SQUIRE PATTON BOGGS

Alcohol, Entertainment and Food Insight UK
Licensing Without Hiccups

Spring/Summer 2016

Welcome to another edition rounding up the current key issues and developments for the alcohol, entertainment and food industry. Highlights include:

- Summer Events: Queen's Birthday and Euro 2016 – TENs Needed?
- Tips and Gratuities: Government Consultation
- Sentencing Guidelines
- Alcohol Wholesaler Registration Scheme – Update
- Camden's Draft Licensing Policy – Focus on Public Health a Sign of Things to Come?
- FSA Research: Allergic Reactions From Food
- Tobacco and Smoking Products – New Rules on Manufacture, Presentation and Sale of Tobacco Products, e-cigarettes and Herbal Cigarettes
- Requirements for Toilets in Takeaways and Coffee Shops

If you have any queries about any of the highlights in this month's review, or if you need any advice on your licensing requirements, applications, or procedures, please contact us.

Summer Events – TENs Needed?

There are two events this summer that many businesses may consider extending their opening hours for: the Queen's 90th birthday celebrations; and Euro 2016.

For the Queen's birthday, an Order has been approved automatically extending hours for the sale of alcohol (for consumption on the premises) from 11pm to 1 am daily on the evenings of Friday 10 June and Saturday 11 June 2016. This extension will apply to all premises licences and club premises certificates authorising the sale/supply of alcohol up to 11pm (or later) excluding shops/off-licences. The sale of hot food and/or hot drink will also be permitted during the extended times if you are selling alcohol to consume on site.

Happily for many operators, the extension for the Queen's birthday will also fall on the first weekend of the Euro's and England will be playing Russia at 8 p.m. on the Saturday evening. Wales are also playing earlier that afternoon against Slovakia, so it could well be a celebratory weekend all round, depending on the results!

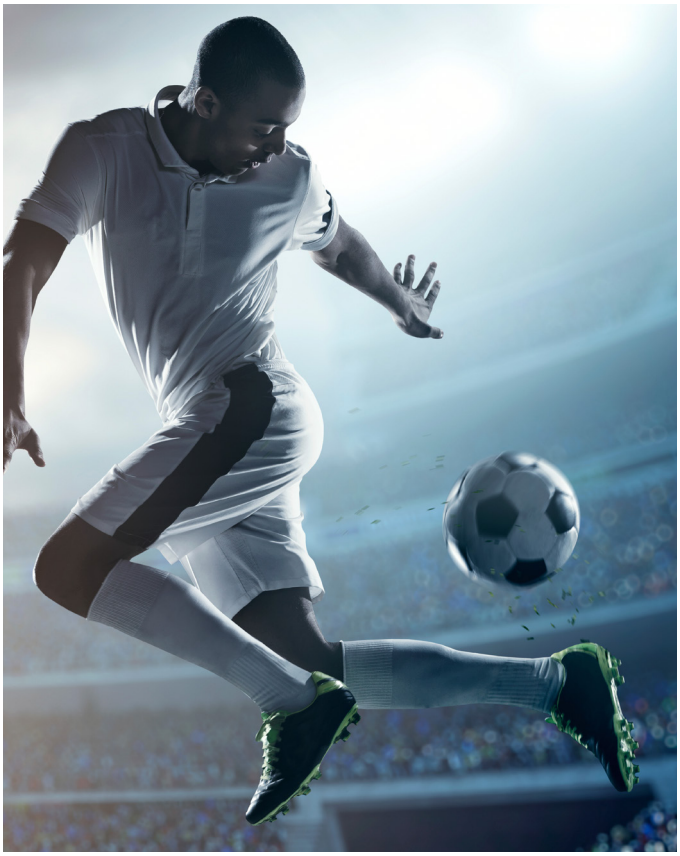
For the rest of the Euros, if you want to open later than usual, you will need to apply for Temporary Event Notices in the usual way. As the host nation is France, there are no late kick-offs (the latest being 8 p.m.) so even with extra time and penalties, the games are unlikely to run beyond 11 p.m. However, if you do want to extend your authorised trading period, we would recommend any applications are submitted as soon as possible. Remember that you need at least five clear working days for a short notice TEN; or 10 clear working days for a standard application. With a short notice TEN, if there is a representation, the application is refused without a hearing, so the more notice you can give the better.

