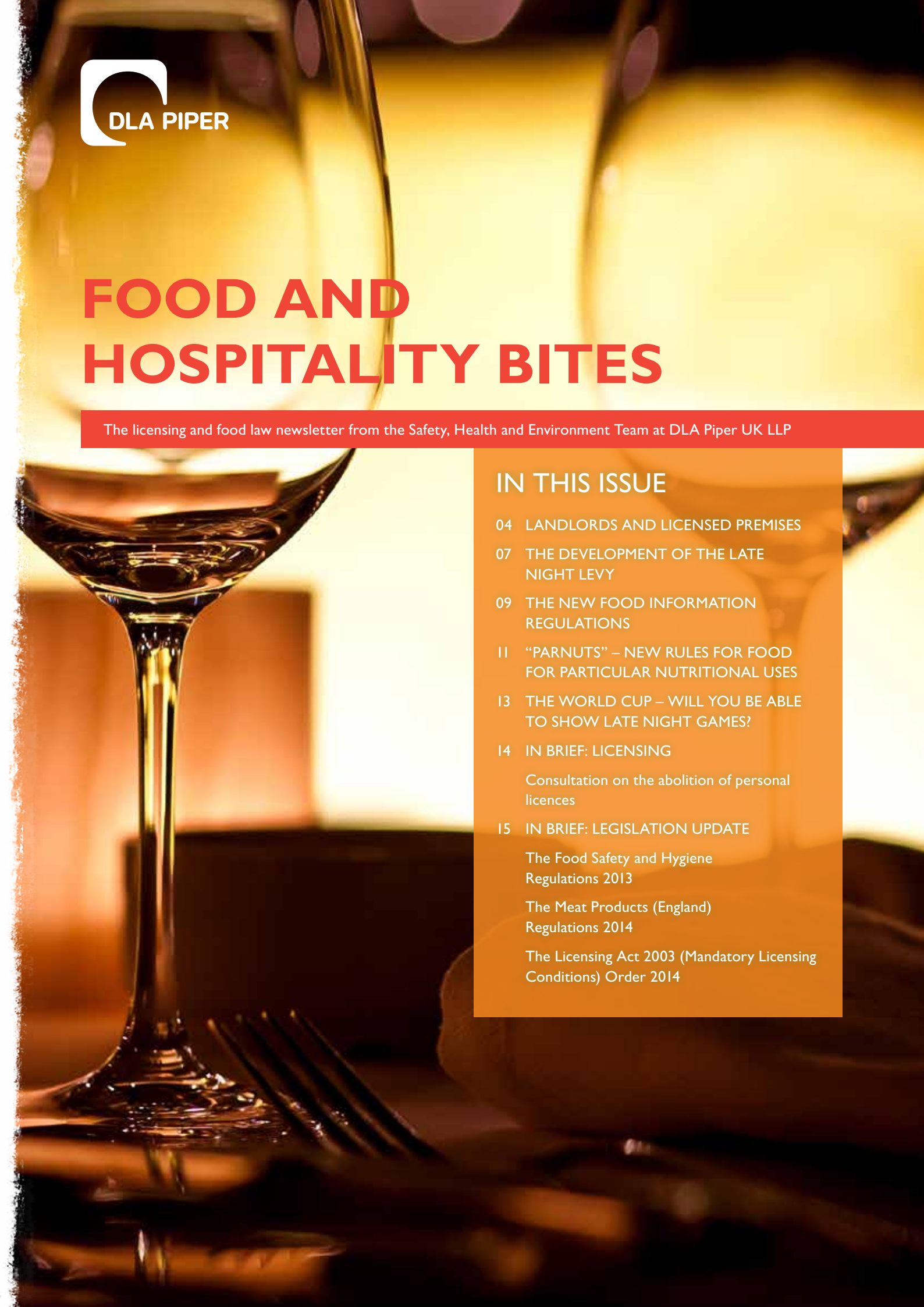

DLA PIPER

FOOD AND HOSPITALITY BITES

The licensing and food law newsletter from the Safety, Health and Environment Team at DLA Piper UK LLP

IN THIS ISSUE

FOOD AND HOSPITALITY BITES

Welcome to this first edition of "Food and Hospitality Bites" a new publication from DLA Piper's Safety, Health and Environment team aimed at all those with an interest in food safety and regulation and in alcohol and gambling licensing matters.

