tobacco product or service of any feature which is the same as, or is so similar as to be likely to be mistaken for, any feature which is connected with a tobacco product is prohibited if the purpose or effect of that use is to promote a tobacco product in the United Kingdom.

(2) Subject to paragraph (3) and regulations 4(5) to (8) and 5, the use by a person in connection with any tobacco product of any feature which is the same as, or is so similar as to be likely to be mistaken for, any feature which is connected with any non-tobacco product or service is prohibited if the purpose or effect of that use is to promote a tobacco product in the United Kingdom through the association which it has with any non-tobacco product or service.

(3) Paragraphs (1) and (2) apply only to the use in the United Kingdom of a feature in the course of a business.

Exceptions

- 4.—(1) Subject to regulation 5(4), the prohibition in regulation 3(1) does not apply if—
- (a) it was not the purpose of the person’s use to promote a tobacco product, or (as the case may be) the tobacco product in question; and
 - (b) the person could not reasonably have foreseen that that would be its effect.
- (2) Subject to regulation 5(4), the prohibition in regulation 3(1) does not apply if—
- (a) when the person uses any feature in connection with a non-tobacco product or service, he does not do so for the purpose of promoting a tobacco product;
 - (b) that person is not, and is not employed or commissioned by—
 - (i) a tobacco producer or promoter,
 - (ii) a company in the same group of companies as a tobacco producer or promoter, or
 - (iii) a company which has a common parent company with a tobacco producer or promoter; and
 - (c) the feature is not used by that person under any agreement or licence, or any series of agreements, licences or both, to which at least one party is a tobacco producer or promoter.
- (3) Subject to regulation 5(4), the prohibition in regulation 3(1) does not apply if—
- (a) when the person uses any feature in connection with a non-tobacco product or service, he does not do so for the purpose of promoting a tobacco product;
 - (b) the feature was first used in connection with a non-tobacco product or service on or before 1st September 2002 in an area which was then or has subsequently become part of the European Economic Area; and
 - (c) the presentation of the feature of the non-tobacco product or service does not make it appear that it belongs to the same brand as any tobacco product.

(a) 1985 c. 6. Section 736 was substituted by the Companies Act 1989 (c. 40), section 144.

(b) S.I. 1986/1032 (N.I. 6). Article 4 was substituted by the Companies (Northern Ireland) Order 1990, S.I. 1990/1504 (N.I. 10), Article 62.

- (4) Subject to regulation 5(4), the prohibition in regulation 3(1) does not apply if—
 - (a) the person who is using a feature in connection with a non-tobacco product or service does not know that the purpose or effect of using the feature is, or is likely to be, to promote a tobacco product; and
 - (b) the use of the feature does not make it appear that the same person, firm or company is responsible for the branding of both the tobacco product and the non-tobacco product or service (whether that is in fact so or not).
- (5) Subject to regulation 5(4), the prohibition in regulation 3(2) does not apply if—
 - (a) it was not the purpose of the person's use to promote a tobacco product, or (as the case may be) the tobacco product in question, through the association which any relevant feature has with any non-tobacco product or service; and
 - (b) the person could not reasonably have foreseen that that would be its effect.
- (6) Subject to regulation 5(4), the prohibition in regulation 3(2) does not apply if—
 - (a) when the person uses any feature in connection with a tobacco product, he does not do so for the purpose of promoting a tobacco product through the association which that feature has with any non-tobacco product or service;
 - (b) the person is not, and is not employed or commissioned by—
 - (i) a tobacco producer or promoter,
 - (ii) a company in the same group of companies as a tobacco producer or promoter, or
 - (iii) a company which has a common parent company with a tobacco producer or promoter; and
 - (c) the feature is not used by that person under any agreement or licence, or any series of agreements, licences or both, to which at least one party is a tobacco producer or promoter.
- (7) Subject to regulation 5(4), the prohibition in regulation 3(2) does not apply if—
 - (a) when the person uses any feature in connection with a tobacco product, he does not do so for the purpose of promoting a tobacco product through the association which that feature has with any non-tobacco product or service;
 - (b) the feature was first used in connection with a tobacco product on or before 1st September 2002 in an area which was then or has subsequently become part of the European Economic Area; and
 - (c) the presentation of the feature of the tobacco product does not make it appear that it belongs to the same brand as any non-tobacco product or service.
- (8) Subject to regulation 5(4), the prohibition in regulation 3(2) does not apply if—
 - (a) the person who is using a feature in connection with a tobacco product does not know that the purpose or effect of using the feature is, or is likely to be, to promote a tobacco product through the association which the feature has with any non-tobacco product or service; and
 - (b) the use of the feature does not make it appear that the same person, firm or company is responsible for the branding of both the tobacco product and the non-tobacco product or service (whether that is in fact so or not).

