

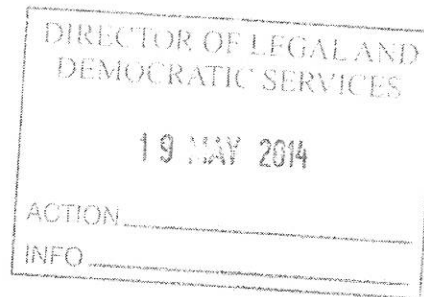
ACS | the voice of
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BRITISH
BEER & PUB
ASSOCIATION

NACM
CIDER MAKERS LTD

wsta
THE WINE AND SPIRIT TRADE ASSOCIATION

Legal Officer
Blackburn with Darwen Borough Council
King William Street
Town Hall
Blackburn
Lancashire
BB1 7DY



16th May 2014

Dear Sir or Madam,

Local 'voluntary' bans on higher-strength beers and ciders and Minimum Unit Pricing of alcohol

We are writing in reference to the decision of Blackburn with Darwen Borough Council to consider the implementation of a local scheme encouraging the removal of higher-strength beer and cider products as well as expressing interest in the implementation of Minimum Unit Pricing for alcohol.

As representatives of drinks producers and retailers, many of which are local, family or regional businesses, we would like to make you aware of some of the concerns we and our members have regarding the potential legal implications of policy decisions of this kind.

The proposals in many cases appear to attempt to impose the removal of certain higher-strength products as a generalist blanket condition across licences. Under licensing law, any such conditions should be evidence based and tailored to specific premises, and therefore the creation of a generalised scheme of this kind will exceed existing licensing powers and place retailers in an uncertain legal position should they comply.

While authorities are able to deal with licensees individually on an evidential basis, the Office of Fair Trading (now the Competition and Markets Authority) are clear that if a Local Authority acts to co-ordinate the independent commercial decision-making of businesses through non-mandatory means, such as the co-ordination of economic activity on non-price factors, such as product removal, they run a high risk of contravening competition law, even if this is on a voluntary basis.

Additionally there is a great concern that the Minimum Unit Pricing for alcohol will exceed licensing powers if applied on a mandatory basis, but also breach competition law if attempted on a voluntary basis. We have outlined further detail in the attached document.

It is for this reason that licensees are often not prepared to sign up to or be involved in a local schemes of this kind voluntarily. However, despite concerns about the legality and effectiveness of the withdrawal of products and local Minimum Unit Pricing our members take alcohol related harm, crime and anti-social behaviour very seriously and look to engage with local authorities in partnership to tackle these harms.

In order to ensure that local schemes are effective and sustainable, it is essential that they are legally sound as well as being evidence based and built upon strong partnership working in the local area. We have already written to Police and Crime Commissioners highlighting the existing powers local authorities

and police have to target local issues, and are working with a wide range of partners to support the expansion of existing industry schemes aimed at tackling alcohol-related issues within communities.

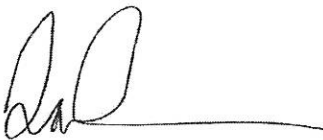
Although independent examination has yet to be carried out in areas that have withdrawn higher-strength products, it appears that a focus on enforcement of existing legislation and development of a comprehensive treatment and rehabilitation strategy have been more effective in tackling street drinking and associated anti-social behaviour than other measures.

Through partnerships with local authorities and other stakeholders, schemes have been developed like Community Alcohol Partnerships, Best Bar None, Purple Flag and Pubwatch which have been very successful in reducing the negative impact of alcohol across a range of areas. Following the announcement by the Home Office of the selection of twenty Local Alcohol Action Areas, the industry will be redoubling efforts to demonstrate the impact of effective partnerships in these areas. There is further information in the attached briefing on some of the measures that are available and have been effective elsewhere.

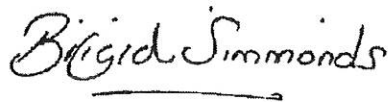
Given the legal issues outlined above, we would urge you as an authority to reconsider the policy that you have proposed and instead look to focus on a comprehensive strategy of enforcement, treatment and local partnerships which have a proven record of tackling alcohol related harm and can be done in close partnership with the trade.

If you would like any further information or are interested in discussing this in more detail we would be more than happy to meet with you to look at how we and our members can work with you to tackle shared objectives.

Yours sincerely,



James Lowman
Chief Executive
Association of Convenience Stores



Brigid Simmonds OBE
Chief Executive
British Beer & Pub Association



Robert Price
Director
National Association
Of Cidermakers



Miles Beale
Chief Executive
Wine & Spirits Trade Association

Schemes restricting higher-strength products – legal guidance

a) Use of blanket licensing conditions

As you will know a licensing authority's statutory power to impose s.18(4) conditions is not at large, but requires the trigger of "relevant representations" (s.18(3)), absent which the licence should be granted with conditions falling within a narrower compass (s.18(2)).

It is important to note that Parliament has identified certain mandatory conditions (s.19) and has entrusted the Secretary of State with the power to specify further mandatory conditions for the promotion of the licensing objectives but this does not extend to product bans. It is not open to local licensing authorities to act as regional legislators, imposing generally-applicable licensing conditions. The point is powerfully illustrated by the five mandatory licensing conditions which were imposed by the Secretary of State in the Schedule to the Licensing Act 2003 (Mandatory Licensing Conditions) Order 2010, including irresponsible promotions etc.