If you are planning on showing some or all of the matches, it may be sensible to:

- Review the conditions on your premises licence, in particular in relation to any maximum numbers, or conditions which may apply when you show televised sporting events.
- Conduct appropriate risk assessments: are additional safeguards required, such as the use of plastic glasses, SIA door supervisors, dispersal arrangements, and/or enhanced ID policy?
- Ensure your CCTV cameras and recording system are in full working order.
- Remind staff to record all refusals to sell alcohol due to age and/or drunkenness.
- Monitor noise from customers, particularly in external areas.

Remember that this year for the first time, the number of permitted temporary event notices per premises per annum is 15 (raised from 12). The change was made under the Deregulation Act 2015.

Let's hope business is good this summer and the home nations bring back the silverware!



Tips, Gratuities and Service Charges: Government Consultation

The government is currently consulting on the treatment of tips, gratuities, cover and service charges (which they term as "discretionary payments for services") to ensure that it is fair and transparent for customers and employees. Depending on the results of the consultation, businesses in the hospitality and leisure sector, may need to adapt current practices.

There are three broad objectives outlined in the consultation:

- Ensuring transparency to consumers that payments for service are discretionary
- Making sure that workers themselves receive their fair share of payments for service
- Ensuring that it is clear and transparent to consumers and workers in terms of how the payments are treated

A current voluntary Code of Practice provides businesses with guidance on transparency, but submissions to the government's recent Call for Evidence suggest that the Code is not widely used or understood and fails to ensure a consistent level of transparency, according to the Consultation document.

The government is now asking whether businesses should be prevented from suggesting a particular amount or level of payment (e.g. including a "voluntary" service charge on the bill). In relation to fairness for workers, the document references media concerns around workers being charged a percentage of tips as a "handling charge" (usually ranging between 5 – 15%); employers retaining the whole service charge; and workers being required to pay back to their employers a percentage of sales they make. The government does note that since the call for evidence, a number of employers have changed, or shown intention to change, their tipping practices.

However, as the Consultation is proceeding, this perhaps underlines the government's stated commitment to making sure everyone is paid fairly. The options being considered include reviewing and updating the voluntary Code of Practice, or placing it on a statutory basis (which would legally require businesses to "have regard" to the Code).

The Consultation is open for comments until 27 June 2016 and any changes to the regime are therefore some way off, but it may be sensible to measure your practices against the voluntary Code of Practice now, to prepare for changes which may be required in the coming months.

Sentencing Guidelines: Health and Safety, Corporate Manslaughter and Food Safety and Hygiene Offences

Background

In February 2016, definitive guidelines published by the Sentencing Council in 2015, came into force. The guidelines included food safety and hygiene offences and health and safety offences which do not result in death, for the first time (earlier guidelines covered corporate manslaughter and health and safety offences resulting in death only, although fine levels for these offences have also been updated in the new guidelines). For licensing offences, see further below – the 2015 guidelines do not cover licensing offences.

All indications to date are that the application of these guidelines by the courts will almost certainly result in significantly higher penalties for organisations convicted of such offences. They apply to organisations in England and Wales which are sentenced on or after 1 February 2016 (regardless of the date of the offence) and to all individual offenders aged 18 and over.

The guidelines include a number of tables setting out starting points and ranges for sentences for the various offences. For example, large organisations (those with a turnover of £50 million or more) could face fines of up to £10 million for health and safety offences, £20 million for corporate manslaughter, and £3 million for food safety and hygiene offences. It will be at the court's discretion to go above these figures if they consider a case to be exceptional.

The Sentencing Council has published a series of case studies to assist the courts in imposing sentences for the various offences. They consider the steps in the guidelines and the facts that should be taken into account at each of the key steps. They confirm which range and starting point is appropriate but do not actually recommend what fine should be imposed.