Point of sale brandsharing

- 5.—(1) The prohibitions in regulation 3 do not apply where paragraph (2) or (3) applies.
- (2) This paragraph applies where—
 - (a) any feature is used—
 - (i) in the course of a business; and
 - (ii) at a place where tobacco products are sold; on a gantry or display unit;
 - (b) the only feature that promotes a tobacco product consists of an advertisement presented in a two dimensional format—
 - (i) with a surface area which does not exceed A5 size (or two or more advertisements with a surface area which in total does not exceed A5 size); and
 - (ii) which consists of any feature of the tobacco product and no other information;

- (c) the surface area of all advertisements on the gantry or display unit does not in total exceed A5 size;
 - (d) the advertisement (or if more than one, each of them) contains the health warning and health information in accordance with the Schedule to these Regulations; and
 - (e) the health warning and health information are parallel to the floor.
- (3) This paragraph applies where any feature is used to promote a tobacco product on a vending machine and the only features used on that machine to promote a tobacco product are contained in an advertisement which—
- (a) consists only of a single picture of the packet of a tobacco product which is for sale from that vending machine or, if more than one tobacco product is for sale from that machine, a single picture of the packet of some or each of those products;
 - (b) includes a health warning which is identical to a health warning which is required to be shown on the most visible surface of the tobacco product to which the picture relates and which occupies not less than 30% of the surface area of the advertisement and is surrounded by a black border which—
 - (i) is not less than 3 millimetres nor more than 4 millimetres in width;
 - (ii) is outside the area occupied by the health warning; and
 - (iii) does not interfere with the text of the warning; and
 - (c) is no larger than the surface area of the largest face of the packet of the tobacco product depicted.
- (4) Where paragraph (2) or (3) applies, the exceptions in regulation 4 do not apply.
- (5) In paragraph (3) “vending machine” means a tobacco vending machine which contains tobacco products which are not visible prior to purchase.

General provisions

6.—(1) A person who uses any feature of any product or service in circumstances set out in one or more of the exceptions in regulation 4(1) to (4) or regulation 5 does not commit an offence under section 2, 3, 9 or 10 of the Act in respect of the use of that feature.

(2) Where a person charged with an offence under section 11(4) of the Act relies on an exception under regulation 4(1) to (3) or (5) to (7) or regulation 5, he shall adduce evidence which is sufficient to raise an issue with respect to that exception.

(3) Where a person charged with an offence under section 2, 3, 9 or 10 of the Act relies on a defence provided by paragraph (1), he shall adduce evidence which is sufficient to raise an issue with respect to that defence.

(4) Where evidence is adduced under paragraph (2) or (3), the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

Signed by authority of the Secretary of State

13th July 2004

Melanie Johnson
Parliamentary Under Secretary of State, Department of Health

THE SCHEDULE

Regulation 5(2)(d)

HEALTH WARNINGS AND HEALTH INFORMATION

1. An advertisement to which this Schedule applies shall include an area which is not less than 30% of the total surface area of the advertisement in which is displayed, in accordance with the requirements specified in paragraph 2, the health warning “Smoking kills” or the health warning “Smoking seriously harms you and others around you” and the following information—

“NHS Smoking Helpline 0800 169 0 169”.

2. The health warning and information which is required by paragraph 1 shall be—
- (a) indelible;
 - (b) legible;
 - (c) printed in black Helvetica bold type on a white background;
 - (d) in a font size consistent throughout the text which ensures that the text occupies the greatest possible proportion of the area specified for the warning and information;
 - (e) in upper case and lower case type as set out in paragraph 1;
 - (f) centred in the area in which the text is required to be printed;
 - (g) surrounded by a black border outside the area specified for the health warning and information, which shall be not less than 3 millimetres and not more than 4 millimetres in width, which does not interfere with the text of the warning or information; and
 - (h) irremovably printed on the advertisement.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations prohibit, subject to exceptions, the use of the same or similar names, emblems or other features in connection with both tobacco products and non-tobacco products and services (“tobacco brandsharing”). The Regulations apply to England, Wales, Scotland and Northern Ireland.

