

# Review

## Licensing Without Hiccups

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### Headlines

Christmas is fast approaching and operators should ensure that any Temporary Event Notices required for Christmas functions (either additional hours or activities) are submitted in good time and certainly no later than 10 clear working days before the function, which is the statutory deadline.

Remember to check your New Year's Eve authorisations: whilst any 'converted' licences should contain the automatic 24 hour exemption for the supply of alcohol on New Year's Eve, this will not cover music and dancing unless you have specifically applied for this. Again, if you need to, apply for a Temporary Event Notice in good time!

The likelihood of routine enforcement inspections is also perhaps greater than ever in the run up to Christmas. Act now to ensure that you have all of the correct documentation displayed and on site and to ensure that all relevant staff are fully briefed on Licence conditions and hours. These simple steps will go a long way to ensuring any inspection proceeds smoothly.

The festive period also often increases the requirement for door supervision.

The Department for Culture Media and Sport have published a Consultation on the "Proposal to Introduce a New Process for Electronic Applications" under the Licensing Act 2003. The consultation is perhaps some time overdue given that the EU Services Directive requires Licensing Authorities to accept electronic applications by 28 December 2009. However, it does at least propose various changes to the current procedure, which for once benefit operators - see full report below.

The Government proposes that cigarette vending machines will be banned from 1 October 2011 - full report on page 4 below.

Licensing continues to be a political football, with both main parties proposing licensing measures in their annual conferences. Does this mean the end of the Mandatory Code reported on in our last review? See summary below at page 5.

Are you paying too much in copyright fees for the playing of music in your premises? Copyright fees are collected by the PRS (for the copyright in the music and lyrics) and PPL (for the copyright in the sound recording). A landmark decision has been made by the Copyright Tribunal that the fees charged by PPL since the beginning of 2005 are unreasonable. The Tribunal did not make any order for PPL to reimburse copyright users for the tariffs paid under the new tariff. However, this seemed to be on the basis that the Tribunal did not consider itself suitably placed to make the relevant calculations. If, however, the parties were unable to agree all the cost issues resulting from the Tribunal's decision then further submissions could be made to the Tribunal. This is therefore likely to pave the way for operators to apply for refunds from PPL for the relevant period. Under section 152 of the Act, PPL can appeal on any point of law arising from a decision of the Tribunal to the High Court on a matter of law. It is widely anticipated that it will do so.

Fruit Machines/ Amusement With Prizes (AWP) Machines: Permits issued under section 34 of the Gaming Act 1968 regarding the use of amusement with prizes (AWP) machines in non-gambling premises expired on 31 July 2009. It is not possible to renew such permits when they expire. As such, premises such as chip shops and taxi offices are no longer permitted to have AWP machines on their premises. However, where a premises is authorised to sell alcohol for consumption on the premises under a Premises Licence, it is possible to obtain authorisation under the automatic notification procedure for up to two machines; or by an application for more than two. Skills with prizes machines (for example, quiz machines) are not controlled in the same way and therefore may be provided without a Gaming Machine Permit: See full report and analysis at page 5 below.

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The Department for Business, Innovation and Skills (formerly BERR) has published a Code of Best Practice on Service Charges, Tips, Gratuities and Cover Charges. The Code provides guidance on compliance, following the change on 1 October requiring that all eligible workers must receive the national minimum wage in base pay with any tips being paid on top. The Code embodies four principles to ensure transparency for customers and workers alike.

Licensing Minister Gerry Sutcliffe has announced that the Government intends to consult on giving police a discretionary power to allow late temporary event notice applications for low-risk events. This news will surely be greeted enthusiastically by the trade, as there is currently no way round the 10-working-day notice provisions, meaning late bookings must often be refused.

Following the report on the introduction of Minor Variations in our last Review, it seems that the procedure has been little used in practice to date. The restrictions on using the procedure for changes in relation to hours for alcohol and increasing the capacity for drinking alcohol, mean that as predicted use of this procedure is likely to be limited.