There is a case study for organisations convicted of health and safety and more general guidelines for corporate manslaughter offences and for food safety. For food safety and hygiene offences:

- Culpability will be rated low to very high – with very high being "*a deliberate breach of or flagrant disregard for the law*" and low being "*the offender did not fall far short of the appropriate standard*".
- Consideration must then be made to whether there was a low or serious risk of an adverse effect on the individual. For example, a "category 1" harm may have serious adverse effect(s) on individual(s) and/or have a widespread impact.
- The court is then required to focus on the organisation's annual turnover or equivalent to reach a starting point for a fine. Offenders which are companies, partnerships or bodies delivering a public or charitable service are expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status.

It is not yet clear how the courts should treat and define "very large organisations" (i.e. those organisations with a turnover or equivalent that very greatly exceeds the threshold for large organisations) for which the new guidelines state that it may be necessary to move outside the suggested fine ranges to achieve a proportionate sentence. It is likely, however, that the courts will refer to the

environmental case of Thames Water[1] for other regulatory offences, such as those for food safety and hygiene offences, where it was stated that very large companies who are involved in cases of serious [environmental] crime could face fines of up to 100% of the company's pre-tax net profits – even if this results in fines of more than £100 million.

It also remains to be seen whether the new guidelines will help magistrates to impose sentences for these offences and encourage them to retain the less complex cases for sentence, rather than commit them to the Crown Court. This is particularly relevant given that magistrates are now able to impose unlimited fines for serious offences committed on or after 12 March 2015[2] as set out in a previous edition of Licensing Without Hiccups.

Implications for Operators

Given the increase in potential fines for commission of a food safety and hygiene (and/or health and safety offence) the overall approach to risk management by operators and senior management will in our view be increasingly important. Prevention, rather than reaction, will help to minimise the risks of potentially very large fines and improvement in compliance systems before an incident occurs will help to achieve this.

The cost benefit analysis in legal proceedings may ultimately change the way in which prosecutions are dealt with in future and where something does go wrong, companies might now consider defending themselves where they previously might not have (if an offence is successfully defended, the company will not, of course, be sentenced, but sentencing would be inevitable with a guilty plea).

Licensing Offences

The 2015 Sentencing Council Guidelines do not cover licensing offences. These are currently dealt with under the Magistrates Court Sentencing Guidelines from 2008. However, the Sentencing Council is currently consulting on new Guidelines for a number of offences relating to the sale of alcohol (including the sale of alcohol to a child). The draft Guidelines which are the subject of the consultation follow a similar format to the 2015 Guidelines for food safety and hygiene offences, as courts will be required to determine harm and culpability to reach a "starting point". Factors which may be relevant in establishing culpability under the draft include entries (or lack of them) in a refusals log and whether an attempt is made to check ID.

The court should use the starting point to reach a sentence within the appropriate category range in a table. There are a number of aggravating and mitigating factors anticipated, particularly relating to the offender's previous record. There may be a reduction for a guilty plea and the court would be required to take into account the totality principle (where more than one offence) in the normal way for criminal offences. The Consultation opened on 19 May and will close on 16 August 2016.

