

Chapter 14: Outdoor advertising

INTRODUCTION

- 14.1 Legislation relating to advertisements is contained in Chapter 3 of Part 8 of the TCPA 1990, which empowers the Welsh Ministers to make provision (by regulation) for restricting or regulating the display of advertisements so far as appears to be expedient to them, in the interests of amenity and public safety. The current regulations are the TCP (Control of Advertisements) Regulations 1992 (“the 1992 Regulations”).¹
- 14.2 The regulations provide for three categories of advertisement;
- 1) those which are excluded from control;²
 - 2) those which normally benefit from “deemed consent”, which can be withdrawn by planning authorities in certain circumstances;³ and
 - 3) those which require express consent from the planning authority (or, on appeal, from the Welsh Ministers).⁴
- 14.3 Displaying an advertisement without the required consent is not just a breach of planning control – as with unauthorised development – but constitutes a strict liability criminal offence.
- 14.4 In our Consultation Paper, we made some suggestions as to the potential reforms of the TCPA 1990 in relation to outdoor advertising. In addition, although the majority of the Paper focussed on primary legislation, we noted that the substantive law on advertising is almost entirely contained in secondary legislation. The 1992 Regulations are now 25 years old, and are likely to be updated in due course,⁵ and we therefore made some suggestions about detailed reforms which could be made to them when that occurs.

¹ SI 1992 No 666.

² 1992 Regulations, reg 1. Advertisements falling within this category refer to items that are generally unobjectionable, including advertisements inside buildings, promotional material on vending machines and traffic signs.

³ 1992 Regulations, reg 6, which grants deemed permission for advertisements that fall within any of the categories listed in Sch 3, including brass plates outside doctors’ surgeries, estate agents’ boards, and shop fascia signs.

⁴ 1992 Regulations, part 3. Advertisements falling within this category include poster-panels, signage at petrol stations and car dealerships, and signs on buildings more than 4.6m above ground level.

⁵ The Regulations originally applied both in England and in Wales; they were replaced in England ten years ago (see the TCP (Control of Advertisements) (England) Regulations 2007, No 783).

BASIC CONCEPTS

Definition of “advertisement”

We provisionally proposed that the definition of “advertisement” in the TCPA 1990 should be clarified, and included in the Code alongside other provisions relating to advertising (Consultation Question 14-1).

- 14.5 Section 336 of the TCPA 1990 provides a wide-ranging definition of “advertisement”. It means “any word, letter, model, sign, placard, board, notice, awning, blind, device or representation, whether illuminated or not, in the nature of, and employed wholly or partly for the purposes of, advertisement, announcement or direction”. It also *includes* “any hoarding or similar structure used or designed, or adapted for use, and anything else principally used, or designed or adapted principally for use, for the display of advertisements”.
- 14.6 The definition in the Act applies also for the purposes of interpreting the 1992 Regulations. The Regulations also provide a definition, which *excludes* “anything employed wholly as a memorial or as a railway signal”.⁶
- 14.7 In our Consultation Paper, we noted that the definition in the Act was to some extent a circular one. It focusses on the physical means by which the message is being put forward, rather than the nature of the message itself.⁷ We suggested that the Act should include a single definition of “advertisement”, which would also apply to the interpretation of the Regulations, along the following lines
- “advertisement” means any sign, placard, board, notice, hoarding, awning, blind, or other object or structure, whether illuminated or not, that is:
- designed or adapted for use for the purpose of announcement, publicity or direction, and
 - used wholly or partly for such a purpose;
- but excludes a memorial (including funerary memorial) or a railway signal.⁸
- 14.8 All 31 of the consultees who responded to this proposal agreed with it. Neath Port Talbot CBC suggested that it would “reduce misinterpretation from the public, advertisers and planning authorities”. The Management Committee of the National Association of Planning Enforcement (“NAPE”) also noted that “advertisements have moved on somewhat from 1992” and suggested that an updated definition might therefore be helpful.
- 14.9 Consultees expressed concern that clarifying the proposed definition would result in the exclusion of the more “high-tech” means of advertisement. The Theatres Trust noted that “advertisements on buildings use light projections are becoming more frequent as is the use of audio” and emphasised that “it is important that the definition

⁶ 1992 Regulations, reg 2.

⁷ Consultation Paper, paras 14.13 to 14.15.

⁸ Consultation Paper, paras 14.16, 14.17.

covers these types of advertisements". We agree, although we note that the advertising industry is constantly evolving, and a more generic definition may be more useful than one that attempts to include specific types of advert.

Recommendation 14-1.

We recommend that the definition of "advertisement" in the TCPA 1990 should be clarified, and included in the Code alongside other provisions relating to advertising.

We provisionally proposed that the reference to the display of advertisements currently included in the statutory definition of "advertisement" in the TCPA 1990 be omitted (Consultation Question 14-2).

- 14.10 We noted in the Consultation Paper that there is no definition of the term "display of adverts". In the light of the discussion above in relation to Recommendation 14-1, and particularly bearing in mind the constantly evolving nature of advertising, and thus the difficulty of arriving at a satisfactory definition of the term, we suggested that a specific reference to the term "display" is unhelpful. We therefore proposed to remove the reference to it.⁹
- 14.11 As with Consultation Question 14-1, the 31 consultees who responded to this proposal unanimously supported it. The Law Society noted that "'display' is inherent in the nature and purpose of an advertisement ... and can therefore be omitted".

Recommendation 14-2.

We recommend that the reference to the display of advertisements currently included in the statutory definition of "advertisement" in the TCPA 1990 should be omitted.

Definitions: the site of a display of advertisements

We provisionally proposed that the word "land" be used in place of "site" and "sites", both in the provisions of the Bill relating to the control of advertisements and in the Regulations when they are next updated (Consultation Question 14-3).

