**LOCKDOWN III : THE IMPACT ON BUSINESSES**

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**Introduction**

Welcome to 2021. Welcome to Groundhog Day: the pandemic. On 4 January, with Covid infection rates spiralling, for the first time the Government moved the UK to alert level 5. This followed advice from the Joint Biosecurity Centre and the four UK Chief Medical Officers. Level 5 means that “*the epidemic is in general circulation, transmission is high or rising exponentially and there is a material risk of healthcare services being overwhelmed”*.

The Prime Minister [addressed](https://www.gov.uk/government/speeches/prime-ministers-address-to-the-nation-4-january-2021) the nation on the evening on 4 January. The new variant of the virus, we were told, is between 50-70% more transmissible than the old one and hospitals are under more pressure from Covid than at any time since the start of the pandemic. On 29 December (shortly after the Government sanctioned Christmas relaxation), more than 80,000 people tested positive for Covid across the UK – a new, unwelcome, record. In England alone, the number of Covid patients in hospitals increased by nearly a third in the preceding week to almost 27,000. That number is 40% higher than the first peak last April.

It came as little surprise that the Prime Minister went on to announce the third National Lockdown.

In line with previous form, the guidance on the new lockdown was issued first on 4 January and updated the following day: “[National Lockdown: Stay at Home](https://www.gov.uk/guidance/national-lockdown-stay-at-home)”. The actual legal changes were published on 5 January at around 5.45 pm. The new national lockdown has legal effect by way of a set of regulations, [The Health Protection (Coronavirus, Restrictions) (No.3) and (All Tiers) (England) (Amendment) Regulations 2021](https://www.gov.uk/guidance/national-lockdown-stay-at-home). As their name suggests, they amend the pre-existing [The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020](https://www.legislation.gov.uk/uksi/2020/1374/contents) (which has now been updated on legislation.gov.uk in a consolidated form incorporating the new amendments, and so easier to make sense of).

The changes come into force on 6 January and were debated in Parliament on the same day. Quietly, the previous expiry date of the All Tiers Regulations has been extended from 2 February to 31 March 2021.

These regulations apply only to England.

All of Wales was previously placed into lockdown (alert level 4) a few days before Christmas by way of [The Health Protection (Coronavirus Restrictions) (No.5) (Wales) Regulations 2020](https://www.legislation.gov.uk/wsi/2020/1609).

In essence, the new National Lockdown measures in England place the whole of England into the pre-existing Tier 4 of the All Tiers Regulations, but with some further tightening and finessing of the restrictions set out in [Schedule 3A](https://www.legislation.gov.uk/uksi/2020/1374/schedule/3A).

This article focuses on the impact of the English lockdown on business premises. But it also, of course, impacts on both people movement and gatherings which are briefly considered below.

**People Movement and Gatherings**

In essence, there is a “stay at home” requirement on us all unless we have a reasonable excuse to be out of our homes. A non-exhaustive list of reasonable excuses is set out in the regulations. These include where it is reasonably necessary for work purposes, for shopping at, or obtaining services from, those “essential” premises that are permitted to remain open (e.g. for food, drink, medicines, the post office, petrol stations, banks etc.), to attend education and childcare (e.g. for children of essential workers or vulnerable children, or to attend early years learning centres which remain open despite primary and secondary schools being closed for most students). People may leave their home for medical reasons or to attend a birth.

The previous exemption that permitted people to leave home for “open air recreation” has been deleted. However, people may still leave their home for outdoor exercise either alone, with members of their household (or support bubble) or with up to one other person from another household. This exercise may take place in a public outdoor place (e.g. parks, beaches, forests, public gardens, grounds of a heritage site or playgrounds). Only guidance, and not the law, suggests this exercise should be limited to once a day in your local area.