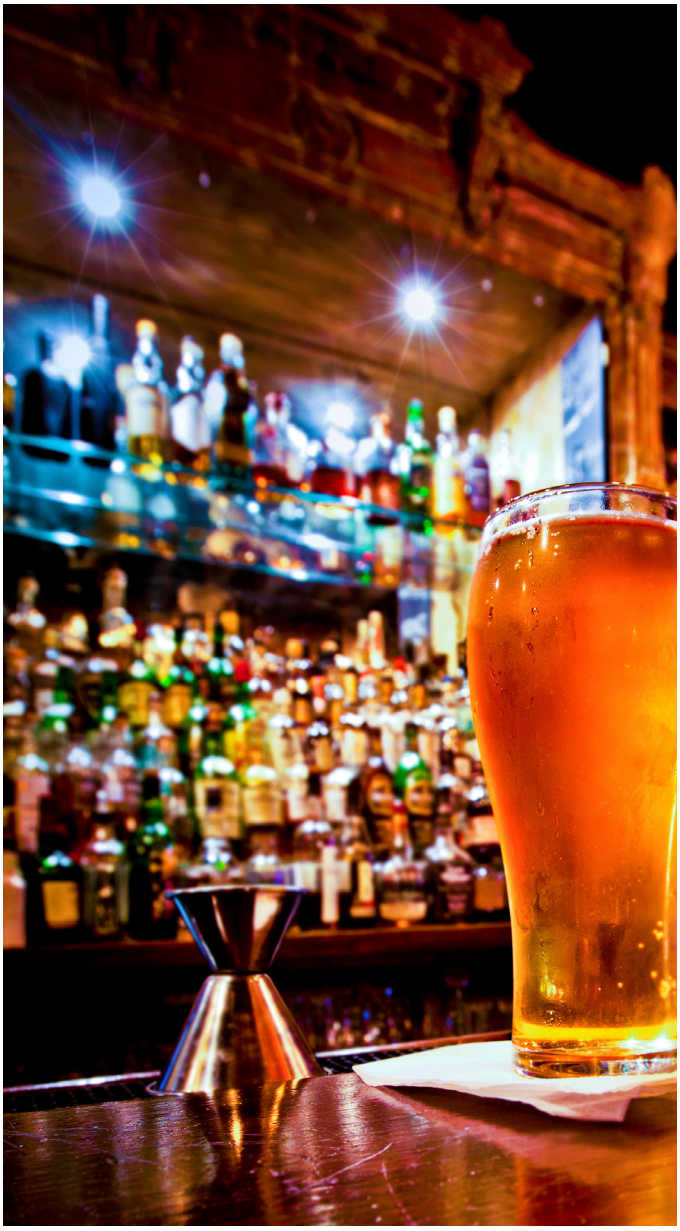
1 *R. v Thames Water Utilities Ltd [2015] EWCA Crim 960 (CA (Crim Div)*
2 Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Alcohol Wholesaler Registration Scheme – An Update

We reported in our last issue on the requirement for existing alcohol wholesalers to apply to HMRC to register for the Alcohol Wholesaler Registration Scheme. By now, all existing wholesalers should be registered.

The key date for businesses which sell alcohol by retail (rather than wholesale) is 1 April 2017. From that date, you will be required to check that any UK wholesalers you buy from are registered under the scheme. It will be an offence to buy alcohol from a UK wholesaler who is not approved after this date, if you know or have reasonable grounds to suspect that they are not an approved person.

If you sell alcohol by retail only, you do not need to register under the scheme, but you may want to remind existing suppliers to register, if they haven't already. If existing wholesale businesses missed the 31 March deadline, they can still apply, but depending on their circumstances may be charged a penalty. New wholesalers must apply for registration at least 45 days before they intend to start trading. Those businesses will not be permitted to trade until HMRC have assured they are "fit and proper".



Camden's Draft Licensing Policy: Focus on Public Health a Sign of Things to Come?

The London Borough of Camden's draft Statement of Licensing Policy for 2017 – 2022 has attracted recent trade press attention because of its focus on public health, despite the fact that public health is not a licensing objective in England and Wales (unlike in Scotland).

We have reviewed the draft Policy and are particularly interested to note that the Council sets out measures they will expect to be considered in the operating schedule regarding health impacts, including consideration of pricing in line with alcohol strength, not advertising in shop windows, or on the shop floor. There are also the "conditions" we have become familiar with the police "proposing" in practice in some areas, including Camden and Westminster, such as a maximum ABV for beer or cider of 5.5% and no single cans or bottles.

It is perhaps surprising that the Council would link measures with public health so explicitly in their public statement of Policy, when it is not a licensing objective. However, in our opinion it does underline the growing trend in practice of local authorities and the police seeking to control alcohol consumption on grounds which are not directly related to the operation of individual premises or the experience and compliance history of the operator, for example by way of conditions seeking to limit strength by volume of beer and cider. These are matters which are perhaps better left to government policy and the market: it is after all not illegal to sell high strength beers and ciders and the elected government have so far declined to introduce minimum pricing in England and Wales. Is it right that local authorities can effectively "legislate" on these matters by the back door for all operators, including demonstrably responsible licence holders?