- 14.12 The legislation relating to advertisements refers to the place where an advertisement is to be found. The 1992 Regulations refer to the "site" on which it is displayed, and defines it as "any land or building, other than an advertisement, on which an advertisement is displayed".¹⁰ Section 336 of the TCPA 1990 defines land as "any corporeal hereditament, including a building, and...any interest in or right over land".

⁹ Consultation Paper, para 14.19.

¹⁰ 1992 Regulations, reg 2(1).

- 14.13 We suggested in our Consultation Paper that the existence of the two terms, “site” and “land”, leads to additional uncertainty and unnecessary complexity.¹¹ We noted that there was no instance in either the Act or the Regulations where the word “land” could not be used in place of “site”. We therefore suggested that references to the term “site” should be replaced with “land”.
- 14.14 All of the 32 consultees who responded to this question agreed with our proposal to integrate the two terms. The Royal Town Planning Institute (RTPI) noted that “section 336 of the Act succinctly defines the word ‘land’ and it potentially will avoid confusion if there is simply one word used, with one definition”.
- 14.15 Ten consultees (largely planning authorities), while agreeing in principle, expressed concern about the definition’s capacity to capture new forms of advertisement like searchlight beams. Allan Archer noted that as these methods of advertisement do not take place on land, they do not fit easily within the definition, creating difficulties with respect to other aspects of the legislation.
- 14.16 We understand the reason for such concern. However, a display of advertising, if it is to come within the Regulations, must involve land (or a building) at some point. And the definition of “site”, which might at first sight seem to be a wider term than “land”, is in fact drafted by reference to “land or building”.
- 14.17 The searchlight display in the *Great Yarmouth* case was projected by a unit that was moveable but currently located on the flat roof of a bingo and amusement centre.¹² And in *Wadham Stringer (Fareham) Ltd v Borough of Fareham*, a balloon displaying an advertisement was tethered to a stationary vehicle standing on the forecourt of a car showroom. Both were found by the courts to be advertisements displayed on land, and thus within the scope of the Regulations.¹³
- 14.18 We remain of the view that it would be helpful to do away with the term “site” in the Act and the Regulations. However, we consider that, to minimise the problems caused by novel forms of advertising, it would be helpful for the relevant statutory references to be drafted, where appropriate, by reference to advertisements being displayed “on or at” land, rather than just “on” land. The reference in section 220(2)(a) would thus become “the land on or at which advertisements may be displayed and the manner in which they may be displayed to it”. And Standard Condition 4 in Schedule 1 to the 1992 Regulations would become “no advertisement is to be displayed without the permission of the owner of the land on or at which it is displayed or of any person with an interest in that land entitled to grant permission”.

¹¹ Consultation Paper, para 14.22.

¹² “Sign” includes an unfocussed beam of light pointing into the sky (*Newport BC v Secretary of State; Great Yarmouth BC v Secretary of State* (1997) 74 P&CR 147 at p 155).

¹³ Advertisements on or attached to untethered balloons or aeroplanes are subject to Civil Aviation Act 1982, s 82, and Civil Aviation (Aerial Advertising) Regulations 1995. Advertisements on vehicles are generally outside the scope of the TCPA 1990 and regulations made under it (see **paras 14.39 to 14.46**).

Recommendation 14-3.

We recommend that the word “site” should be used in place of “land”:

- (1) in the provisions of the Bill relating to the control of advertisements; and**
- (2) in the Regulations when they are next updated; and**

that the Bill and the Regulations are, where appropriate, drafted by reference to advertisements being displayed “on or at” land.

Definitions: the person displaying an advertisement

We provisionally proposed that a definition of “person displaying an advertisement” in the TCPA 1990 be included in the Code alongside other provisions relating to advertising, to include (1) the owner and occupier of the land on which the advertisement is displayed; (2) any person to whose goods, trade, business or other concerns publicity is given by the advertisement; and (3) the person who undertakes or maintains the display of the advertisement (Consultation Question 14-4).

14.19 Section 224(4) of the TCPA 1990 provides that a person is deemed to display an advertisement (and thus to be liable for any breach of the Regulations) if:

- 1) they are the owner or occupier of the land on which the advertisement is displayed; or
- 2) the advertisement gives publicity to their goods, trade, business or other concerns.

14.20 Regulation 2(3)(b) of the 1992 Regulations provides a more extensive non-exhaustive definition, which also includes “the person who undertakes or maintains the display of the advertisement”.

14.21 We suggested in our Consultation Paper that the advertising contractor should be included within the statutory definition as they will usually have primary responsibility for ensuring compliance. We therefore suggested that the two definitions should be merged into one, to be included in the Act, but based on the definition in the Regulations.¹⁴

14.22 Of the 33 consultees responding to this proposal, 31 agreed, with the RTPI noting that “the definition provided in the Regulations is more robust and encapsulates all relevant interested parties”. The Planning Inspectorate (PINS) also emphasised the “need for consistency in defining a person displaying an advertisement” and suggested that it was “logical to include the person who undertakes or maintains the display of the advertisement in the definition”.

¹⁴ Consultation Paper, paras 14.27 to 14.29.

- 14.23 Two consultees, the Central Association of Agricultural Valuers and Sirius Planning, disagreed. Both argued that the owner and occupier of land should not “automatically be considered to be a person displaying an advertisement for the purposes of the definition”. The Association suggested that the owner may have “little control over ... the terms of the tenancy or other occupation ... and may perhaps be as anxious as the planning authority to have an advertisement removed”.
- 14.24 We agree that questions of actual control should be taken into account when considering whether or not a person should be prosecuted for displaying an advertisement without consent. However, section 224 of the TCPA 1990 already provides room for consideration of such questions, in that it provides a defence to prosecution where a person is able to “show that the advertisement was displayed without his knowledge and that he took all reasonable steps to prevent the display or, after the advertisement had been displayed, to secure its removal”.¹⁵
- 14.25 We therefore do not consider it necessary to remove them from the scope of the definition altogether.