The relevant SIA Licences due for renewal? Remember that SIA licences are granted for a period of 3 years only and many will shortly be due for renewal. Operators will need to be vigilant to ensure that employees' licences are renewed in time and that the expiry date of licences held by individuals contracted in are checked as a matter of course.

## Electronic Licensing Applications – Benefit to UK Operators?

### OVERVIEW

As reported in last month's Review, the EU Services Directive aims to remove barriers in cross border trade in services between countries in the EU. The UK will essentially seek to create an online 'single point of contact' for operators to apply for all necessary authorisations.

So what relevance does this have for operators of licensed premises? Well, "entertainment" is classed as a service and therefore it must be possible to submit premises licence applications online by 28 December 2009, which of course is currently impossible under the Licensing Act. The intention is for the Business Link website to be the single point of contact (and operate in a similar way to the Planning Portal) for operators who wish to apply online.

In order for the Services Directive to be implemented, changes are therefore required to the current Act and Regulations governing the way in which applications are made. The DCMS have published a consultation document setting out their proposals as to what the changes will be. These changes will not only benefit overseas operators, but will also have implications for operators in the UK who are currently required to serve applications in hard copy on the Licensing Authority and all Responsible Authorities (including the police, fire service, environmental health, trading standards, planning and the relevant body for safeguarding children).

### WHAT IS PROPOSED UNDER THE CONSULTATION?

The proposals in the consultation mean that electronic applications are to be permitted for all authorisations and notifications under the Licensing Act except applications for and renewals of personal licences and reviews of premises licences. Applicants applying electronically will download the relevant application form from the site, complete and then upload it, together with the premises plan (where relevant) and any other supporting documents. When the application has been validated, the applicant will be directed to the licensing authority's payment site.

#### In detail, the proposals include the following changes to the current procedures:

Where applications are submitted online either via the Electronic Application Facility (the EAF) or the Licensing Authority's own website, the requirement to copy applications to responsible authorities (the police, fire and rescue, etc) will be transferred from the applicant to the licensing authority.



It must be possible to submit premises licence applications online by 28 December 2009.

Handwritten signatures will not be necessary. The Government proposes that electronic or digital signatures will be acceptable without additional proof of identity, as will 'tick' boxes confirming that the statements in the application are true; and scanned in copies of a handwritten signature.

The plan requirements under the Regulations will be amended to remove the reference to a 'standard' scale (1:100) and replace it with a requirement for plans (submitted electronically or in writing) to be supplied in a format which is 'clear and legible in all material respects'.

## ADVANTAGES TO OPERATORS

The DCMS estimates that requiring licensing authorities to copy applications to responsible authorities will save applicants around £20 - £40 per application in administrative costs. However, in our experience cost savings will potentially be much higher for two reasons:

The cost of serving hard copy applications by special delivery to eight recipients totals approximately £40 in postage costs alone;

The cost of producing eight sets of hard copy plans can total hundreds of pounds where a premises is very large requiring drawings on A1 or A0 paper, multiplied further where that premises has multiple floors, which is invariably the case for premises such as hotels or large offices.

Moreover, there are clearly potential cost savings in the production of plans. Currently, plans are required to be drawn to a scale of 1:100 and show fixed furniture and fire information amongst other things. Usually, such plans have to be specifically drawn for a Licence application at considerable cost to the applicant, as such detail is rarely included on drawings for construction purposes.

However, the new proposal that the plans must simply be 'clear and legible in all material respects' is clearly a lesser standard. We would anticipate that in the majority of cases, construction drawings would be suitable, cutting out the additional cost of producing separate licence plans.

In addition to the cost advantages, the new procedures may also reduce the time it takes to submit an application. This is extremely important if an application is time-sensitive, for example an urgent DPS Variation, a Temporary Event Notice, or a new Licence where completion is imminent. If the proposal to abandon the requirement for a handwritten signature is approved, this will, for example, prevent the delays often caused by the failure of a DPS to post his or her consent form or the vagaries of the postal system, especially during a strike!