There are an increasing number of developments in these areas at both a UK and EU level and to provide coverage of these developments we have decided to produce a standalone publication devoted to food and hospitality matters.

In this introductory issue we consider forthcoming changes to food labelling rules and we have been working closely with clients to "future proof" their labels to take account of these new rules which will come into force in December 2014.

We also look at the introduction of the late night levy around the country which continues to spark debate and also at how landlords of licensed premises can protect their investments if a tenant becomes insolvent or otherwise loses their licence to sell alcohol.

Finally, Summer 2014 will see the FIFA World Cup take place in Brazil. There has been much discussion between industry and the Government about whether pubs will be granted a general extension to licensing hours to enable them to open to show England games which, given the time difference, will take place after 11 pm in the UK. As we went to print, the Government confirmed that there will be relaxed licensing hours for England's games. However licence holders will need to consider licensing arrangements for other world cup games they would like to show.

We hope that you find this publication of some interest and would be happy to discuss any of the issues raised in this issue with you.

Teresa Hitchcock

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LANDLORDS AND **LICENSED PREMISES**

It is important for landlords and freeholders of licensed premises to take steps to protect any existing premises licences in the event that a tenant becomes insolvent, ceases trading or otherwise walks away to ensure that the premises can continue to benefit from an authorisation to sell alcohol and/or to provide regulated entertainment.

This is because the loss of any such licence can severely affect the value of commercial premises if they do not have the ability to trade, particularly where those premises can only really be used for a particular use (e.g. a purpose built pub or club) and cannot be redeveloped into a different use which does not require a premises licence.

We have worked with many landlords to ensure that their interests are adequately protected if their tenants cease trading or otherwise lose their licences. The most common ways of protecting a landlord's interests are:

- tenant due diligence;
- lease covenants;
- registering an interest on the licensing register;
- applying for a shadow licence; and
- the landlord holding the premises licence.

We have considered each option in turn below.

TENANT DUE DILIGENCE

One thing we know a lot of landlords do is undertake financial and other checks on tenants to try and identify, as far as possible, whether or not they are likely to pay the rent on time and comply with the lease covenants etc.

We would recommend that when letting out licensed premises the same approach be applied to the licensing aspects of the landlord and tenant relationship.
For example, it is possible to look into a premises licence holder's compliance history and background and to do some limited digging into how they have managed and operated other licensed premises in the past.

Whilst this will not be possible or appropriate in all cases it could form part of the background information which is generated when considering whether or not a prospective tenant is suitable for a letting.

LEASE COVENANTS

It is now quite common for leases which relate to licensed premises to include express covenants relating to the premises licence. These often, for example, impose positive obligations to hold, comply with and maintain a premises licence in order to prevent its revocation and to inform the landlord of any threat to the continuity of the licence.

Whilst such provisions would have no impact on the licensing process itself they do provide a landlord with some contractual protection that the licence will remain in place for the duration of the lease and that it will be available to be transferred to the landlord, or a future tenant, should any problems arise with the existing tenant. Any contractual provisions will also provide the landlord with various contractual remedies, including the right to commence forfeiture proceedings against the tenant, if they are breached.

This option would therefore provide the parties with clarity about what it is expected and by whom and also a framework for dealing with any licensing applications, problems or disputes which may arise during the term of the lease.

REGISTERING AN INTEREST ON THE LICENSING REGISTER

Section 178 of the Licensing Act 2003 allows, among others, the freeholder of a property to notify a licensing authority of their interest in a property. Having done so, the person who has made the notification will then be informed of any change which is made to the licensing register.

Whilst this does not mean that a landlord would be notified in advance of any proposed changes to the premises licence – because the notification would only be made once the licensing register has been updated, which is done after any application has been determined – it should mean that a landlord would receive sufficient notification of any changes to a licence with sufficient time to react to the change.

This may be helpful to, for example, identify whether works have been undertaken to a property without the consent of the landlord being sought. This is because most significant refurbishment works will require an application to be made to vary the premises licence to ensure that those works do not contravene the licensing objectives and that an accurate plan of the premises is lodged with the licensing authority.

However, we think that the most effective use of this section is where a tenant has applied to surrender a premises licence. This is because a premises licence will lapse once notice of its surrender is served on the licensing authority and, ordinarily, disappear forever. However, those with an interest in the premises covered by a premises licence can make an application to resurrect a licence which has been surrendered provided this is done within 28 days from the date that notice is given to the licensing authority, which is why it is important to receive notification and to act quickly.