This development was perhaps inevitable since Public Health was made a responsible authority under the licensing regime two years' ago. In addition to the specific measures suggested for operators in the draft Camden policy, the document makes clear that Public Health, when making representations, will demonstrate a link between health concerns and the **licensing objectives** and may provide information such as ambulance call-outs and admissions to hospital caused by alcohol. Whilst we anticipate that it would be difficult to link such evidence with individual premises, it may be persuasive to Sub-Committees hearing licence applications where cumulative impact policies come into play. It remains to be seen though whether it is evidentially possible to properly link health concerns with the prevention of crime and disorder, the prevention of public nuisance, the promotion of public safety, or the protection of children from harm.

It should be remembered that the Camden policy is a draft at this stage and is still open for consultation. The draft policy may therefore be amended before it comes into force, but we thought it was worth a mention in our update because it underlines the growing focus in practice on commercial matters such as the products you propose to sell, advertising and pricing.

FSA Research: Allergic Reactions From Food

To mark Allergy Awareness Week recently, the Food Standards Agency (FSA) and Allergy UK carried out a survey on allergic reactions from food when eating out. The report from the FSA found that, whilst there has been some improvement, one in four of the survey respondents has suffered a reaction while eating out in a restaurant or cafe since new allergen labelling legislation came into force in December 2014. It also notes that nearly one in five (19%) of those allergic reactions resulted in a hospital visit.

As we have previously reported, the EU Food Information for Consumers Regulation (EU FIC), enforced in England and Wales through the Food Information Regulations 2014, introduced a number of significant changes for the labelling of pre-packed food. It also introduced new rules for the provision of information on non-pre-packed/loose foods, including food sold on deli counters, in pubs, hotels, restaurants, take-aways, cafés; and food supplied by caterers, for example, in staff canteens, at functions or on wedding buffets.

Under the rules in the EU FIC, the 14 food allergens listed (including peanuts, milk, eggs and cereals containing gluten) need to be specifically highlighted to customers. Beer (and other drinks) are classed as food and therefore allergen information should be available for draft beers (allergens for beer may include cereals and sulphites) as well as bottled products where the information is on the label.

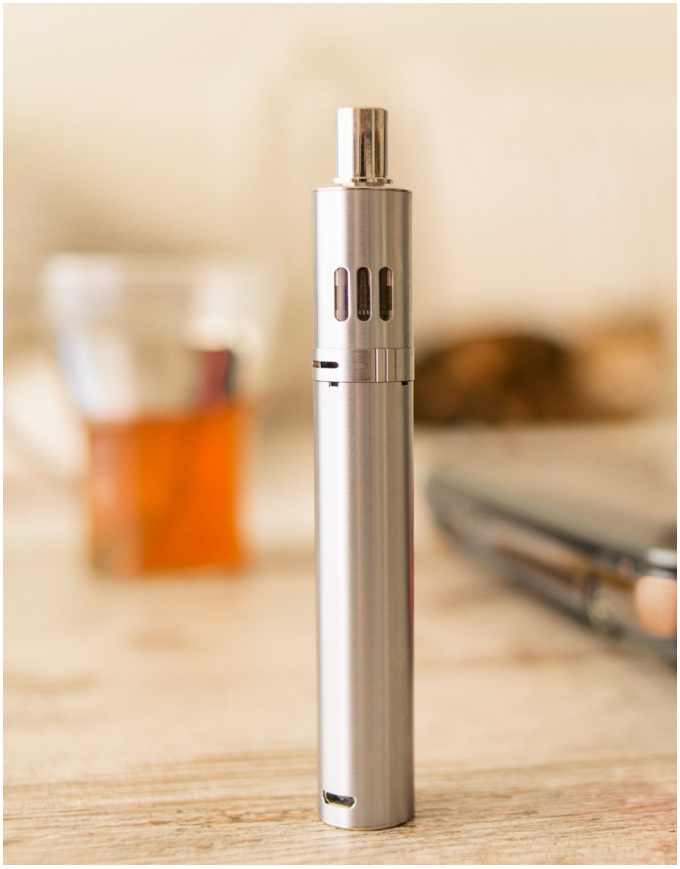
Many businesses selling loose food have reviewed their menus and other means of providing allergen information such as websites, reviewed training needs for staff in relation to allergens, engaged with suppliers as to ingredients and reviewed food preparation measures to ensure compliance. However, the latest research shows that mistakes can still happen. This is underlined by the news this week of the Indian restaurant owner imprisoned for manslaughter after the death of an Indian restaurant customer who suffered an allergic reaction (a severe anaphylactic shock) in January 2014 after eating a takeaway containing peanuts, despite making his allergy known to staff. In that case, the court reportedly heard evidence that cheaper ingredients had been substituted for spices.