Recommendation 14-4.

We recommend that a definition of “person displaying an advertisement” in the TCPA 1990 should be included in the Bill alongside other provisions relating to advertising, to include:

- (1) the owner and occupier of the land on or at which the advertisement is displayed;**
- (2) any person to whose goods, trade, business or other concerns publicity is given by the advertisement; and**
- (3) the person who undertakes or maintains the display of the advertisement.**

CONSENT FOR ADVERTISEMENTS

Deemed consent

- 14.26 For advertisements falling within the categories of advertising prescribed in the 14 Classes in Schedule 3 to the 1992 Regulations, permission is deemed to have been granted. Where a planning authority wishes to revoke such permission, however, they may serve discontinuance notices, which revoke deemed consent for particular displays and require that a particular display be removed or that a site is no longer to be used for such a display.

We provisionally proposed that a discontinuance notice under the advertisements regulations: (1) should contain a notice as to the rights of any recipient to appeal against it; (2) should come into force on a particular date specified in it (rather than at

¹⁵ TCPA 1990, s 224(5), (6).

the end of a specified period from the date of service); and (3) should be “issued” (rather than “served” as at present), with a copy served on all those deemed to be displaying the advertisement in question (Consultation Question 14-5).

- 14.27 The 1992 Regulations require that a discontinuance notice specify the advertisement or site to which it relates, a period within which the display is to be continued and state the reasons why action has been taken.¹⁶ But there is no requirement for the notice to state the recipient’s right to appeal against it – an omission described in the courts as “curious”.¹⁷ We suggested in the Consultation Paper that this omission should be rectified.¹⁸
- 14.28 A discontinuance notice must specify the period at the end of which it is to come into effect – starting on the date on which the notice is “served”.¹⁹ We noted in the Consultation Paper that this may cause problems where a notice is served on more than one person, and suggested that the Regulations should be amended to provide for a notice to be “issued”, with copies being “served”, each coming into force on the particular date specified within it.²⁰
- 14.29 We received 31 consultation responses to this proposal. All were in agreement with it. PINS described it as a proposal which would “provide clarity for all parties...would remove uncertainty and avoid prejudice”. The RTPI also argued that it was “logical to bring this procedure in line with the process relating to enforcement notices”.

Recommendation 14-5.

We recommend that a discontinuance notice under the advertisements regulations:

- (1) should contain a notice as to the rights of any recipient to appeal against it;**
- (2) should come into force on a particular date specified in it (rather than at the end of a specified period from the date of service); and**
- (3) should be “issued” (rather than “served”, as at present), with a copy served on all those deemed to be displaying the advertisement in question.**

¹⁶ 1992 Regulations, reg 8(2).

¹⁷ By the High Court in *Swishbrook Ltd v Secretary of State for the Environment* [1989] JPL 137, upheld in the Court of Appeal at [1990] JPL 824.

¹⁸ Consultation Paper, para 14.35.

¹⁹ 1992 Regulations, reg 8(3).

²⁰ A similar change was made to the provisions as to enforcement notices, by the Local Government and Planning (Amendment) Act 1981; see *Nahlis v Secretary of State* [1995] 3 PLR 95.

Powers to make advertisements regulations

We provisionally proposed that section 220(2), (2A) and (3) be replaced with a provision enabling regulations to be made that provides for the matters relating to advertising that may be controlled by regulations (Consultation Question 14-6).

- 14.30 The Regulations controlling the display of advertisements are more important in practice than the relevant primary legislation. However, as we noted in the Consultation Paper, the powers in the TCPA 1990 enabling the Welsh Ministers to make such regulations are far from satisfactory. In particular, section 220(2)(c) enables the Ministers to make provision as to express consent, by applying various provisions of the Act subject to such adaptations and modifications as may be specified in the Regulations. By contrast, section 220(2A) simply enables the Ministers to make regulations as to various categories of matters, with no need to do it by way of modifications of the Act.
- 14.31 We suggested in the Consultation Paper that the approach taken in section 220(2A) was more straightforward.²¹ Adopting this approach would make the enabling provisions in the Act slightly longer, but clearer; and the Regulations much clearer, and briefer. And those enabling provisions need only refer to the types of provisions that have in fact been included in regulations made since 1948.
- 14.32 All of the 31 consultees who responded to this proposal were in agreement with it. PINS commented: “Whilst the enabling provisions in the Act might be longer, it would facilitate a more straightforward approach and allow the Regulations to be shorter and clearer to the benefit of all”.

²¹ Consultation Paper, para 14.46.

Recommendation 14-6.

We recommend that section 220(2), (2A) and (3) should be replaced with a provision enabling regulations to be made providing for:

- (1) the dimensions, appearance and position of advertisements that may be displayed, and the manner in which they are to be affixed to the land;**
- (2) the prohibition of advertisements being displayed or land being used for the display of advertisements without either deemed or express consent;**
- (3) the discontinuance of deemed consent;**
- (4) the making and determination of applications for express consent, and the revocation or modification of consent;**
- (5) appeals against discontinuance orders and decisions on applications for express consent;**
- (6) areas of special control over advertising; and**
- (7) consequential and supplementary provisions.**

Overlap with planning permission

We provisionally proposed that deemed consent under the advertisements regulations should be granted for a display of advertisements that has the benefit of planning permission (Consultation Question 14-7).