## DISADVANTAGES OF PROPOSALS

Whilst the proposals to change the current Licensing Act unusually offer benefits for operators, the consultation document is not without its 'thorn in the side'.

This particular thorn comes in the form of paragraphs 3.16 to 3.20 of the Consultation. These paragraphs propose that If the applicant provides insufficient or incorrect details and the published deadline needs to be extended, licensing authorities will be able to 'hold' an application as long as the applicant is notified promptly and given a full explanation. This effectively resets the 'clock' to zero in terms of the published statutory timescale for processing the application.

Furthermore, the consultation proposes that the licensing authority should advise the applicant that they should not advertise the application in a local newspaper until they have received confirmation from the licensing authority that the application includes all the required information.

This proposal could cause an administrative nightmare for applicants and their agents. It would be virtually impossible for the applicant to wait until they have received confirmation from the licensing authority that the application includes all the required information before advertising in a local newspaper as the Regulations require that such notice is published within 10 working days of the application. Local newspapers themselves often only publish once per week and have deadlines for submission of an advert of several days beforehand. Invariably in order to comply with the newspaper requirements, on a practical basis newspaper adverts are usually submitted at the same time as the application is made.

Moreover, there are clearly potential cost savings in the production of plans.

We have therefore responded to the DCMS that if an Authority is able to 'hold' an application, it is essential that there is a strict time limit for the Authority to notify the applicant that the application is complete. There must also be a 'consequence' if the Authority fails to meet that time limit. We have suggested that the consequence is that the application is deemed to be complete for the purposes of advertising in a newspaper.

Whether our suggestions will be taken on board in the final legislation remains to be seen.

## Time Up for Cigarette Machines in England?

The Health Bill 2009 proposes various measures in relation to the advertising of tobacco products, with a much-publicised proposal that from 2013, it will be unlawful for displays of tobacco products to be visible to customers. However, it is the proposals on cigarette machines that perhaps merit closer scrutiny for on-trade operators at this time.

On 12 October 2009, the Department of Health published the "Consultation on proposed tobacco control regulations for England under the Health Bill 2009" which included proposals for regulations on tobacco vending machines, essentially restricting the access of children to those machines. One month later, however, decisions in Parliament have meant that the consultation has been revised in relation to cigarette vending machines, with the options considered being:

Retain the status quo, including the voluntary NACMO guidance on the siting of vending machines; or

Prohibit the sale of tobacco from vending machines

Option '1' has essentially been discounted and it is intended that regulations prohibiting sales from vending machines will come into effect on 1 October 2011. The draft Children and Young Persons Protection from Tobacco (Sales from Vending Machines)(England) Regulations 2010 include the following details:

**Timing:** These regulations will come into force on 1 October 2011.

**Prohibition:** Regulation 2(1) prohibits the sale of tobacco from an automatic machine (a vending machine).

**Liability:** Regulation 2(2) proposes that the person who controls or is concerned with the management of the premises where the vending machine is located shall be liable for any breach of the prohibition (the sale of tobacco from a vending machine).

**Applicability:** Regulation 2(3) defines the type of premises to which these regulations will apply. All types of premises in which a vending machine might be located are included and therefore it would be prohibited to sell tobacco from a vending machine in any location in England, including pubs, hotels, restaurants and nightclubs.

Consultation on the proposals ends on 4 January 2010. However, in the meantime, the increase of enforcement activity and underage 'sting' operations on cigarette machines may perhaps suggest to operators that the phasing out of machines should begin sooner rather than later.

Until the ban on tobacco displays is in force, operators could, of course, still continue to display cigarettes behind bar serveries and hopefully maintain any income that may be lost from machine sales. It could certainly be easier to monitor underage sales from behind a bar and limit the opportunity for trading standards officials to successfully send an under -18 to purchase cigarettes. If operators decide to take this course of action, time will surely be up on tobacco vending machines sooner rather than later.



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## Licensing Policy: A Political Football?