The FSA issues Guidance in relation to the provision of allergen information for loose foods. It states that where allergen information is not provided upfront in writing, signposting a customer to where they can get this information is required. This could be, for example, by way of a sign, notice or statement at the till point, on a menu board, or on the menu. For example, a sign might direct customers to ask staff for allergen information (although our advice would be that reliance only on verbal communication might make it difficult to demonstrate effective compliance). It also highlights that businesses should consider any risks of cross-contamination if they claim a food is free from a particular allergen.

Under the Food Information Regulations 2014, the primary enforcement mechanism in England for failure to comply with the EU FIC is Improvement Notices, however, failure to comply with allergen labelling/information requirements for both pre-packed and loose foods may still be dealt with from the outset as a criminal prosecution in the magistrates' court. Clearly, as the recent manslaughter conviction shows, where the failure results in injury or even death, businesses can also be prosecuted under other legislation (and civil claims may also follow).

Tobacco And Smoking Products – New Rules on Manufacture, Presentation and Sale of Tobacco Products, E-Cigarettes And Herbal Cigarettes

New UK regulations governing tobacco products and e-cigarettes came into effect on 20 May 2016 (legal challenges by the tobacco industry to the High Court and the ECJ having recently failed). The regulations impose obligations on producers now; and retailers won't be able to supply non-compliant products after the relevant transitional periods.



The Tobacco and Related Products Regulations 2016 implement the EU Directive on Tobacco Products and require tobacco products to carry a health warning label including a colour photograph on the front and back surfaces and a general warning and information messages on other surfaces. The Regulations also set maximum tar, nicotine and carbon dioxide levels for cigarettes and prohibit cigarettes (and hand rolling tobacco) with a characterising flavour: this includes menthol cigarettes, although the prohibition will not apply to menthol cigarettes until 20 May 2020. In addition, cigarette packs must contain at least 20 cigarettes and hand rolling tobacco packs must weigh at least 30 grams. These requirements are now in force, although there is a one year transitional period for the sale of old stock (i.e. where the product was produced prior to 20 May 2016 it can be sold up to 20 May 2017).

In relation to e-cigarettes, producers are now required to submit information about their products to the Medicines and Healthcare Products Regulatory Agency (MHRA) through a notification portal, but retailers do not need to submit information for any products they sell unless they also qualify as a producer. E-cigarettes are also required to be labelled and presented in accordance with specific requirements under the Regulations. The government has Guidance on its website for retailers relating to the transitional period, but in short, again, you have until 20 May 2017 to sell existing stocks of products that do not comply. On 20 May 2017, you will be obliged to remove from sale any e-cigarettes which do not comply with the requirements. Remember though that some products that are similar to e-cigarettes, such as disposable e-cigarettes that do not contain nicotine and 0% nicotine liquids are not covered by the Tobacco Products Directive and will not have to meet its requirements.