- 14.33 We noted in the Consultation Paper that there will be a few cases in which planning permission is granted for a building project that necessarily includes an element of advertising. We suggested that in those circumstances it should not be necessary also to obtain advertisements consent.²²
- 14.34 We cited as one example the erection of a new shopfront that includes a fascia sign – although in many cases such a sign would already benefit from deemed consent under Class 4B (if illuminated), or Class 5 in other cases). But a development proposal might, for example, include an advertisement panel, whose desirability would be considered in the course of the determination of the planning application.
- 14.35 Further, as pointed out by the Law Society, there are increasing numbers of large structures designed specifically, or at least primarily, to house advertising – for example, next to motorways in urban areas. Such a structure would not benefit from deemed consent under the advertising regulations; and arguably it would be more appropriately assessed as a development project rather than just as an “advertisement”.

²² Consultation Paper, para 14.55.

- 14.36 Of the 33 consultees responding to this question, 31 agreed, with PINS noting that it would “streamline the system” and “help simplify the situation”. The Theatres Trust also agreed, suggesting that it would “simplify the planning process and reduce costs for applicants by removing unnecessary duplication”.
- 14.37 Three consultees, who agreed in principle, expressed concern about the scope of the proposed deemed consent regime. The NAPE Management Committee suggested that it was necessary to define the circumstances in which deemed consent arising from planning permission would arise. However, planning permission will have only been granted on the basis of drawings and other material, and it will be the advertising element of the scheme shown on those drawings that would benefit from the proposed deemed consent.
- 14.38 We suspect that such a class of deemed consent, if introduced, would not often be required; but it would remove a minor overlap of controls.

Recommendation 14-7.

We recommend that deemed consent under the advertisements regulations should be granted for a display of advertisements that has the benefit of planning permission.

Advertisements on and in vehicles

We provisionally proposed that the display of advertisements on stationary vehicles and trailers be brought within control by the Regulations being amended so as to provide that: (1) no consent (express or deemed) be required for the display of an advertisement inside a vehicle, or on the outside of a vehicle on a public highway; and (2) deemed consent be granted for the display of an advertisement on a vehicle, provided that the vehicle is normally employed as a moving vehicle and is not used principally for the display of advertisements (Consultation Question 14-8).

- 14.39 We noted in the Consultation Paper that one category of display causing problems is advertising on and in vehicles. At present, consent is not required for an advertisement displayed on a vehicle; and the Regulations put the matter beyond doubt by providing that the display of an advertisement “on or in a vehicle” does not require consent – express or deemed – provided that the vehicle is “normally employed as a moving vehicle” and is not used principally for the display of advertisements.²³
- 14.40 This is designed to permit advertising in the form of paper posters on the outside or the inside of buses or taxis and the display of the operator’s name and other promotional artwork on commercial vehicles generally.
- 14.41 However, the same provision also permits advertising on stationary vehicles and trailers parked in fields next to major roads and railways, which may be detrimental

²³ TCP (Control of Advertisements) Regulations 1992, Sch 2, Class C.

to amenity in rural areas, provided that the vehicle or trailer is capable of being driven or towed on and off the land. This was confirmed by the Divisional Court in *Calderdale MBC v Windy Bank Dairy Farm Ltd and Quinn*.²⁴

- 14.42 We suggested that one way to avoid the problem of unsightly advertising on parked vehicles would be to amend the Regulations so as to provide that consent would be required, but deemed consent granted, for the display of an advertisement on a vehicle when not on a highway.
- 14.43 This would mean that in the great majority of cases such advertising could continue to be displayed without the need for an application to be made to the planning authority for express consent under the Regulations. However, a planning authority could issue a discontinuance notice in respect of the use of a particular piece of land for such advertising, which would bring the display to an end (subject to a right of appeal to the Welsh Ministers).
- 14.44 If there were to be a persistent problem, the authority could seek a direction from the Welsh Ministers withdrawing the deemed consent altogether – either in relation to a particular plot of land, or over a larger area.²⁵
- 14.45 Of the 32 consultees who responded, all were in agreement with the principle underlying this proposed reform, which attempts to deal with a well-known and longstanding problem. However, the Law Society, the RTPI and Torfaen CBC pointed to problems that could be caused by advertising on vehicles parked for an extended period on the highway (including lay-bys, footways and grass verges).
- 14.46 We have modified our recommendation accordingly; and no doubt the detailed wording will be given further consideration when the 1992 Regulations next come to be updated or replaced.

²⁴ [2010] EWHC 2929 (Admin), [2011] JPL 754.

²⁵ Consultation Paper, paras 14.60-14.63.

Recommendation 14-8.

We recommend that the display of advertisements on stationary vehicles and trailers should be brought within control by the Regulations being amended so as to provide that:

- (1) no consent (express or deemed) is required for the display of an advertisement**
 - inside a vehicle, or**
 - on the outside of a vehicle on a public highway, other than one remaining stationary for more than 21 days;**
- (2) deemed consent is granted for the display of an advertisement on the outside of a vehicle not on a highway, provided that the vehicle is normally employed as a moving vehicle and is not used principally for the display of advertisements.**

Need for consent

We provisionally proposed that: (1) a provision be introduced in the advertisements regulations to enable a certificate of lawfulness to be issued in relation to a display of advertisements; and (2) an appropriate enabling provision be included in the Bill, in line with the approach indicated in Consultation Question 14-6 (Consultation Question 14-9).