Notice given under this section expires after 12 months and will therefore need to be renewed every year but it is relatively easy to make a notification and only costs £21 to do so. We therefore think it is an effective way for a landlord to keep track of any changes to a licence which may affect their premises.

SHADOW LICENCES

The term *shadow licence* is one which refers to a licence which is sought by a person in respect of premises in relation to which another licence has already been granted to another person. The applicant of the second licence therefore seeks a further licence for the same premises to operate in parallel to the existing licence.

This is permitted under the Licensing Act 2003 which provides that two or more licences may have effect concurrently in respect of the whole or a part of the same premises. However, whether or not a person is entitled to apply for a shadow licence depends more upon whether or not they fulfil the qualifying criteria set out in the 2003 Act.

In the context of a landlord, section 16(1)(a) of the 2003 Act provides that any person who carries on or who proposes to carry on a business which involves the use of the premises for licensable activities may apply for a premises licence. Up until recently, there has been limited guidance on how this provision applies to so called *shadow licences* but a recent High Court decision – *Extreme Oyster and Star Oyster Limited v Guildford Borough Council* – has provided some welcome clarity on whether or not shadow licences are indeed possible.

This case specifically considered whether or not the landlords of several licensed premises were entitled to apply for premises licences in respect of those premises even if the tenant already held several in respect of the same premises. Here, the local authority had refused applications for shadow licences on the basis that it felt that the applicants did not fall within the categories of those who were entitled to apply for a premises licence. However, the High Court, in considering a judicial review brought by the relevant landlords, concluded that shadow licences could lawfully be granted in those circumstances providing those licences only covered the same activities as the premises licences already held by the tenant.

A shadow licence is therefore another possible option to consider when trying to put in place measures which will protect a landlord's interests. Since an application can be made at any time it is possible to make an application for a shadow licence at any point during the term of a lease, which may be helpful if there are growing concerns about the ability of a tenant to operate and run licensed premises.

In practice, it is likely that a licensing authority will want to include conditions in a shadow licence which prevent any trading under the shadow licence whilst the tenant's premises licence remains in force. This is unlikely to be problematic though given that the whole purpose of the shadow licence is to provide the landlord with a licence that they can either trade under or transfer to a buyer or tenant if the existing tenant loses the ability to trade under the existing authorisation.

Whilst applying for a premises licence is probably the most onerous and expensive of the options we have outlined it is, providing the qualifying criteria are satisfied, the most effective way of ensuring that the landlord can continue trading if the tenant loses the ability to trade under their own premises licence.

LICENCES HELD BY THE LANDLORD

In some cases a landlord may want to retain a degree of control over how licensed premises are operated and in those circumstances it is possible for the landlord to apply for and obtain a premises licence.

This is quite common, for example, in the case of some of the large breweries who are often very prescriptive about the way in which their tenants run their business. In effect, the tenants (who are usually individuals) will often run the premises on behalf of the landlord and will be named on the licence as the designated premises supervisor.