With anti-social behaviour continuing to play a large part in the battle for the nation's hearts and minds, it was perhaps inevitable that both the Government and the Tories would set out their stores on licensing at their autumnal party conferences.

The Prime Minister announced at the Labour Party Conference, that extended opening hours were not working in some places and that Labour would give local authorities the power to ban 24-hour drinking throughout a community in the interests of local people. The government is also proposing that licensing officers will be able to review a premises licence, even if there have been no complaints by police or residents. This shows a disregard of the facts: few premises have applied for 24 hour authorisation under the new regime and the majority that have are hotels and supermarkets.

The Tories response? The Shadow Home Secretary, Chris Grayling, in turn announced at the Conservative's Party Conference that they would 'tear up' the current licensing regime. His proposals include: a late night levy to be charged on pubs and clubs open after midnight; a ban on supermarkets selling alcohol at below cost price; and giving Council's explicit powers to control the closing time and licensed capacity of venues (seemingly independently of objections from responsible authorities or interested parties).

Meanwhile, the future of the Mandatory Code under the Policing and Crime Bill is in doubt. Lord Mandelson has proposed that the Code be delayed due to the recession until at least April 2011. However, the Home Office have not yet accepted that implementation will indeed be so delayed.

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## Gaming Machines: Entitlement for Alcohol Licensed Premises

Gambling is unlawful in Great Britain, unless the appropriate permission is obtained or the gambling is exempt under the Gambling Act 2005. A person commits an offence if he makes a gaming machine available for use unless he has the appropriate operating licence or an exception applies. The penalty for this offence is imprisonment for up to 51 weeks or a fine of up to £20,000 or both.

The Gambling Commission is the regulator for gambling in Great Britain and licences commercial gambling operators and personnel working within the industry. In addition, local Licensing Authorities (i.e. the Council) licence gambling premises in their area and are responsible for monitoring compliance at those premises.

Please note that the requirement for a licence (or relevant exception) under the Gambling Act is in addition to the separate requirement for a Customs & Excise Permit for any machine.

### Exemptions for Gaming Machines in Licensed Premises – Up to Two Machines

If an on-licensed premises (in accordance with the interpretation below) make one or two category C or D machines available for use, then under Section 282 of the Gambling Act they are exempt from the applicable offences, provided that:

1. The person who holds the alcohol licence sends the Licensing Authority:
  - a. Written notice of his intention to make gaming machines available for use in reliance with this exemption; and
  - b. The applicable fee (currently £50).
2. The relevant provisions of any applicable Code of Practice about the location and operation of a gaming machine is complied with.

Section 278 of the Gambling Act provides that this exemption only applies to premises:

1. In respect of which an on-premises alcohol licence has effect;



2. which contain a bar at which alcohol is served for consumption on the premises (without a requirement that alcohol is served only with food) and
3. at a time when alcohol may be supplied in reliance on the alcohol licence.

The Guidance to Licensing Authorities dated May 2009 specifies (paragraph 26.1):

“Sections 279 to 284 of the Act only apply to premises in respect of which an on-premises alcohol licence (in England and Wales) or a licence for sale by retail or supply of alcoholic liquor, but excluding an off-sale licence (in Scotland) has been issued and that have a bar at which alcohol is served, without a requirement that alcohol is served only with food. So, *any hotel, restaurant or pub that has a bar can offer gambling under Part 12 of the Act, but hotels and restaurants that serve alcohol only with food cannot.*”

Unfortunately, there is no definition of ‘bar’ or ‘on-licence’ in the Act itself, but the Guidance suggests that a bar server rather than a ‘bar’ in the traditional sense will suffice for the purposes of the exemption.

It is, however, essential that the Code of Practice is complied with. The Code of Practice provides that the following are conditions:

- All gaming machines situated on the premises must be located in a place within the premises so that their use can be supervised, either by staff whose duties include such supervision (including bar or floor staff) or by other means.

Permit holders must have in place arrangements for such supervision.