- 14.47 We noted in the Consultation Paper that there can be considerable uncertainty as to whether consent is required for a particular display of advertisements, and particularly as to whether the advert falls within one or more of the classes benefiting from deemed consent. This arises not least as a result of the constantly changing nature of modern advertising, which means that it is not always clear whether new types of display are within such a class. It is possible to seek an informal opinion from the relevant authority. However, such an opinion will not necessarily bind it in the event of subsequent enforcement proceedings, which is particularly unfortunate given that the display of advertisements without consent is a criminal offence.
- 14.48 We suggested, therefore, that it would be more straightforward for there to be a mechanism, similar to that governing applications for certificates of lawfulness of development (CLEUDs and CLOPUDs),²⁶ whereby anyone can seek a binding decision as to the lawfulness of an existing or proposed display of advertisements – that is, as to whether it amounts (or, if carried out, would amount) to an offence under section 224 of the TCPA 1990. Such a certificate, if issued, would then prevent the authority from instituting a prosecution.²⁷

²⁶ See paras 7.64 to 7.72.

²⁷ Consultation Paper, paras 14.64-14.69.

- 14.49 We received 30 responses to this suggestion. 18 agreed, including six planning authorities, the Planning Inspectorate ("PINS"), the Law Society, PEBA, and the NAPE Management Committee ("NAPE"). NAPE commented as follows:

This is a particular area of control where uncertainty currently exists. Developers/public will contact the LPA asking whether or not permission is needed for the display of an advertisement, but there is no formal mechanism available to give an 'answer'. This is left to informal opinion by an officer outside of an application process.... A certificate route would reduce uncertainty and, given the fact prosecution could be pursued for an offending advertisement, is important. Whilst it could be argued that it produces another layer it would give LPA certainty and a fee for those applications which it otherwise would not get when giving general feedback.

- 14.50 As for the resources implications, Blaenau Gwent CBC suggested that it did not anticipate this would result in many applications; Rhondda Cynon Taf CBC observed that:

the procedure for applying for certificates of lawfulness generates comparatively few applications as a proportion of the total planning related applications to the Council, therefore the resource implications are unlikely to be significant.

- 14.51 Twelve consultees (including eight planning authorities, POSW and the RTPi) disagreed, largely on the basis that it adds another stream to the process, making it more complicated.
- 14.52 We still consider it important that there should be a straightforward process by which anyone can find out whether consent is required. We accept that this would be an additional procedure for planning authorities, but once uncertainty has arisen it has to be resolved somehow. A certificate procedure is greatly preferable to relying on an informal opinion from an officer; and it should not be significantly more time-consuming. Nor is it preferable to allow the matter to be resolved in the magistrates' court.
- 14.53 If it is argued that it is more expensive to issue a certificate than to give an informal opinion, this is likely to be because the officer will consider the matter less carefully if only offering an informal opinion – which rather supports the case for a more formal procedure, resulting in a certificate on which the applicant can safely rely. In any event, we too consider that there are unlikely to be many applications for certificates under the proposed procedure; and the authority would of course be able to charge a fee for such an application, which it cannot do for answering an informal enquiry.

Recommendation 14-9.

We recommend that:

- (1) a provision should be introduced in the advertisements regulations to enable a certificate of lawfulness to be issued in relation to a display of advertisements; and
- (2) an appropriate enabling provision should be included in the Bill, in line with the approach indicated in Recommendation 14-6.

BREACH OF ADVERTISEMENTS CONTROL

14.54 There are three mechanisms to deal with unauthorised displays of advertising:

- 1) deemed consent is granted for advertisements which have been used for many years;
- 2) a planning authority may be able to remove the display; or
- 3) it can prosecute those responsible.

Deemed consent for advertisements in place for many years

We provisionally proposed that Class 13 in Schedule 3 to the 1992 Regulations be amended to provide that deemed consent is granted for the display of advertisements on a site that has been used for that purpose for ten years, rather than by reference to a fixed date (currently 1 April 1974) (Consultation Question 14-10).

14.55 The first of the three mechanisms above regularises displays that should have been the subject of express consent some years ago, but were not – without the need for any action by either the planning authority or the advertiser. The deemed consent granted by Class 13 can be withdrawn by the planning authority serving a discontinuance notice, but until then, the advertiser can be assured that there will be no prosecution. This mechanism has been in place for a long time; the question is simply what should be the length of the relevant period.

14.56 Until 1987, deemed consent was granted for an advertisement (in England or Wales) that had been in place since 1 August 1948. The cut-off date was then rolled forward to 1 April 1974 – apparently to reflect the date of local government reorganisation. The 2007 Regulations (in England)²⁸ then replaced the reference to a fixed date by a rolling ten-year period, reflecting the rolling period applicable to other forms of planning enforcement provisions, under which unauthorised development is immune from enforcement action after four or ten years.²⁹

²⁸ The Town and Country Planning (Control of Advertisements) (England) Regulations (SI 2007/783).

²⁹ Four years for unauthorised building works, ten years for unauthorised change of use or breach of conditions.

- 14.57 We suggested that a rolling ten-year period was more appropriate than reference to a fixed date, which would inevitably recede into history.
- 14.58 Of the 30 consultees who responded to this proposal, 29 agreed with it. The Law Society described it as “sensible ‘future-proofing’”, and as being consistent with other enforcement provisions. The RTPI suggested that:
- this is a logical approach to take and we welcome the proposed change. The current fixed date of 1 April 1974 has lost all relevance, simply due to the passage of time. The ten-year approach fits well with other current timescales within the legislation.
- 14.59 Only one consultee, Torfaen CBC, objected to the proposal. They argued that the number of advertisements which are put up without consent could mean that granting deemed consent to these could result in problems. While they noted that discontinuance notices could be served, this could require the use of greater resources.
- 14.60 We remain convinced that a ten-year period seems sufficient to enable action to be taken. Indeed, even after that period has elapsed, it is still possible to serve a discontinuance notice to bring the deemed consent to an end – and such action is subject to a right of appeal, but no automatic right to compensation.

Recommendation 14-10.

We recommend that Class 13 in Schedule 3 to the 1992 Regulations should be amended to provide that deemed consent is granted for the display of advertisements on or at land that has been used for that purpose for ten years.