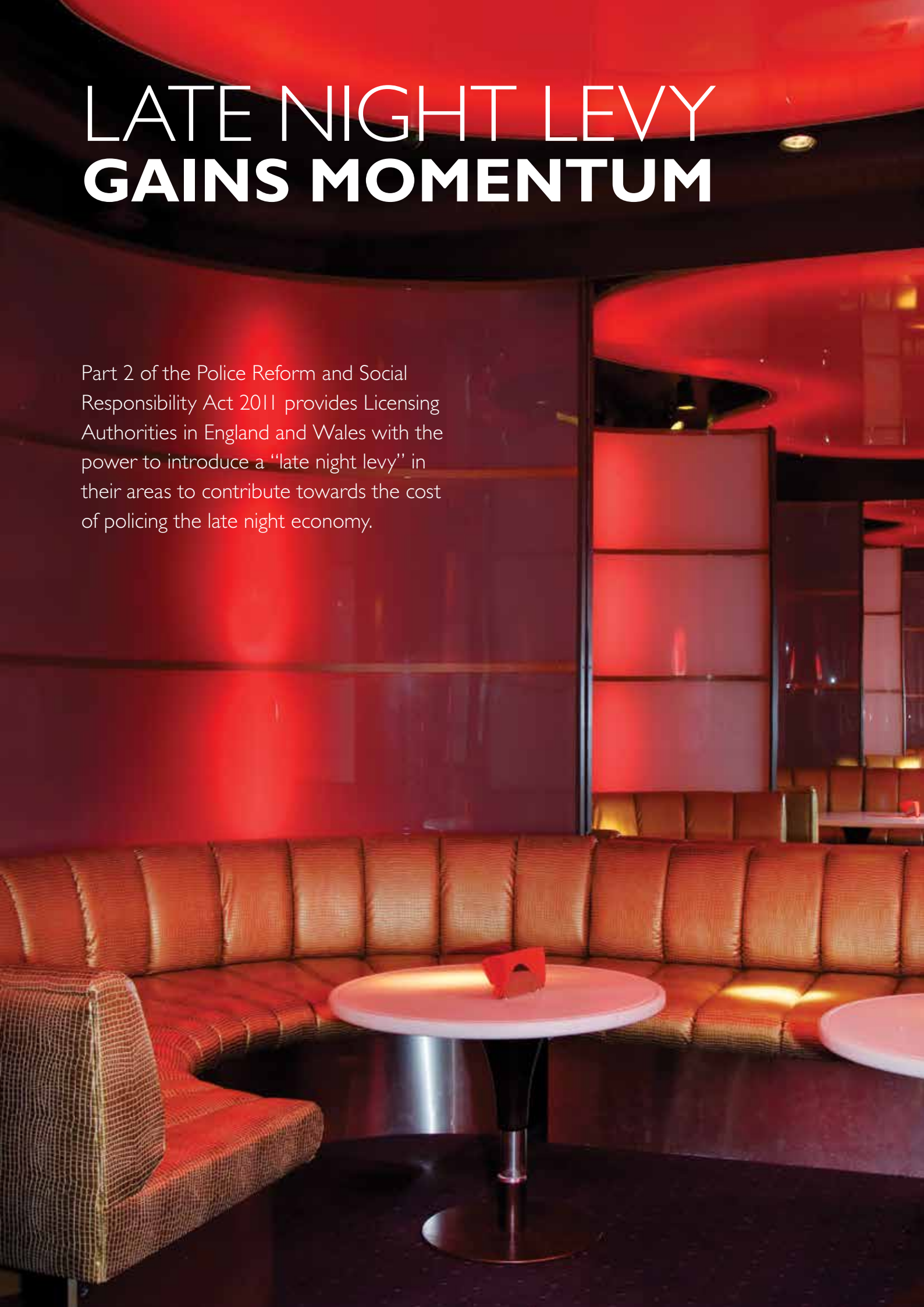
This arrangement will not suit every letting because many landlords will want to hand the premises over to their tenant and let them get on with running the business but in some circumstances it does make sense for the landlord to hold the premises licence.

CONCLUSION

There are therefore a number of measures which can be used by landlords of licensed premises to try and safeguard the position of the licence and the premises in the event that anything happens to the tenant which may place the licence in jeopardy.

Whilst the circumstances will vary in each case we find that in practice clients often use a combination of some or most of the measures set out above to provide them with the best possible protection.

LATE NIGHT LEVY **GAINS MOMENTUM**



Part 2 of the Police Reform and Social Responsibility Act 2011 provides Licensing Authorities in England and Wales with the power to introduce a "late night levy" in their areas to contribute towards the cost of policing the late night economy.

If an Authority decides to implement the levy, then a charge is levied on those premises licence holders who are entitled to serve alcohol between midnight and 6.00 am, subject to some exemptions. The proceeds of the levy are shared between the licensing authority and the police and should be used to fund initiatives for tackling alcohol-related crime and disorder and the provision of services for managing the night time crowds. The amount of levy payable is prescribed by the Government and will depend upon the rateable value of the premises.

