

Welcome to our round up of key licensing issues and developments. This month, the often strict licensing controls in Westminster are facing adverse press coverage in relation to the decision to 'pull the plug' on a concert in Hyde Park.

Yet again, in a month where licensing is hitting the headlines, this seems to be a bumper issue, as there are numerous changes on the horizon for operators across the leisure and retail industries. Highlights include:

- Suspensions of Premises Licences for overdue annual fees. Councils have been required to suspend Licences for non-payment of annual fees since 26 April this year. It is imperative that your annual fee payments are scheduled and paid on time to ensure continuity of trade.
- The Late Night Levy – Proposed levy amounts have now been published and the levy provisions are due to come into force on 31 October 2012, although the required consultation will mean that the earliest date a levy could be introduced is likely to be June 2013. The proposed exemptions are very narrow and will not apply to the vast majority of operators. If your Licence allows sales of alcohol between midnight and 6am and the Local Authority introduces a levy for some or all of those hours, you will be caught – where implemented, the levy will apply to the whole of a Local Authority Area and to both on and off sales. Your annual levy liability will be between £299 and £4440, depending upon the rateable value of your premises and whether or not you are used exclusively or primarily for the sale of alcohol.
- Early Morning Restriction Orders – also likely to be in force from October. If a Local Authority decides to impose an "EMRO" in an area where your premises are situated, this will prevent alcohol sales during the specified period, which can be anywhere from midnight to 6am. It is proposed that there will be no exemptions to EMROs whatsoever, but an EMRO will not apply to the whole Local Authority area so its applicability to your premises will depend on where the 'line' is drawn.
- The late night levy and EMRO provisions could lead to increased costs and/ or reduced revenue, if the measures prove popular amongst Authorities. Any Local Authority could elect to introduce one, or even both, of these measures. For example, if your Licence allows the sale of alcohol until 3am and your Authority introduces a levy for sales between midnight and 2am and an EMRO in your area from 2am to 6am, you will face a double whammy – you will need to pay to operate until 2am and your sales for the last hour will be lost.
- Operation Condor – On the weekend of 29 June to 1 July further Licensing and SIA Inspections across London were carried out on a wide scale, in a repeat of a very similar operation in February. 4,896 premises were visited during the course of the weekend. 658 breaches were identified and there were 420 arrests. The repeat of Operation Condor highlights the importance of robust due diligence and staff briefings/ training on potential enforcement visits. It is proof, if proof were needed, that unannounced inspections and test purchases can and do take place. It is unlikely that targeted operations such as Condor will be restricted to the Capital for long.
- A Draft Code for Age Restricted Products and Services - published by BIS (dealing with the sale of items such as tobacco, alcohol, knives and fireworks). The Code is aimed at Local Authorities and other enforcement agencies. From a responsible operator's perspective, the benefits of the Code are that it stresses the principles of 'good regulation' i.e. that it should be proportionate, consistent, accountable, transparent and targeted. If you wish to respond to the consultation to give an industry perspective, you have until 28 September 2012.
- Early indications that Primary Care Trusts are flexing their muscles as Responsible Authorities under the Licensing Act (a role they have had since April this year). There are already a number of reports of objections to Licence applications from health bodies. Perhaps the most notable is the alleged objection by NHS Cumbria to a Licence application for a new supermarket on the basis that alcohol should be kept separately and served through separate tills.
- Westminster City Council's announcement that they will now be charging for pre-application advice from Environmental Health with regard to applications under the Licensing Act 2003. The proposed level of these charges is over £1,100 for a 'large' application.



Unless you are confident that your procedures would stand up to an enforcement operation such as “Operation Condor”, contact us for audits, advice on procedures and policies and/ or training. Equally, if you have failed a test purchase or inspection and need assistance for any subsequent meeting, interview, prosecution or Licence review, we can help.

We can also assist if you need any advice on the effect of the proposed changes in licensing to your business, or if you want to vary your licences in due course to avoid liability to pay the levy.

### Suspension of Licences for Non-Payment of Annual Fees

Since 26 April 2012, Councils in England and Wales have been required to suspend Premises Licences where annual fee payments fall overdue. If a Licence is suspended, there is no authority to provide licensable activities and you must therefore stop selling alcohol, providing regulated entertainment and late night refreshment unless and until the annual fee payment is received by the Council. Where Councils have no facilities to accept payments made by card, even making the payment to restore authority can be logistically challenging.