Removal of unauthorised advertising

We provisionally proposed that the power (currently in section 224) for the Welsh Ministers to include in Regulations provisions similar to those governing enforcement notices not be restated in the Code (Consultation Question 14-11).

- 14.61 We noted that, in most cases where advertisements are displayed without consent, the principal concern of the planning authority is not so much to punish those responsible as to remove the offending display.
- 14.62 Section 224 of the TCPA 1990 (in common with all its predecessors) provides that regulations may apply the general enforcement provisions of the Act to the control of advertisements, to enable a planning authority to issue an enforcement notice to bring about the removal of any unauthorised advertising.³⁰ However, none of the regulations applying in England or Wales since 1948 have contained such a procedure; other procedures, considered below, have been used instead. We

³⁰ Consultation Paper, para 14.76.

suggested that this procedure is not necessary, and that the enabling powers in the TCPA 1990 need not be restated in the Code.

- 14.63 Of the 30 consultees who responded to this suggestion, 26 agreed with it. Allan Archer expressed support on the grounds that, as proposal 14-12 (below) makes suggestions as to the alternative powers which may be utilised, the provision is likely to remain obsolete. Rhondda Cynon Taf CBC also described it as a “helpful simplification of the powers of planning authorities” in relation to the removal of unauthorised advertisements.
- 14.64 Two planning authorities and the Planning Officers’ Society of South-East Wales disagreed, on the basis that they considered that the proposal would place the burden on authorities to remove unacceptable signage, whereas the offender should be required to remove it.
- 14.65 We consider that, in the case of larger or more valuable advertisements (such as electronic hoardings), the threat of the authority taking action to remove them is likely to cause the advertiser to take the necessary action itself. In the case of less elaborate advertising, a demand from the authority for the advertiser to take action is likely to lead nowhere, with the unauthorised advertisement remaining in place indefinitely. We therefore remain of the view that the only powers that are likely to be of any practical use are those enabling an authority to take direct action and those enabling it to prosecute – both of which we consider below.
- 14.66 The use of enforcement powers, as envisaged by section 224(1) and (2), is thus likely to be of little value, and we are not surprised that no regulations have ever been made to bring them into use.

Recommendation 14-11.

We recommend that the power (currently in section 224(1) (2) of the TCPA 1990) for the Welsh Ministers to include in Regulations provisions similar to those governing enforcement notices should not be restated in the Bill.

Removal of advertisements

We provisionally proposed that the powers currently in section 225 of the TCPA 1990 and in section 43 of the Dyfed Act 1987 be replaced with a new single procedure allowing the removal of any unauthorised advertisements, subject to: (1) no advertisement being removed without notice having first been given to those responsible; (2) a right of appeal being available against the notice; (3) compensation being payable for damage caused by the removal of the advertisement; and (4) protection for statutory undertakers to be afforded (Consultation Question 14-12).

- 14.67 At present, section 225 of the TCPA 1990 allows any planning authority to “remove or obliterate placards and posters”. But it does not allow the removal of the hoardings or other structures to which the posters or placards are attached.

- 14.68 Section 43 of the Dyfed Act 1987 provides additional powers for planning authorities in areas of special control and conservation areas in the former county of Dyfed (now Ceredigion, Carmarthenshire and Pembrokeshire).³¹ In such areas, the authority can remove any unauthorised advertising, other than a poster or placard (covered by section 225 of the TCPA 1990).
- 14.69 We described these procedures in the Consultation Paper, along with section 225A of the TCPA 1990, which applies only in England and allows a planning authority to remove any structure used for the purpose of the display of advertisements which do not have consent under the advertisements regulations.³² We observed that there was clearly a need for planning authorities to be able to remove unauthorised advertisements. But the existing powers available in most of Wales, other than parts of West Wales, are limited to the removal (or obliteration) of posters and placards – they do not enable the removal of the structures used for their display. In England and in West Wales, by contrast, it is possible to remove any unauthorised “advertisement” – in the broadest sense of that term.
- 14.70 We therefore suggested replacing the existing provisions in section 225 of the TCPA 1990 and section 43 of the Dyfed Act 1987 by a single procedure allowing for the removal or obliteration of **any** advertisement displayed without consent or in breach of conditions attached to consent, subject to provisions on notices, rights of appeal, compensation and protection for statutory undertakers.
- 14.71 Of the 28 consultees who responded to this proposal, one community disagreed, without giving any reasons; all the others agreed.
- 14.72 The Law Society suggested an additional ground of appeal against such a notice, that consent should be granted for the offending display (equivalent to a ground (a) appeal against an enforcement notice).³³ In the Consultation Paper we suggested that, as with the existing procedure under section 225A in England, the appeal should be to the magistrates’ court, and limited to technical grounds (principally relating to the lawfulness of the display, and the service of the notice). Since an appeal to PINS, possibly including an additional ground as suggested, it would be more likely to be used as a means of delaying the removal.
- 14.73 Two authorities suggested that the proposal to require a 21-day period to elapse before taking action would be ineffective in the case of fly-posting. We recognise the need for rapid action in some cases, and consider that it would be possible to allow a shorter period of, say, two days in the case of posters and placards, and 21 days in other cases – in effect retaining the features of both the existing regimes – on the grounds that the removal or obliteration of a poster or placard which requires a rapid response, and the advertiser can always replace it if appropriate, whereas the removal of a billboard is a more major operation.

³¹ The county of Dyfed was created on 1 April 1974, as an amalgamation of Cardiganshire, Carmarthenshire and Pembrokeshire. It was abolished on 1 April 1996.

³² Consultation Paper, paras 14.75-14.82.

³³ See **paras 12.88 to 12.96**.