Regulation 3 sets out the prohibitions on tobacco brandsharing. Paragraph (1) prohibits the use in connection with any non-tobacco product or service of any feature which is the same as, or is so similar as to be likely to be mistaken for, a feature which is connected with a tobacco product. Paragraph (2) prohibits the use in connection with any tobacco product of any feature which is the same as, or is so similar as to be likely to be mistaken for, any feature which is connected with a non-tobacco product or service if the purpose or effect of such use is to promote a tobacco product by the association which it has with any non-tobacco product or service.

Regulation 4 sets out exceptions to the prohibitions on tobacco brandsharing. Where any exception applies, the prohibition on brandsharing does not apply.

Paragraph (1) applies if the person does not use brandsharing features for the purpose of promoting a tobacco product and that person could not reasonably have foreseen that a tobacco product would be promoted.

Paragraph (2) applies if the person does not use any brand feature in connection with a non-tobacco product or service for the purpose of promoting a tobacco product, he does not produce or promote any tobacco product and he is not a party to an agreement or licence relating to the use of the feature, to which a producer or promoter of a tobacco product is also a party. The paragraph also applies where the link between the user of the feature and the producer or promoter of the tobacco product is through various employment, commissioning or company relationships.

Paragraph (3) applies if the person does not use a brand feature for the purpose of promoting a tobacco product, the feature of a non-tobacco product or service was used in the European Economic Area before 1st September 2002 and the presentation of any feature of the product or service does not make it appear to belong to the same brand as any tobacco product.

Paragraph (4) applies if the person who is using a feature in connection with a non-tobacco product or service does not know that the purpose or effect of using the feature is, or is likely to be, to promote a tobacco product and the use of the feature does not make it appear that the same person, firm or company is responsible for the branding of both the tobacco product and the non-tobacco product or service (whether that is in fact so or not).

Paragraph (5) applies if the person does not use brandsharing features for the purpose of promoting a tobacco product through an association with a non-tobacco product or service and that person could not reasonably have foreseen that a tobacco product would be promoted.

Paragraph (6) applies if the person does not use any brand feature in connection with both a tobacco product and a non-tobacco product or service for the purpose of promoting a tobacco product through an association with a non-tobacco product or service, he does not produce or promote any tobacco product and he is not a party to an agreement or licence relating to the use of the feature, to which a producer or promoter of a tobacco product is also a party. The paragraph also applies where the link between the user of the feature and the producer or promoter of the tobacco product is through various employment, commissioning or company relationships.

Paragraph (7) applies if the person does not use any brand feature for the purpose of promoting a tobacco product by association with a non-tobacco product or service, the feature of the tobacco product was used in the European Economic Area before 1st September 2002 and the presentation of any feature of the tobacco product does not make it appear to belong to the same brand as any non-tobacco product or service.

Paragraph (8) applies if the person who is using a feature in connection with a tobacco product does not know that the purpose or effect of using the feature is, or is likely to be, to promote a tobacco product through the association which the feature has with any non-tobacco product or service, and the use of the feature does not make it appear that the same person, firm or company is responsible for the branding of both the tobacco product and the non-tobacco product or service (whether that is in fact so or not).

Regulation 5 provides exceptions for brandshared gantries, display units and tobacco vending machines. These exceptions, which apply instead of those in regulation 4, permit restricted promotion of tobacco products on gantries, display units and tobacco vending machines. The regulation permits certain advertisements of "A5 size". That expression is defined in regulation 2 by reference to British Standard BS EN ISO 216: 2001 which can be obtained from the British Standards Institute, 389 Chiswick High Road, London W4 4AL.

Regulation 6 contains general provisions. Paragraph (1) prescribes the circumstances in which a person who uses brandshared features does not commit an offence under section 2, 3, 9 or 10 of the Act. Paragraphs (2) to (4) provide that a person who wishes to rely on an exception in regulation 4 or 5 shall adduce evidence sufficient to raise an issue with respect to that exception but that where he does so it is for the prosecution to prove beyond reasonable doubt that the exception does not apply.

The Schedule sets out health warnings and health information which is required by regulation 5(2)(d) to be displayed in any tobacco advertisement which is displayed at the point of sale on a gantry or display unit.

A draft of these Regulations has been notified to the European Commission as a technical standard, pursuant to Directive 98/34/EC of the European Parliament and of the Council (OJ No. L204, 21.7.98, p. 37) laying down a procedure for the provision of information in the field of technical standards and regulations, as amended.

A regulatory impact assessment has been prepared for these Regulations and a copy has been placed in the library of each House of Parliament. Copies of the Regulatory Assessment are published on the Department's website (www.dh.gov.uk) and can be obtained from the Department of Health, Room 708, Wellington House, 133-155 Waterloo Road, London SE1 8UG.

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