Many operators are now feeling the bite of the suspension provisions where there are overdue annual fees. However, it is important to note that Licences can only properly be suspended for annual fees which fell due after 26 April 2012. Historic overdue payments are still recoverable only as a debt. It seems that not all Councils are aware of this and they are therefore, incorrectly, chasing fees for previous years with the threat of suspension. A number of Councils are seeking to suspend licences for historic annual fees which fell due before the provisions came into force. In such circumstances, often different operators held the relevant Licence(s) and they therefore owe the historic debt, but for practical reasons to ensure continuity of trade the existing licence holders make the payment in accordance with the suspension notice.

In addition to errors with historic overdue fees, administration failures within the finance departments of some Authorities, are leading to suspension notices being issued where the relevant fee has in fact been paid. In such circumstances, Licence holders have little choice but to pay up to protect continuity of trade and sort the duplicate payment out afterwards.

It is also an on-going concern that annual fee payment requests / invoices issued by Councils are often incorrectly addressed or late. As advised in our last issue, the only way you can protect against national inconsistencies in requests for annual fee payments is to ensure you schedule and meet all annual fee payment dates going forward and retain proof of payment.

### Late Night Levy– 31 October Commencement – What will your Liability be?

The Government has published draft Regulations setting out the proposed charges that will apply if a Licensing Authority elects to introduce a late night levy in their jurisdiction. The Regulations are due to come into force on 31 October 2012 and will empower Councils to charge an additional levy to businesses that supply alcohol in the ‘late night supply period’ (which can be anywhere between midnight and 6am at the discretion of the Council). The purpose of the levy is to help pay towards the costs of policing the late night economy and 70% of the net revenue must go to the police. The levy is effectively an additional tax on late night businesses.

If a Licensing Authority decides to introduce a levy, it will apply to the whole Local Authority area, not just City centres, or ‘hot-spots’. All licensed premises with Licences that allow the sale of alcohol during the relevant times will therefore be affected, including both on-licences and off-licences. It is irrelevant whether the premises trades the hours that the Licence allows - the mere fact that there is a Licence in force which authorises sales of alcohol during the proposed ‘late night supply period’ means that the levy will be payable.

It is intended that the levy due for each relevant Licence will depend on the rateable value of the licensed premises, although an additional levy is due where premises in the top two brackets are exclusively or primarily for the sale of alcohol:

Rateable Value (£)	Up to 4,300	4,301 to 33,000	33,001 to 87,000	87,001 to 125,000	125,001 and above
Annual Levy – Standard (£)	299	768	1,259	1,365	1,493
Annual Levy – Exclusively or Primarily for Sale of Alcohol (£)	299	768	1,259	2,730	4,440



Before introducing a levy, any Licensing Authority is required to consult the police, licensed premises and other relevant parties. The Home Office therefore anticipates that the earliest date a levy could be in force following the consultation would be in June 2013 (see the Home Office factsheet at <http://www.homeoffice.gov.uk/publications/alcohol-drugs/alcohol/alcohol-proposals-factsheet/late-night-levy>). If you do respond to the consultation, please send us a copy so that we can also include your views in our response. Alternatively, contact us if you would like us to respond on your behalf.

It is, as yet, unclear whether there will be a wide take up of the power by Authorities, although some Councils are seemingly already calculating the revenue that a late night levy will raise in their jurisdiction (the Publican's Morning Advertiser has reported that Northampton Borough Council have claimed they could raise more than £160,000 by implementing the measure).

There will be certain categories of premises that can be exempted from the levy at a local level. Regulations on the exemptions have not yet been published, but all indications are that the categories will be very narrow. The Home Office's Consultation response indicates that the only possible exemptions will be premises with overnight accommodation (but only where Licences are restricted to sales to residents between the relevant times); theatres and cinemas (where sales are restricted to ticket holders or participants only); bingo halls with a membership scheme; community amateur sports clubs; country village pubs; and premises in Business Improvement Districts. New Year's Eve will, however, be included as a discretionary exemption.

If a levy is introduced in your area and your premises are caught, it will be possible to vary the hours on your Licence to avoid liability for the levy. This may be an attractive option if you are licensed for later hours than you usually trade just for flexibility. It is proposed that for any such variations, the Council fee will not be payable. Further, if the variation relates to the reduction of hours only, it will be a minor variation and there will therefore be no requirement for a newspaper advert. However, the draft regulations do not include provision for a 'rebate' of a levy already paid if hours are voluntarily reduced after the imposition of the levy.