- 14.74 The RTPI also noted that the section 225 procedure is relatively quick, and normally achieves a positive result with little paperwork involved, whereas the new procedure would be more drawn-out, with a right of appeal.
- 14.75 Torfaen CBC pointed out that there would need to be appropriate powers to enable planning authorities to enter land.
- 14.76 On reflection, rather than a single procedure as proposed in the Consultation Paper, we consider that it would be more straightforward:
- 1) to restate in the Bill, unamended, the provisions currently in section 225 of the TCPA 1990, allowing the removal or obliteration of unauthorised posters and placards (with no right of appeal), and
 - 2) to introduce alongside them a new procedure equivalent to that available under the Dyfed Act (and under section 225A in England) to allow the removal of other unauthorised advertisements, with a right of appeal to the magistrates' court.
- 14.77 We have formulated our recommendation accordingly.
- 14.78 As for the resource implications of this proposal, the new power to remove advertisements would be entirely discretionary. Further, the mere threat of an unauthorised hoarding being removed is likely to lead to it being removed by the advertiser in many cases. The new procedure would therefore probably not be much used in practice – so as to involve an authority actually removing advertisements, as opposed to merely threatening to do so. We therefore do not consider the resource implications would be major.

Recommendation 14-12.

We recommend that the powers currently in section 43 of the Dyfed Act 1987 (removal of other unauthorised advertisements) should be replaced with a new procedure, applying to all areas in Wales, allowing the removal of any unauthorised advertisement other than a poster or placard, subject to:

- (1) no advertisement being removed or obliterated without 21 days' notice having first been given to those responsible;**
- (2) a right of appeal being available to recipients of such a notice and to owners and occupiers of the site of the offending advertisement – on grounds relating to the lawfulness of the advertisement, the service of the notice, and the time for its removal;**
- (3) compensation being payable by the planning authority for damage caused to land or chattels by the removal of the advertisement (other than damage to the advertisement itself); and**
- (4) protection for statutory undertakers to be afforded in similar terms to section 225K of the TCPA 1990).**

Prosecution

We provisionally proposed that the maximum sentence on conviction for unauthorised advertising be increased to an unlimited fine (Consultation Question 14-13).

- 14.79 Those who display advertisements without the necessary authorisation commit a criminal offence under section 224(3) of the TCPA 1990, punishable by a fine on summary conviction. We suggested in the Consultation Paper that the power to prosecute – rather than merely to take enforcement action – exists as a result of the ease with which advertisements may be erected, the substantial financial benefits accruing to those responsible,³⁴ and the cost to planning authorities of bringing about their removal.
- 14.80 However, we noted that the level of fines imposed as a result of prosecutions for unauthorised advertisement have substantially fluctuated since their introduction under s 32(3) of the TCPA 1947 – from a low of around £350 (at today’s values), just before the introduction of the standard scale, up to £3,730, and now down to £2,500.³⁵ And it is 25 years since the last order was made increasing the fine at each level on the standard scale, so the maximum fine is likely to continue to fall in real terms.³⁶
- 14.81 By way of comparison, the penalties for other offences under the TCPA 1990 – the carrying out of unauthorised works to a listed building and the felling of a protected tree – used to be a maximum fine of £20,000 on summary conviction and an unlimited fine on indictment.³⁷ Since 2015, the penalty in each case is an unlimited fine, either on summary conviction or on indictment.³⁸
- 14.82 We therefore proposed that, for future offences, the maximum fine be replaced by an unlimited one. We suggested that this would be more appropriate, especially for offences committed by corporate defendants.
- 14.83 Of the 33 consultees commented on this proposal, 31 agreed with it, largely without further comment. The RTPI described how:
- excessive time and resources are used to take prosecution proceedings, with the result being a small fine. This proposal will potentially deter larger companies from undertaking unauthorised advertising. For some companies the displaying of unauthorised advertisements is lucrative. The additional income raised normally far exceeds any current maximum fine given.
- 14.84 Huw Williams (Geldards LLP) also agreed that “the penalties should be consistent with other planning enforcement crimes”.

³⁴ Consultation Paper, para 14.75, fn 43

³⁵ Consultation Paper, para 14.86.

³⁶ Consultation Paper, para 14.86.

³⁷ Listed Buildings Act 1990, s 9(4); TCPA 1990, s 210(2).

³⁸ Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015 (SI 664), Sch 4, paras 18, 19.

- 14.85 Two consultees disagreed with the proposal. Both the Theatres Trust and the Canal & River Trust suggested that increasing the potential sentence for such convictions could result in the imposition of disproportionate fines. The former suggested that “many instances of unauthorised advertising are undertaken unknowingly, particularly where they relate to community and voluntary groups”, and that a degree of discretion should be reserved for such offenders.
- 14.86 We agree that, in some cases, unauthorised displays of advertisements are the result of ignorance of the law, particularly in the case of individuals and community groups. But it would rarely be expedient for an authority to mount a prosecution in such a case. In any event, the amount of the fine actually imposed in any particular case will be determined in accordance with normal criminal sentencing principles, which enable the court to take into account all the circumstances of the particular case.

Recommendation 14-13.

We recommend that the maximum sentence on conviction for unauthorised advertising displayed on or after the date of the enactment of the Bill should be increased to an unlimited fine.

Policy basis for action against unauthorised advertising

We provisionally proposed that it be made clear on the face of the Bill, rather than (as at present) in the Regulations, that all statutory powers relating to advertising should be exercised in the interests of amenity and public safety (Consultation Question 14-14).