In order to introduce the late night levy a Licensing Authority must conduct a consultation within its area and we have seen a gradual increase in the number of local authorities who are considering whether or not this is a measure that they want to introduce the levy, with some mixed results

Newcastle City Council was the first authority to introduce the levy and the levy came into effect in Newcastle City Centre on 1 November 2013. At the time of writing the levy has been considered by the following local authorities:

LICENSING AUTHORITY	DECISION MADE
Chelmsford City Council	Consultation launched and closes on 23 June 2014
Cheltenham Borough Council	Approved – comes into force from 1 April 2014
Cheshire East Council	Consultation proposed – working group established to evaluate options
City of London	Further round of Consultation launched and closes on 8 April 2014
City of York Council	Consultation closed – decision currently on hold
Colchester Borough Council	Consultation proposed
Islington Council	Consultation closed – comes into force no earlier than 1 September 2014
Leeds City Council	Rejected – further review expected early 2014
Milton Keynes Council	Rejected
Nottingham City Council	Consultation launched and closes on 6 April 2014
Plymouth City Council	Consultation closed – decision postponed
Tameside Metropolitan Borough Council	Consultation closed – awaiting decision
Woking Borough Council	Rejected

It is fair to say that the levy has produced mixed reactions. Critics of the scheme point out that the levy is paid by all licensed premises in the area including those that are "low risk" properties, for example, hotel bars which could mean that premises with a good track record with no premises reviews or police involvement would still be liable to pay. The authority does have discretion to exempt certain premises but this only applies to certain categories of premises, such as theatres and community premises.

Others point to the fact that the costs of the business rates for central bars and clubs are already substantial and that the additional sums due through the levy will place further financial pressure on them.

On the other hand, supporters of the scheme welcome what they see as a contribution from those who benefit from being able to serve alcohol late at night towards the costs of policing the night time economy and cleaning up after what is often well publicised antisocial behaviour.

It is clear that the power to introduce the levy has been met with a mixed response, with more than a handful of local authorities deciding not to introduce the measure. We recommend that you monitor developments in your local area to identify whether or not this is something which your local council is considering introducing and, if it is, participating in the consultation process to ensure that your point of view is considered.

LABELLING REQUIREMENTS OF "FOOD FOR SPECIFIC GROUPS"

INTRODUCTION

On 12 June 2013, the EU Parliament adopted Regulation 609/2013 (**"Regulation"**) which sets out the composition and labelling requirements for food intended for infants and young children, food for special medical purposes and total diet replacements for weight control. Collectively these are known as "food for specific groups".

This is a consolidating piece of legislation and aims to both simplify and clarify the labelling and composition requirements of foods which came to be known as "Foodstuffs for Particular Nutritional Uses" (**"PARNUTS"**). As well as the requirements set out in the Regulation, "food for specific groups" still need to comply with other relevant food legislation.

LEGISLATIVE HISTORY

Directive 2009/39/EC (**"PARNUTS Framework Directive"**) set out the general labelling and product safety rules for dietetic foods. A number of further Directives focusing on specific PARNUTS were introduced including: Directive 2006/141/EC on infant formula and follow on formula; Directive 2006/125/EC on processed cereal based foods and baby foods for infants and young children; and Directive 1999/21/EC on dietary foods for special medical purposes. The Regulation will gradually repeal these directives and at the end of the transition period will come into force from 20 July 2016.

THE REGULATION

The Regulation covers four categories of food:

1. infant formula and follow-on formula;
2. processed cereal based food and baby food;
3. food for special medical purposes; and
4. total diet replacements for weight control.

Food falling into these categories can only be placed on the market if they are in compliance with the requirements of the Regulation which include:

- the composition of the food must be appropriate to satisfy the nutritional requirements of the intended consumer;
- the food should not contain any substance which would harm the health of the intended consumer; and
- only the use of vitamins and minerals included on the list in the Annex to the Regulation (known as the "Union List") can be added to the food.

As stated above, the Regulation will apply from **20 July 2016**. However Articles 11, 16, 18 and 19 have been in force since 19 July 2013. These articles give the Commission powers to adopt further changes to the requirements of the food covered by the Regulation. For example, further requirements in relation to the composition of the food covered by the Regulation and further labelling and advertising rules.

The Regulation also states that by 20 July 2015, the Commission will produce reports covering food intended for "sportspeople" and milk-based drinks for young children which will consider the need for special provisions needed for these products and where necessary, the publishing of draft legislation.

FOOD INFORMATION REGULATIONS

On 13 December 2014, Regulation 1169/2011 on the provision of food information to consumers (**"Regulation"**) will come into force. The Regulation sets out a number of important changes to the labelling of food and applies to all "food business operators" at all stages of the food chain. The underlying requirement of the Regulation is that food supplied to either final consumers or mass caterers needs to have the information required by the Regulation.