If you wish to retain your licensed hours, your liability for the levy may be reduced if you participate in best practice schemes. Again, Regulations are yet to be published, but the Home Office's Consultation response indicates that Licensing Authorities will be able to offer a discretionary reduction of up to 30% in relation to best practice schemes such as Pubwatch and Best Bar None, where those schemes meet relevant criteria, which it seems will again be at the discretion of the Licensing Authority.

## Early Morning Restriction Orders – Will You be Affected?

Early Morning Restriction Orders ("EMROs") will enable Licensing Authorities to restrict the sale of alcohol in the whole or a part of their area for any specified period between midnight and 6am. The Home Office has indicated that EMROs will come into force in October 2012, in all likelihood at the same time as the Levy.

Following the Consultation on EMROs, it appears that there will be NO exemptions from EMROs at all. Therefore, if your business falls within an EMRO area, you will be prevented from selling alcohol, regardless of the hours specified on your Licence. However, it is proposed that EMROs will not apply on New Year's Eve.

If your Local Authority proposes to introduce an EMRO, they will be required to notify all holders of Licences in the proposed EMRO area. They will also be required to publicise the EMRO on their website and in their local newspaper. You will have 42 days to make relevant representations, so don't put the notification into the 'tomorrow' pile if you want to object! Contact us if you receive notification of an EMRO in your area and you would like assistance with any representation.

## Operation Condor – Licensing and SIA Inspections across London – Again!

We reported in our March review that in February 2012, Operation Condor took place, with around 5,000 licensed premises visited in and around London over the course of a weekend. It is now apparent that Operation Condor was repeated on the weekend of 29 June to 1 July.

The Met police's website confirms that "Operation Condor began at 8am on Friday 29 June and went throughout the weekend ending on Sunday 1 July. Activity took place in all 32 London boroughs as part of a massive crack-down on licensing."

It seems Condor was indeed a 'massive' operation. Their website details that "In the first day of activity there were 2,525 venues visited and 133 arrests. Condor was first launched in February and over two days 4,896 licensed premises were visited. These consisted of venues such as pubs, off-licences, cafes, shops, fast food outlets and entertainment venues. In Lambeth 200 premises were checked to ensure owners were operating within the licensing law. Two of these premises failing these visits were closed down by police. Officers administered 51 fixed penalty notices for licensing issues."

It is clear from the Met police online report that across the Metropolitan Police Service, 658 breaches were identified and the operation resulted in 420 arrests (including those in Lambeth). It seems that officers were looking for drug taking and other illegal activity inside pubs and checked that alcohol was sold and consumed in line with licensing laws.

In shops and supermarkets, they took action against people selling alcohol, cigarettes and knives to children and those who had not checked correctly the history of second hand goods for sale.

The Morning Advertiser reported on 6 July, that as part of the Operation, 400 door supervisors were inspected at 109 venues in a number of London Boroughs, including Westminster, Lambeth and Hammersmith and Fulham. The SIA reportedly also carried out visits in Guildford with Surrey police. The SIA's head of investigation reported finding a number of offences, including door staff working with revoked or expired licences and unlicensed supervisors.

### Age Restricted Products and Services – Code of Practice for Regulatory Delivery

BIS (the department for Business, Innovation and Skills) has opened a consultation on a draft Code of Practice on age restricted products and services, including products such as alcohol, tobacco, knives, solvents, fireworks and gambling (including lottery). The Code is aimed at Local Authorities and other enforcement agencies and relates to all local regulatory activities, compliance and enforcement activities.

From a responsible operator's perspective, the benefits of the Code are that it stresses the principles of 'good regulation' (as set out in the Legislative and Regulatory Reform Act 2006) i.e. that regulation should be proportionate, consistent, accountable, transparent and targeted. The draft Code is divided into 4 parts, being prioritisation and targeting; working with businesses and communities; conduct of checks on compliance; and responses to non-compliance.