Furthermore, while local authorities may still discuss whether individual retailers would like to adopt the provision on their licence on a voluntary basis, licensing requirements extend to circumstances in which the effect is to create a generalised scheme through the voluntary acceptance under the threat of review or the desire to maintain good relations with the police and licensing authority and would apply to either general restrictions on the ABV strength or the targeting of specific products or brands. It is important for authorities to understand that it is these concerns regarding the legality of the policy, as well as concerns about the legality of their own role in these types of discussion, that leads to some retailers not supporting or being involved in these types of scheme.

b) Entirely voluntary schemes

Although we understand that some local authorities have taken the view that voluntary agreements with no use of licensing conditions are less onerous and restrictive to retailers, we would like to raise concerns about the risk this places on retailers of breaching competition law.

The Office of Fair Trading (now the Competition and Markets Authority) advises that there is a high risk of the Competition Act 1998 being infringed if a Local Authority:

'acts as a mechanism to co-ordinate the independent commercial decision-making of businesses through non-mandatory means, effectively substituting individual/unilateral decision-making with a co-ordination of economic activity (including on price and non-price factors)'

We therefore believe that the OFT have been clear that any coordinated voluntary agreement between businesses, such as an agreement not to stock certain brands or higher strength products, is at risk of infringing of competition law. Additionally, although technically voluntary, local retailers may feel compelled to participate in such schemes to maintain good relations with the police and licensing authority.

It is important for your authority to understand that it is these concerns regarding the legality of the policy, as well as concerns about the legality of their own role in these types of discussion, that lead to some retailers not supporting or being involved in these types of scheme.

Schemes that seek to apply a Minimum Unit Price - legal guidance

Licensing Authorities are restricted in their use of blanket conditions, as outlined in a) above. This same principle applies to any attempt to implement a blanket condition of Minimum Unit Pricing for alcohol.

Additionally, competition law about this is very clear about the creation of voluntary pricing restriction of this kind. Horizontal price-fixing arrangements by or between undertakings are a breach of the domestic Chapter I prohibition (Competition Act 1998 s.2(2)), and the EU Article 101 TFEU prohibition. The domestic and EU prohibitions are broadly equivalent for present purposes. So, s.2(2)(a) provides that the Chapter I prohibition is applicable to "practices which ... directly or indirectly fix ... selling prices".

This was also defined by the Department for Business, Enterprise and Regulatory Reform, which stated "Businesses must not enter into agreements, decisions or practices which ... directly or indirectly fix prices".

Further to this, advice from the Office of Fair Trading, (now the Competition and Markets Authority), in "Guidance Agreements and Concerted Practices (December 2004)" stated:

- An agreement whose object it directly or indirectly to fix prices ... of any product or service ... almost inevitably infringes Article [101] and/or the Chapter I prohibition.
- The OFT considers that such price-fixing agreements, by their very nature, restrict competition to an appreciable extent.
- There are many ways in which prices can be fixed. Price fixing may involve ... setting a minimum below which prices are not to be reduced ...

This means that retailers and other operators could be in breach of competition law, as could the local authority itself, for simply discussing the provision of a Minimum Unit Price for alcohol.

Local voluntary schemes restricting higher-strength beers and ciders – alternatives

The industry is fully committed to working in partnership with local authorities and police to tackle local problems and is keen to engage in strategies to tackle alcohol misuse at a local level. There are already a wide range of powers in place which can be used to deal with alcohol related crime and disorder as well as a wide range of other measures including local partnership working, which can provide more sustainable long term solutions than removal of products.

1. Enforcement of current laws

Alcohol Control Zones: Under the Criminal Justice and Police Act 2001 local authorities have the power to introduce these (officially called Designated Public Place Orders), which give police the power to confiscate alcohol in a designated zone.

Serving drunks: Under section 141 of the Licensing Act 2003 it is illegal to serve drunks.

Dispersal notices: Under the Violent Crime Reduction Act 2006, Section 27 notices can be issued to order individuals to leave a given area and not return for 48 hours.

Drinks Banning Orders: Also under the Violent Crime Reduction Act 2006, an individual who breaks the law or causes problems whilst drinking, can be banned from drinking or possessing alcohol in public, buying alcohol and from entering certain licensed premises.

Underage selling: The Government recently increased the maximum fine to £20,000 for persistent underage selling at the same premises which can be just two occurrences.

2. Forthcoming legislation

Legislation to prevent below-cost-selling (defined as duty plus VAT) coming in on the 28th May 2014 and new anti-fraud measures will prevent the small numbers of retailers that sell at very low prices from doing so. This is particularly the case for beer, which has a higher duty rate for beers over 7.5% ABV.

3. Alcohol support services

Anecdotal evidence has shown that putting money and focus on providing support services to targeted individuals and getting them off the streets has had an impact on crime and disorder associated with the issue of street drinking. Whilst this is a complex issue with no easy solutions, tackling the causes of why people drink to this level and providing further help and support is likely to be much more effective and sustainable than simply removing certain products.

4. Partnership schemes

Partnership schemes contribute to creating a safer and more secure late-night economy in towns and cities around the country. Initiatives such as Pubwatch, Best Bar None, Business Improvement Districts, Community Alcohol Partnerships and Purple Flag fulfil a variety of different functions, but all help with tackling crime and anti-social behaviour. An outline of the various partnership schemes can be found at bit.ly/lapportman.

5. Awareness and education

The industry continues to be extremely supportive of initiatives to better educate and inform consumers. We are committed to help consumers in making informed choices through funding of Drinkaware, to supporting initiatives and campaigns on responsible drinking and unit awareness.