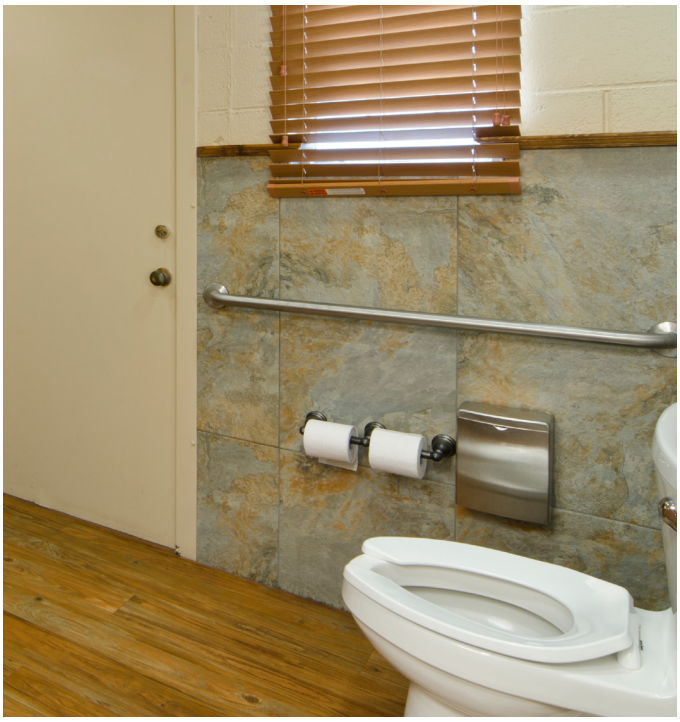
The Standardised Packaging of Tobacco Products Regulations 2015 contain UK requirements over and above the EU Directive and also came into force on 20 May. They require standardised "plain" packaging for tobacco products. The material, size, shape and opening mechanism of the packaging; the colour of the packaging and the cigarettes; and the text font, colour, size, case and alignment are all prescribed by the regulations and again, from 21 May 2017, it will be an offence to supply a tobacco product or e-cigarette in breach of these new Regulations.

In England and Wales, the penalty for breach of the requirements will be an unlimited fine and up to three months' imprisonment on summary conviction, or up to two years' imprisonment on indictment. However, a due diligence defence is available. When sourcing new supplies of any tobacco products, e-cigarettes or refill container products during the transitional periods, it would be sensible to ask your supplier(s) to confirm that the product complies with the requirements of the regulations, particularly where stock is unlikely to be sold before the 20 May 2017.

Requirements for Toilets in Takeaways and Coffee Shops: *R (On the Application of Kingston Upon Hull City Council) v Secretary of State for Business, Innovation and Skills*

This recent case will be of interest to operators of hot food and drink takeaway businesses which have some eat-in facilities. Newcastle City Council had advised (as a primary authority partner for a hot food retail business) that, if **the main use of a shop was take-away sales and if no more than 10 seats were provided**, a requirement to provide customer toilets in accordance with the legislation, would not apply. **However, the Court has confirmed that this advice was not correct**.

The need for toilets in small premises has been a long running debate between operators and some local authorities. The requirements are contained within the 1976 legislation, the Local Government (Miscellaneous Provisions) Act, under which a local authority may require an owner or occupier of a "relevant place" to provide sanitary appliances (i.e. customer toilets). A "relevant place" is defined as including a place which is normally used or is proposed to be normally used for the sale of food or drink to members of the public for consumption at the place. The Court noted that if a person sat down at the seats provided and consumed food and drink purchased at the counter for that purpose, that was a normal use of the premises. The fact that most customers took away their purchases and those who stayed did not normally stay long, did not change that. Therefore, the "test" applied by Newcastle City Council referring to the "main use" of a shop and the number of seats was incorrect.



The judgment was also of interest in relation to the powers of a primary authority. The court found that under the Regulatory Enforcement and Sanctions Act 2008, the primary authority has power only to issue advice and guidance to authorities outside its own area: the discretionary functions under the 1976 Act remained with the authority for the area concerned. In advising and giving guidance on the exercise of discretionary powers (i.e. in this case, the power of Kingston upon Hull City Council to require a business to provide customer toilets in a relevant place) the primary authority might suggest what weight should be given to particular factors (presumably in this case factors such as the number of seats and whether the majority of sales were take-away) but those discretionary matters must be separated from statements of the law.

This case has been reported both in the national press and in trade publications as potentially meaning that operators will have to incur the cost of providing toilets in many small premises. However, there is actually no change in the underlying legal position i.e. that this is at the discretion of the relevant local authority; and the authority can only serve a notice requiring the installation and maintenance of sanitary facilities in respect of premises normally used (or proposed to be normally used) for the sale of food or drink to members of the public for consumption at that place.

Contacts

For further advice, training, or copies of our previous newsletters, please contact:

Stephanie L. Perraton
Partner
T +44 121 222 3559
E stephanie.perraton@squirepb.com

Nicola Smith
Senior Associate
T +44 121 222 3230
E nicola.smith@squirepb.com