Whilst rules on the labelling of food have been around for some time the new rules introduced some key changes, particularly around how unpackaged food is sold.

MANDATORY FOOD INFORMATION

The Regulation prescribes 12 pieces of information that must be indicated to consumers:

1. the name of the food;
2. the list of ingredients;
3. any ingredient or processing included in Annex II of the Regulation. These include, for example, cereals, eggs, crustaceans, peanuts and soybeans;
4. the quantity of certain ingredients or categories of ingredients;
5. the net quantity of the food;
6. the date of the minimum durability;
7. any special storage conditions and/or conditions of use;
8. the country of origin or places of provenance where the Regulation requires;
9. the name or business name and address of the relevant food business operator
10. instructions for use;
11. in respect of beverages, alcoholic volume if greater than 1.2%; and
12. a nutrition declaration.

Together these are known as the "mandatory food information".

The mandatory food information is therefore similar to the general labelling requirements under the current UK Food Labelling Regulations 1996. The Regulation sets out further guidance and requirements in relation to some of the above information.

Particular types of food need to be labelled with the required additional information which is set out in Annex III of the Regulation. For example, food containing sweeteners will need to indicate this with the phrase "with sweeteners".

EXEMPTIONS

The Regulation contains exemptions from the requirements for the provision of all the mandatory food information. These include food that is:

1. offered for sale to the final consumer or mass caterer without pre-packaging;
2. packed on the premises at the consumer's request; and
3. pre-packed for direct sale.

The exemption is, however, not a total exemption from the labelling requirements of the Regulation. Where the food falls under one of these exemptions then *only* information about any of the ingredients listed in Annex II of the Regulation needs to be given to the final consumer. Annex II sets out substances that cause allergies or intolerances.

KEY CHANGES

The current UK law is set out in the Food Labelling Regulations 1996 and whilst many of the requirements will remain the same the following changes are key.

- The Regulation will for the first time apply to all sales between businesses (the current legislation provides an exemption for labelling requirements for some food when sold between businesses);
- Nutritional information will be mandatory from 2016. The inclusion of such information has, until now, been voluntary unless certain health claims (eg "low in fat") were being made. Any voluntary nutritional information will need to comply with the requirements of the Regulation between now and 2016;
- A minimum font size of not less than 1.2 mm will be required for all mandatory food information; and
- Allergenic ingredients will need to be emphasised on the face of the label through the use of, for example, the font, colour or style.

IMPACT ON LICENSED PREMISES

Whilst the main labelling changes that the Regulation brings into force relate to food that is packaged before being sold to a consumer, there are also implications for non pre-packed food that is sold by "mass caterers". For the purposes of the Regulation, this means premises where food is prepared to be ready for consumption by the final consumer.

This will include restaurants, cafes and canteens and operators will therefore need to ensure that they provide information about allergenic ingredients in a way that meets the requirements of the Regulation. The basic requirement is that the information is clear, visible, legible and indelible.

Premises selling non pre-packed food should therefore review:

- the menus and food information given to customers to ensure that the required information is given and is done so in the correct manner;
- make staff aware of the changes and provide relevant training; and
- check that suppliers are aware of the Regulation and that sufficient information is provided to meet the obligations of the Regulation.

THE WORLD CUP
WILL YOU BE ABLE TO SHOW ENGLAND GAMES?

The Fifa World Cup in Brazil is fast approaching and we know that publicans are starting to think about how and where they will show England's crucial group games.

In January 2014 the British Beer and Pub Association, a representative body of England's pubs, asked the Home Office to consider granting a blanket extension of licensing hours to allow pubs to open in order to show England's World Cup opening game against Italy. This would mean extending the licensing hours from 11pm to 1am the next day.

This is not an unprecedented request and the Licensing Act 2003 does allow for the extension of licensing hours in exceptional circumstances, which was used to extend licensing hours temporarily for, as an example, the Queen's Golden Jubilee. However, the Home Office concluded that an England World Cup game does not qualify as an "exceptional circumstance" for these purposes.

Without this extension any pub which wishes to open late to show an England game would need to lodge a Temporary Event Notice (TEN) to authorise temporary extension to their licensing hours at a cost of around £21.