- All gaming machines must be located in a place that requires a customer who wishes to use any cash machine to stop gambling at the machine in order to do so.

In addition, the Code of Practice sets out the best practice which the Gambling Commission consider should be implemented. Although this is not a condition of the exemption, it is likely that compliance will be considered as part of a decision whether or not to remove the automatic exemption (see below). Best practice procedures are as follows:

- Procedures to prevent underage gambling including procedures for:
  - Checking the age of apparently underage customers; and
  - Refusing access to anyone who appears to be underage and who tries to use category B or C machines and cannot produce acceptable ID
- All reasonable steps to be taken to ensure that all relevant employees understand their responsibilities for preventing underage gambling.
- Acceptable ID will be that which:
  - Contains a photograph from which the individual can be identified;
  - Is valid; and
  - Is legible and has no visible signs of tampering or reproduction.
- Procedures for dealing with cases where child repeatedly attempts to gamble on machines, including oral warnings, reporting the offence to the Gambling Commission and the police and making available information on problem gambling.

The Code also includes provisions on self-exclusion, although this applies only to club gaming permit and club machine permit holders only.

In practice, licensing Authorities often focus on the location of machines in determining whether they are likely to attract underage customers. Whilst it is no longer necessary to lodge a plan showing the machines’ location, siting is still very important for compliance purposes. Locating a machine in a children’s dining area in a pub, or next to sweet and magazines in a licensed cafe is likely to prove controversial.



The Code of Practice sets out the best practice which the Gambling Commission consider should be implemented.

## Removal of Automatic Authorisation

Licensing Authorities can remove the automatic authorisation in respect of any particular premises by making an Order under section 284 of the Gambling Act, which provides that they may make such an Order if:

- Provision of the machines is not reasonably consistent with the pursuit of the licensing objectives;
- Gaming has taken place on the premises in purported reliance on the section but in breach of a condition of that section (ie, the conditions relating to location and operation of machines under the Code of Practice);
- The premises are mainly used or to be used for gaming; or
- An offence under the Act has been committed on the premises.

Given that the automatic entitlement can be removed, it is crucial to work with the Licensing Authority to persuade them that the exemption under section 282 of the Gambling Act properly applies and that the machines are properly supervised and located.

It is clearly possible that if machines are not properly located/ supervised, the Licensing Authority may seek to remove the automatic entitlement on the grounds that it is contrary to the licensing objective of protecting children/ vulnerable persons, or on the ground that gaming has taken place on the premises in purported reliance on the section but in breach of a condition of that section.

## Exemptions for Gaming Machines in Licensed Premises – More than Two Machines

Licensing Authorities may (on receipt of a valid application) issue licensed premises with a gaming machine permit for any number of category C or D machines. If a permit is issued, this will effectively replace any automatic entitlement to two machines.

As per the automatic entitlement to two machines, the permit can only be applied for in relation to a premises with an on-premises alcohol licence which contain a bar at which alcohol is served for consumption on the premises (without a requirement that alcohol is served only with food) and at a time when alcohol may be supplied in reliance on the alcohol licence.

In addition, the conditions of the Code of Practice must be complied with as set out above.

The permit can be cancelled by the Licensing Authority if the premises are used wholly or mainly by children or young persons or if an offence under the Act has been committed. Again, therefore, it is essential to work with the Licensing Authority to persuade them that the permit can be properly granted.



If machines are not properly located/ supervised, the Licensing Authority may seek to remove the automatic entitlement.

## FURTHER INFORMATION

### Stephanie Perraton

Partner, Commercial and Dispute Resolution  
T: +44 (0)121 222 3559  
M: +44 (0)7778 341 244  
F: +44 (0)870 460 2829  
E: stephanie.perraton@hammonds.com

### Nicola Smith

Senior Associate, Commercial and Dispute Resolution  
T: +44 (0)121 222 3230  
M: +44 (0)7771 726 555  
F: +44 (0)870 460 2915  
E: nicola.smith@hammonds.com