

THE LONDON OLYMPIC GAMES AND PARALYMPIC GAMES (ADVERTISING AND TRADING) (ENGLAND) REGULATIONS 2011:

GUIDANCE ON REVERSE BURDEN DEFENCES

1. The London Olympic Games and Paralympic Games Act 2006 (the “Act”) provides for the making of regulations about advertising and trading in the vicinity of London 2012 Games events.¹ Regulations for England – the London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations 2011 – were made on 1 December 2011 and are available on the [official website of UK legislation](#) (the “Regulations”). It is an offence to contravene the Regulations.²
2. In the course of Parliamentary debate on the draft Regulations, the Minister for Sport and the Olympics agreed to issue guidance on two reverse burden defences that apply to the Regulations.³ This is that guidance. It relates only to the defences that apply in the case of a contravention of the Regulations. It does not relate to other reverse burden defences that apply to different offences or to reverse burden defences generally.

Defences

3. Any person charged with contravening the advertising regulations has a defence if they prove that the contravention occurred:⁴
 - (a) without their knowledge, or
 - (b) despite them taking all reasonable steps to prevent it from occurring or (where they became aware of it after its commencement) from continuing.
4. There is a similar defence for some people charged with contravening the trading regulations. A person is treated as contravening the trading regulations if:⁵
 - (a) unlawful trading activity is undertaken by a business in which a person has an interest or for which the person is responsible, or
 - (b) unlawful trading activity takes place on land that a person owns, occupies or manages.
5. But it is a defence for such a person to prove that:⁶
 - (a) the trading activity took place without their knowledge, or
 - (b) they took all reasonable steps to prevent the trading activity taking place or, where it has taken place, to prevent it continuing or recurring.

¹ See sections [19](#) and [25](#).

² See sections [21\(1\)](#) and [27\(1\)](#) of the Act.

³ [Hansard, First Delegated Legislation Committee, 1 November 2011, Col 8](#).

⁴ See section [21\(2\)](#) of the Act.

⁵ See regulation [13\(3\)](#).

⁶ See regulation [13\(4\)](#).

Standard and burden of proof

6. The legal burden of proving the advertising and trading defences is borne by the accused. That means that an accused person will only benefit from either defence if they adduce sufficient evidence to prove the defence on a balance of probabilities.
7. “Balance of probabilities” is the same burden as that placed on a claimant in a civil action and is a lesser burden than that usually borne by the prosecution in criminal cases (i.e. “beyond reasonable doubt”). “Balance of probabilities” has been summarised by the court in the following way:⁷

“If the evidence is such that the tribunal can say: “We think it more probable than not”, the burden is discharged, but, if the probabilities are equal, it is not.”

What must an accused prove to satisfy either defence?

8. The advertising and trading defences are similar to longstanding defences that apply under general advertising and trading laws.⁸ The High Court has indicated that the reverse burden nature of the general advertising defence is justified:⁹

“It does, on the face of it, seem to me reasonable and proportionate to place a burden on a person whose trade or business is being given publicity by such advertisements. As this case shows, there is a real public interest in controlling such advertisements. Enforcement again, as this case suggests, is difficult. It is, on the face of it, easy enough if the burden of proof is on the balance of probabilities for a defendant to prove that he does not know of, or consent to, the display of such advertisements.”

9. The Appellate Committee of the House of Lords has also said that it should not be hard for the accused to make out the general advertising defence in circumstances where it truly applies:¹⁰

“It is true that the burden of proving this defence is placed on the defendant but it should not be difficult to discharge in a genuine case.”

Of course, the court must be satisfied with the evidence presented by the accused.

10. The evidence necessary to prove either of the defences will vary from case to case and will depend on the particular facts of each case. Evidence that establishes the defence in one set of proceedings might not be sufficient to establish it in another. In each case, it will be for the court to decide whether, in the light of all the circumstances, the evidence that has been adduced by the accused is sufficient to

⁷ *Miller v Minister of Pensions* [1947] 2 All ER 372, 374 per Denning J.

⁸ See, for example, section [224\(5\) and \(6\)](#) of the Town and Country Planning Act 1990 and [paragraph 10\(2\) of Schedule 4](#) to the Local Government (Miscellaneous Provisions) Act 1982.

⁹ [Barking and Dagenham London Borough Council v Christodoulou](#) [2003] EWHC 1662 (Admin), paragraph 28 per Goldring J.

¹⁰ *Porter v Honey* [1988] 3 All ER 1045, 1048 per Lord Griffiths. This case concerned the predecessor to section [224\(5\) and \(6\)](#) of the Town and Country Planning Act 1990 – the proviso to [section 109\(3\)](#) of the Town and Country Planning Act 1971.

make out the defence. For that reason, it is not possible to give a definitive inventory of evidence that, if adduced, would prove the defence in every case.

9. However, the following is a non-exhaustive list of types of evidence that (if available) may be relevant to the court's decision whether a defence has been established in a particular case. To reiterate: whether any or all of the following evidence is sufficient to prove the defence in a particular case is a question for the court hearing that case, having regard to all the circumstances. As such, it may be that the defence will not be proven to the court's satisfaction even though some or all of the following evidence has been adduced:

- Internal documents about a business's advertising or trading activities, including (for example):
 - contracts with, and / or instructions to, external agents engaged by the business (e.g. advertising agencies, agents that undertake trading activity on a business's behalf, etc),
 - minutes or other documents showing how particular advertising or trading decisions taken by the business were made,
 - information as to the business's past and usual advertising or trading practices,
 - advertising or trading policies, procedures or standards implemented by the business,
 - evidence about steps taken by the business to ensure that its advertising or trading activities comply with the law,
 - information about any steps taken by the business once it became aware that its advertising or trading activities contravened the law.
- Evidence as to the land on which advertising or trading activity takes place, including (for example):
 - information as to whether the land is actively managed by its owner or manager,
 - contracts with, and instructions to, any agents engaged by the owner of the land to manage or otherwise deal with it,
 - evidence of any steps taken by the owner or manager of the land to ensure that it is not used for advertising or trading activities in contravention of the law,
 - information about any steps taken by the owner or manager of land once they became aware that it was being used for advertising or trading activities in contravention of the law.