However, David Cameron stepped in and announced that there would be a consultation with pubs, the police and local councils on whether a blanket extension of licensing hours should be granted. The consultation ran from 13-26 March 2014 and the Government's response was published on 31 March 2014. The Government agreed with the British Beer & Pub Association that England playing in the World Cup is an occasion of exceptional national importance. Licensing hours will therefore be relaxed during England matches that are scheduled to kick off at or after 20:00. The relaxation will last for 4 hours to a latest time of 01:00.

This will affect England's first game which will kick-off at 23:00 local time, however the remaining two other group games are scheduled to kick-off at 20:00 and 17:00 respectively. Later games, should England progress, are scheduled to kick-off at 21:00, except the final which will be shown at 20:00 local time. This means that many games should be within the licensed hours of the majority of premises.

However, there are other games, particularly in the group stages, which will have late kick-offs and the extension of licensing hours only applies to games which England are or may be involved in, and only until 01:00. Therefore, if there are other games which will be shown outside of your licensing hours or after 01:00 in the case of England matches which you wish to show then it would be necessary to lodge a TEN to cover this period.

With just over 4 months to go, licence holders should therefore begin to plan now which games they wish to show and check whether the premises licence or relaxation of licensing hours covers the planned activities so that steps can be taken in good time to ensure that they are able to do so.

IN BRIEF **LICENSING**

CONSULTATION ON THE ABOLITION OF PERSONAL LICENCES

Under the current system all sales of alcohol have to be made or authorised by a personal licence holder. In September 2013, the Home Office launched a consultation on the proposed abolition of this requirement, which sought views on proposals to:

1. amend licence conditions so that all alcohol sales have to be authorised by the DPS and not the personal licence holder;
2. grant the police the right to object to a new DPS based on the crime prevention objective in general. The current position only allows for objections in "exceptional circumstances";
3. allow licensing authorities to require a criminal records declaration with each new change of a DPS; and
4. allow those named as the DPS on a premises licence or those who have accredited training to lodge up to 50 Temporary Event Notices a year and to limit those without such training to lodge only five.

The aims of the consultation were to help reduce the regulatory burden on businesses as well as help tackle crime and disorder. The response to the consultation was published on 24 March 2014 and confirms that the Government has decided not to proceed with the proposal to abolish the personal licence system.

Responses received focused on concerns that additional conditions instead of a personal licence would not in fact reduce the burden but instead have quite the opposite effect and complicate matters. The consultation states that the Government will maintain an open dialogue with stakeholders and has not ruled out the possibility of future changes to personal licences.

IN BRIEF
LEGISLATION UPDATE

FOOD SAFETY AND HYGIENE (ENGLAND) REGULATIONS 2013

On 31 December 2013, the Food Safety and Hygiene (England) Regulations (**"2013 Regulations"**) came into force. The 2013 Regulations repeal and replace the General Food Regulations 2004 (insofar as they apply to England) and the Food Hygiene (England) Regulations 2006.

The 2013 Regulations do not introduce new requirements but instead consolidate the food safety and hygiene laws for England into one piece of legislation. This is an attempt to address the concerns raised by businesses that it was difficult to find the law relevant to them as the law was piecemeal with various amending statutory instruments.

The main change to note is that the 2013 Regulations bring into effect the enforcement provisions of European law setting out the requirements relating to the hygienic production of sprouted seeds and seeds intended for sprouting.

MEAT PRODUCTS (ENGLAND) REGULATIONS 2014

From 23 January to 6 March 2014 DEFRA is consulting on the introduction of new regulations governing meat products which would bring English legislation in line with European requirements. The proposed regulation would come into force on 13 December 2014.

The proposed regulations would introduce other changes such as new and simpler enforcement powers for regulators but would still include similar restrictions on, for example, the use of certain animal parts in meat products.

THE LICENSING ACT 2003 (MANDATORY LICENSING CONDITIONS) ORDER 2014 ("ORDER")

The Order is due to come into force on 6 April 2014 and introduces a new mandatory condition for existing and future premises licence. The new condition requires licence holders to "*ensure that no alcohol is sold or supplied for consumption on or off the premises for a price which is less than the permitted price*".

The lowest "permitted price" that alcohol can be sold at is the cost of the alcohol duty added to the VAT that is payable on that duty.

The Order was published following the Government's recent guidance on banning the sale of alcohol below the cost of duty plus VAT in England and Wales, instead of introducing a minimum unit price for alcohol.

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