- 14.87 Regulation 4 of the 1992 Regulations provides that a planning authority exercising its powers under the Regulations must do so only in the interests of amenity and public safety, taking into account any material change in circumstances. But that does not apply to functions under the TCPA 1990 – including, in particular, functions relating to enforcement of control against unauthorised signs.³⁹
- 14.88 We suggested that, in practice, functions relating to advertisements, including prosecutions brought under section 224 and removal of unauthorised advertisements under section 225 are generally only exercised in circumstances where they are necessary for reasons of amenity and public safety. And it does not seem appropriate for an authority to bring a prosecution where there is merely a technical breach.
- 14.89 We therefore suggested that the requirement for planning authorities to exercise their functions in the interests of amenity and public safety should be moved from secondary legislation to the Act, so that it would govern all relevant functions, including action against unauthorised advertising.

³⁹ *Kingsley v Hammersmith and Fulham LBC* (1991) 62 P&CR 589 at p 592; see Consultation Paper, paras 14.91 to 14.93.

- 14.90 All 31 consultees who responded to this proposal agreed with it, largely without comment. Huw Williams suggested that the proposal would be a “useful clarification and restatement of the current position”.

Recommendation 14-14.

We recommend that it should be made clear on the face of the Bill, rather than (as at present) in the Regulations, that all statutory powers relating to advertising should be exercised in the interests of amenity and public safety.

MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS

- 14.91 In our Consultation Paper, we identified three areas of the law which were partially or wholly obsolete and suggested that they not be included in the Code. Our proposals were as set out below.

Advisory committees and tribunals

We provisionally proposed that the provisions in section 220 of the TCPA 1990 relating to advisory committees and tribunals not be included in the Code (Consultation Question 14-15).

- 14.92 Section 220(2)(d) of the TCPA 1990 provides that advertisements regulations may provide for special advisory committees and independent tribunals to determine appeals in place of the Welsh Ministers.⁴⁰ We noted in our Consultation Paper that no such provision has ever been made, either in England or Wales, in the seventy years since its first appearance.⁴¹ We therefore proposed that the provision be removed.⁴²
- 14.93 The 29 consultees who responded to this proposal unanimously agreed with it, almost entirely without comment. PINS noted that:

In view of the role administered by the Planning Inspectorate on behalf of the Welsh Ministers there would appear to be no need for provision to be made for special advisory committees or independent tribunals.

Recommendation 14-15.

We recommend that the provisions in section 220 of the TCPA 1990 (relating to advisory committees and tribunals) should not be included in the Bill.

⁴⁰ TCPA 1990, s 220(2)(d), (4).

⁴¹ Note that it was originally set out in the TCPA 1947, s 31(1)(e), (2).

⁴² Consultation Paper, para 14.96.

Experimental areas

We provisionally proposed that the provisions in section 221(1)(b), (2) of the TCPA 1990 relating to experimental areas not be included in the Code (Consultation Question 14-16).

- 14.94 Section 222(1)(b) provides that advertisements regulations may make special provision for deemed consent to be given for the display of advertisements in “experimental areas”. In our Consultation Paper, we noted that only one such “experimental area” had been designated, for a two-year period from 1987 to 1989.⁴³ After the period had lapsed, the area was not renewed, and the relevant class of deemed consent was accordingly withdrawn. Since then, section 221(1)(b) has remained unused; we accordingly suggested that it should not be restated in the Code.
- 14.95 Of the 29 consultees commenting on this proposal, 28 were in agreement, with PINS suggesting that there was no “need or justification for them”, and Huw Williams (Geldards) describing the provision as “falling into desuetude”.
- 14.96 Accessible Retail opposed the recommendation, arguing that it is valuable to have a mechanism to enable new ideas to be tried out. We can see the attraction of this in theory, but consider that it is very unlikely that this power would ever be used in practice.

Recommendation 14-16.

We recommend that the provisions in section 221(1)(b), (2) of the TCPA 1990 relating to experimental areas should not be included in the Code.

Compensation for removal of advertisements

We provisionally proposed that section 223 of the TCPA 1990, providing for the payment of compensation in respect of the costs of removing advertisements on sites that were in use for advertising in 1948, should not be included in the Code (Consultation Question 14-17).

- 14.97 Compensation is not normally payable when the use of a site for advertising has to be discontinued, or when a particular advertisement has to be removed. However, we noted in the Consultation Paper that it may be possible to claim very limited compensation in certain cases, where the site in question was being used for advertising on 1 August 1948, or the particular advertisement was being displayed on that date, under section 223 of the TCPA 1990.⁴⁴ In either case, it does not matter what happened in the years between 1948 and the date on which the removal or discontinuance has to take place.

⁴³ The area was in Kent: see Consultation Paper, para 14.99.

⁴⁴ The significance of that date is that that was when the first advertisements regulations came into effect in (England and) Wales.

- 14.98 Further, the amount that can be claimed is very limited. It is restricted to expenses reasonably incurred in discontinuing the advertising (or removing the advertisement, as the case may be).⁴⁵ It does not, in particular, extend to loss of income from the use of the site for advertising – which may, in the case of a prominent site, be considerable. There has never been any compensation for such loss under the Regulations.
- 14.99 In the Consultation Paper, we suggested that few, if any, claims for compensation are now made under section 223.⁴⁶ We therefore provisionally considered that it need not be restated in the Bill.
- 14.100 Of the 30 consultees responded to this proposal, 29 agreed, largely without comment. PINS agreed in principle, but expressed concern that “it may be seen as prejudice if the right to make a claim was no longer available”.
- 14.101 However, the entitlement to compensation under this provision was only ever designed to protect landowners who were displaying advertisements in 1948, when the present system of control came into existence. Preserving this entitlement some seventy years later seems anomalous.

Recommendation 14-17.

We recommend that section 223 of the TCPA 1990, providing for the payment of compensation in respect of the costs of removing advertisements on sites that were in use for advertising in 1948, should not be included in the Bill.

⁴⁵ TCPA 1990, s 223(1).

⁴⁶ Consultation Paper. paras 14.102 to 14.103.

