

Alcohol delivery services examined

Consulting editor Roy Light looks at the technical elements of ensuring remote sales are properly licensed.

Background

There appears to have been an increase in applications for premises licences for the provision of off-sales of alcohol ordered by phone or over the internet for delivery to the purchaser's home. Such delivery services are, of course, not new. Supermarkets and specialist alcohol suppliers have been operating delivery services for many years.

However, applications for two particular types of retail trade, which provide a 24 hour or late night service, appear to be growing. First, are applications for premises licence variation made by independent convenience stores that already hold a licence for off-sales of alcohol. While there seems to be nothing in the legislation or regulations (but see the s.182 Guidance below) which require a variation for alcohol delivery, the variation is usually for extended hours for the delivery service only. So that a store licensed say from 0700 to 2300 hours may apply for a variation to allow a delivery service that runs from 2200 to 0500 hours (which may or may not be combined with the delivery of other non-licensable goods from the store).

Secondly, a number of dedicated delivery services have been established around the country which do not offer public access to their premises and operate only as a phone and internet alcohol delivery service (other goods such as snacks and cigarettes may also be available).

Premises to be licensed

The Licensing Act 2003 provides that premises at which a licensable activity, which includes the retail sale of alcohol, takes place must be authorised by a premises licence. Where does the sale of alcohol take place? At common law the sale takes place when the goods are appropriated to the contract. Section 190 of the Licensing Act 2003 adopts the common law position. So if the order and/or payment is taken at one address and the alcohol is stored at, specifically selected and dispatched from, another address the sale of alcohol will not be made where the order is placed or payment is made. The sale takes place where the specific alcohol is physically selected and allocated to that order. It is the premises at which this appropriation takes place that must have a premises licence:

The place where the order for alcohol, or payment for it, takes place may not be the same as the place where the alcohol is appropriated to the contract (i.e. the place where it is identified and specifically set apart for delivery to the purchaser). This position can arise when sales are made online, by telephone, or mail order. It will be the premises at this location which need to be licensed; for example, a call centre receiving orders for alcohol would not need a licence but the warehouse where the alcohol is stored and specifically selected for, and despatched to, the purchaser would need to be licensed. These licensed premises will, as such, be subject to conditions including the times of day during which alcohol may be sold. The premises licence will also be subject to the mandatory licence conditions. (para.3.8, s.182 guidance).

Why not licence the delivery vehicle? While the 2003 Act defines premises to include vehicles a vehicle may only receive a premises license if it is parked at a particular place where it will *be treated for the purposes of this Act as if it were premises situated at that place* (s.189(2)). And if the vehicle for the purposes of s.189(2) is parked at more than one place each place is to be treated as separate premises (s.189(4)). So while a vehicle may be granted a premises licence the authorisation to sell alcohol will be limited to the specific location specified in the application. This provision would defeat any attempt to introduce a 'stop me and buy some' service or to allow customer selection of alcohol from the vehicle at the delivery address. The appropriation of the alcohol to the contract cannot be made by the delivery driver at the delivery address but must have been made at the premises holding the premises licence. As the s.186 Guidance puts it:

The sale by retail of alcohol is a licensable activity and may only be carried out in accordance with an authorisation under the 2003 Act. Therefore, a person cannot sell alcohol from a vehicle or moveable structure at a series of different locations (e.g. house to house), unless there is a premises licence in respect of the vehicle or moveable structure at each location at which a sale of alcohol is made in, on or from it (para.3.7).

A new licensable activity?

A section on *Mobile, Remote, Internet and Other Delivery Sales* was introduced into the s.182 guidance in 2012. There are some new and reworded sections on the wholesale of alcohol (3.6-3.7 - now 3.3-3.6 in June 2014 amended guidance) and internet and delivery sales (3.8-3.10 - now 3.7-3.9 in amended guidance). In particular, it is stated that 'alcohol delivery services' should be mentioned in operating schedules and existing premises licence holders who wish to add delivery services should *apply to vary their licence to add this activity to their existing licensable activities* (para.3.10). Can this be right? The Guidance appears to be seeking to add a new licensable activity to the existing activity of sales on and/or off

the premises by introducing 'alcohol delivery services'. When raised with the Home Office it was accepted that there is some 'ambiguity' in the wording:

... the list of licensable activities in the Licensing Act 2003 could only be changed by amending the Act itself and this cannot therefore be achieved in the guidance. This guidance was written on the basis that a premises which has a licence, but not to serve alcohol, would need to apply for a variation to add the sale of alcohol as a licensable activity if they were intending to additionally operate an alcohol delivery service. Moreover, a premises may already have an existing licence to serve alcohol (for example, a pub or off licence) but if they intend additionally to begin operating an alcohol delivery service, they should make the licensing authority aware of this to ensure appropriate conditions are added to the licence with regards to this additional activity to ensure the promotion of the licensing objectives. We expect to lay revised statutory guidance in October this year to support the expected commencement of Early Morning Alcohol Restriction Orders and based on the issues you have raised will consider whether the guidance could be made clearer in the October revision (Personal communication Home Office 2012).

The guidance has not been changed and paragraph 3.10 is now paragraph 3.9 in the June 2014 amended guidance. This seems to suggest that premises with alcohol sales as a licensable activity, which deliver alcohol but did not mention this when applying for a licence, must apply for a variation (in order to add 'appropriate conditions'). While the Guidance applies to new applications, premises that have run a delivery service for some years without including it specifically in their initial application, without any problems, may enquire on what basis they are being required to do this. However, for applications made on or post 25 April 2012 for premises that will deliver alcohol it may be argued that mention should be made of the delivery service and conditions considered appropriate to support the activity included in the operating schedule.

Promotion of licensing objectives

Concerns relating to promotion of the licensing objectives may include public nuisance, crime and disorder and underage sales, Numerous conditions may be suggested as appropriate to address such concerns. As always, care should be taken in offering/imposing only those conditions considered to be appropriate and proportionate.

Protection of children from harm - While the Act creates an offence of 'delivering alcohol to children' there is an exemption if *the alcohol is delivered at a place where the buyer or, as the case may be, person supplied lives or works* (s.151(6)(a)). However, how is the age of the 'buyer' to be determined in a phone/internet transaction? Concern has been expressed at the risks for underage sales (see, for

example, *On your doorstep: underage access to alcohol via home delivery* Alcohol Concern June 2013).

While all the major retailers have policies in place to prevent underage sales they are usually age checks on delivery - and the sale takes place, of course, when the alcohol is appropriated to the contract. However, a number of conditions can be formulated to assist with avoiding underage sales. These may include:

- At the time the order is placed a declaration will be required from the person placing the order that that person is over 18 years of age.
- Challenge 25 - if the driver considers the recipient of alcohol appears under 25 recognised photographic identification to be requested before any alcohol is handed over.
- Acceptable proof of age shall include identification bearing the customer's photograph, date of birth and integral holographic mark or security measure. Suitable means of identification would include PASS approved proof of age card, photo-card driving licence and passport. No ID no delivery.
- Minimum age of 18 for delivery drivers.
- Delivery will be refused if the driver believes the alcohol is being purchased on behalf of another person aged under 18 years.
- Customers to be reminded that it is a criminal offence for a person under 18 to purchase or attempt to purchase alcohol and that it is also an offence to purchase alcohol on behalf of a person aged under 18.

Prevention of crime and disorder - there may be concerns that the alcohol could be supplied to revellers on the street effectively sidestepping efforts to restrict late night off-sales in particular areas, such as cumulative impact areas. There may also be concerns for the security of drivers carrying cash and alcohol in their vehicle. Potential conditions may include:

- Full name and address details, including postcode, must be given when placing an order.
- Alcohol can only be delivered to a residential or business address and not to a public place.
- Alcohol will only be delivered to the person who placed the order and whose name appears on the credit/debit card (if used).
- Drivers will not deliver to any person anywhere other than at the residential/business address given when the order was placed.

Prevention of public nuisance - late night deliveries may cause disturbance to those living in the vicinity of the distribution point and/or at the delivery address. Again conditions may be considered if it was thought appropriate in the particular case. For example, there may be staff training in noise minimisation and the use of quieter vehicles.

Consideration may also be given to conditions relating to driver logs, refusal/incident books, refusal of delivery to those appearing to be under the influence of drink or drugs and perhaps importantly that the licence conditions should form part of the delivery service's 'Terms & Conditions' displayed on their website or any other promotional material.

It may also be thought appropriate for those businesses offering a delivery service only that the premises should solely be used for storage and distribution of alcohol for fulfilling phone and internet orders, that the public shall have no access to the premises and that no sale or supply of alcohol shall be made from the premises.

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