The draft Code appears to emphasise the importance of enforcement agencies and the policies of those agencies, being open and based on risk. This will no doubt be welcomed by responsible retailers. The principles of the draft Code include the principles that enforcing authorities should:

- assess and prioritise risks in any given area;
- work collaboratively (with other agencies in relation to matters such as public health initiatives and education, as well as enforcement);
- ensure transparency as to enforcement policies and approach;

- where a local authority is acting as licensing authority, have regard to the statutory principles of good regulation when considering licence conditions (the Guidance to the draft Code stresses that standardised conditions should be avoided and conditions should be proportionate);
- provide clear information and guidance on legislation;
- prioritise support to businesses to those in priority risk areas that are least likely to have robust compliance arrangements in place (it should be noted that the Guidance recognises that businesses in a Primary Authority partnership covering age restricted sales are able to receive authoritative advice from their primary authority and as such they will usually represent a low priority for other local authorities);
- ensure information and guidance is clear in relation to acceptable forms of age – PASS cards should be the preferred form;
- target proactive checks (presumably this would include test purchases) on compliance on the basis of a robust risk assessment model – the Guidance notes that this should include consideration of the potential harm of the product/service, the number of young people that might access it, past compliance records, systems for managing compliance, evidence of external accreditation and management competence;
- ensure responses to complaints or intelligence is proportionate;
- select test purchasers with regard to suitability e.g. age, appearance, dress;
- notify businesses in writing of the outcome of a test purchase event (whatever the outcome) – to be sent to the owner of the business and the premises licence holder in the case of alcohol, promptly in the case of a failure (up to 5 working days) and within a reasonable period (up to 10 working days) if purchase is denied; and
- respond to breaches of compliance proportionately and focus on securing ongoing compliance (Guidance notes that responses to 'initial' evidence might include advice or support, partnership working, or agreeing an action plan).





A number of Local Authorities and businesses have contributed their views during the development of the Consultation document. However, the consultation itself is open until 28 September 2012. The consultation is available for download from [www.bis.gov.uk/brdo/publications/current-consultations](http://www.bis.gov.uk/brdo/publications/current-consultations) where you can also complete a response form. Again, if you do respond to the consultation, please send us a copy so that we can also include your views in our response too. Alternatively, contact us if you would like us to respond on your behalf.

Whilst the draft Code is relatively positive for responsible operators, there are a number of items which may potentially be of concern. In particular, the consultation seeks views as to whether test purchasers should be allowed to use 'fake ID'. Depending on the quality of the 'fake', this could unfairly trap responsible businesses and staff members.

In addition, the draft Code allows Local Authorities to consider whether a test purchaser should be permitted to lie about their age when asked. This could be problematic if staff members rely on verbal responses only. However, any responsible operator would train staff to ask for ID as well and therefore, as long as fake ID is not permitted under the final version of the Code, lying should not adversely affect the test purchase result for the majority of retailers with robust policies and training.

Businesses may claim that extended use of test purchases where the test purchaser lies about their age and/ or presents fake ID is entrapment and therefore an abuse of process. However, this may not be the case: Police are allowed to present an unexceptional opportunity to commit a crime, as long as they do no more than this. Alternative arguments may be made that the Police or Trading Standards are acting as an "Agent Provocateur", enticing another to commit an offence they would not otherwise have committed and then prosecuting them. This again is not likely to be relevant as the fact that the offence has only been committed because of the actions of the test purchaser is not a defence.

In relation to both the 'entrapment' and the 'agent provocateur' argument, test purchases have generally been deemed to be acceptable (DPP v Marshall [1988]) on the basis that they aim to

collect evidence of criminal acts in which a suspect is already engaged. The Police/ Trading Standards are, however, only allowed to present an unexceptional opportunity, with test purchasers acting in the same way as any ordinary customer would do. They are not able to incite / induce / lure a person to commit a crime that they would not otherwise commit. It may be considered that giving false information about age and presenting fake ID are the actions of ordinary underage customers when they are seeking to purchase alcohol.

Interestingly, the draft Guidance suggests that the whole question of whether lying about age should be permitted, could be avoided by using people old enough to buy the product to test compliance with mandatory alcohol licence conditions. Presumably this refers to the mandatory condition which requires licence holders to ensure an age verification policy applies to the premises and that the policy must require individuals who appear to be under 18 years, or such older age as may be specified in the policy, to produce ID. If a licence holder operates Challenge 21 or Challenge 25 under their age verification policy, the use of test purchasers over 18 could only serve to highlight breaches of Challenge 21/ 25. Does this unfairly penalise operators who use such schemes as part of robust due diligence to prevent underage sales?

Some good news which will no doubt be welcomed by operators, is the requirement in the draft Code that enforcing authorities must notify the business owner and premises licence holder in writing of the result of any test purchases. In our experience it is a real frustration that most Local Authorities do not advise businesses when they have passed a test purchase operation, only if they have failed.

Notifications of a positive outcome could serve to validate due diligence procedures and may provide valuable evidence on compliance for Licence applications and reviews. Furthermore the draft Code specifies that the notification must include the name of the individual who made/ refused the sale, where known, which will allow operators to better identify training needs, or indeed reward staff who are complying with the law and company policies.

If you need assistance with developing or improving your age verification procedures, or if you have failed a test purchase and need advice and assistance for any subsequent meeting, interview, prosecution or Licence review, we can help.



Primary Care Trusts as Responsible Authorities – Flexing their Muscles?

Since 26 April this year, Primary Care Trusts have been a Responsible Authority under the Licensing Act 2003. As such, they are entitled to receive copies of, and make representations to, Licence applications.

Many believed that Trusts would have little interest in commenting on Licence applications, but it seems that these hopes may well have been misplaced. NHS Cumbria is using its powers to push its view that alcohol should be kept separate to food and soft drinks and should be sold from separate tills. Carlisle News & Star have reported that the public health team, which is consulted on all new licensing proposals, put forward the recommendation in response to an application by a well-known supermarket for a new store, set to open in Carlisle in October. According to the press report, NHS Cumbria’s Associate Director of Public Health said they will do the same with any new supermarket applications.

It has also been reported that the Director of Public Health and Wellbeing in Portsmouth has objected to a Licence application for a small off-Licence (along with other Responsible Authorities) where there has allegedly been a history of underage sales. Furthermore, in other areas of the country, there are reports of objections from Trusts to proposed hours specified in new Licence applications.

Given reports to date, it seems that operators should certainly prepare to face new hurdles as health bodies get to grips with their new powers and role.



Westminster to Charge for Pre-Application Advice

Westminster City Council has announced that it will now be charging for pre-application advice by the Environmental Health Consultation team with regard to licence applications under the Licensing Act 2003.

The ‘packages’ available are as follows:

Application Type	Fee amount
Small Max 2.5 hours of officer time	£178
Medium Max 7.5 hours of officer time including 1 site visit	£518.50
Large Considerable officer time and multiple site visits	£1144.50

Westminster states that the benefits of such advice are:

- Understanding how their policies will be applied to your application
- Identifying the need for specialist input, layout design, acoustic measures, etc
- Assisting in the preparation of an application, which if you follow should be handled effectively without incurring unnecessary delays
- Indicating those proposals that are completely unacceptable, so saving the cost of pursuing an application

Westminster notes that they are entitled to charge under the provisions of the Local Government Act 2003, which does allow Authorities to charge for discretionary services.

Westminster is an extremely experienced Authority with many knowledgeable Officers. There is no doubt that seeking their advice prior to submitting an application is helpful to applicants in the vast majority of cases.

However, the proposed charges raise a number of questions and concerns. Firstly, applicants are generally encouraged to consult with Responsible Authorities before submitting a Licence application. In the majority of cases this facilitates partnership working between operators and regulators, which is beneficial for all.

These charges could discourage such consultation, as it may be tempting from a cost perspective to submit an application without any consultation in advance. Objections from Environmental Health in the representation period are dealt with under statute and are not discretionary, so subsequent negotiations as part of a representation presumably cannot be charged for.

Secondly, from Westminster's perspective, this may be dangerous territory. Their stated 'benefits' of pre-application advice may well lead an applicant to believe that if they pay for and follow this advice, their application stands a better chance of success. Given that they will have paid for this advice, would they look to take action if the application ultimately did not succeed before the Committee?

Clearly, seeking the advice of the EHO cannot prevent objections from other Responsible Authorities or residents. Equally, if there are nuisance problems/ complaints post-grant, despite compliance with the advice of Environmental Health (for example music noise escape even though the operators have implemented acoustic measures agreed with the EHO as part of their pre-application advice), residents may well have an axe to grind with the Environmental Health Service and enforcement could potentially be problematic.

More generally, many businesses may feel that it is not equitable for an Authority to charge for advice on top of payments they already make such as rates, Licence application fees and annual fees, particularly in the current climate. Going forward, Licence fees will be set locally on the basis of cost recovery (it is anticipated that this provision will come into force in 2013), so some question why it is also necessary to charge for pre-application advice now.

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