People may leave home for animal welfare purposes (e.g. dog walking or seeing a vet) or to attend a place of worship. Subject to limits on numbers, people may also attend weddings ceremonies (albeit in limited settings and comprising of no more than 6 persons) and funerals (up to 30 persons). Outdoor sports venues, including tennis courts, golf courses and swimming pools must close.

People may also leave their home to fulfil legal obligations, for example to attend court. In relation to court hearings, the [Lord Chief Justice has indicated](https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-latest-covid-19-restrictions/) that the courts and tribunals must continue to function:

*“The position remains that attendance in person where necessary is permitted under the proposed new regulations. This would include jurors, witnesses, and other professionals, who count as key workers.”*

However, the default position, where possible, is remote attendance:

*“The significant increase in the incidence of COVID-19 coupled with the increase in rates of transmission makes it all the more important that footfall in our courts is kept to a minimum. No participant in legal proceedings should be required by a judge or magistrate to attend court unless it is necessary in the interests of justice. Facilitating remote attendance of all or some of those involved in hearings is the default position in all jurisdictions, whether backed by regulations or not.”*

In relation to gatherings, it is generally against the law to meet socially with family or friends unless they are part of your household or support bubble (subject to the outdoor exercise exemption with one other person). Certain specified exceptions are set out where larger gatherings may lawfully take place, including for work purposes or to provide voluntary or charitable services. So, the work exemption permits a person to work in other people’s homes where necessary (e.g. a tradesperson, nanny or cleaner) and people may gather in offices or other workplaces for work purposes where, in the altered words of the guidance, “*it is unreasonable to do so from home*”.

The restrictions on businesses and services are considered below.

**Restricted Businesses and Services**

The closure of, and restrictions on, businesses in Tier 4 areas (so now the whole of England) is covered by [Part 3](https://www.legislation.gov.uk/uksi/2020/1374/schedule/3A/part/3) of the amended Schedule 3A to the All Tiers Regulations. The lockdown amendments made to the Tier 4 provisions make some significant changes to the earlier restrictions, particularly in relation to licensed premises and off-sales.

A person responsible for carrying on a restricted business, or providing a restricted service, in the Tier 4 area must “cease to carry on that business or provide that service”.

***In a nutshell***

In a nutshell, non-essential retail must close but essential retail can remain open. Leisure, sports[[1]](#footnote-1) and entertainment venues must close.

Hospitality venues, including pubs, bars and restaurants, must close with the now more tightly regulated exception of providing food and drink for takeaway (considered further below).

Hotels and similar accommodation must close save for specific circumstances (e.g. where it acts as a person’s main residence or to shelter the homeless or it is essential to stay there for work purposes).

Animal attractions must close, as must indoor attractions at venues such as botanical gardens, heritage homes and landmarks (though outdoor grounds of these premises can stay open for outdoor exercise only).

Personal care facilities such as hair, beauty, tanning and nail salons, tattoo parlours, spas, massage parlours, body and skin piercing services must also close. (The guidance suggests that these services should not be provided in other people’s homes, although they would seemingly be permitted by law by virtue of the work exemption).

Community centres and halls must close except for a limited number of exempt activities. Libraries can also remain open to provide access to IT and digital services – for example for people who do not have it at home – and for click-and-collect services.

***In more detail***

The detailed list of businesses and services that are restricted businesses, and in many cases, must cease trading without exception (unless they were to reconstitute themselves as a non-prohibited type of venue) are set out in paragraph 15 of Schedule 3A, They include the following:

***Nightclubs (etc), SEV’s, Shisha bars***

* Nightclubs, dance halls, and discotheques.
* Any other venue which: (a) opens at night, (b) has a dance floor or other space for dancing by members of the public (including venue members), and (c) provides music, whether live or recorded, for dancing. (Save for nightclubs, a premises ceases to be prohibited from opening if it “ceases to provide music and dancing”).
* Sexual entertainment venues and hostess bars;
* Any business (e.g. shisha bars) which provides, whether for payment or otherwise : (a) a waterpipe to be used for the consumption of tobacco or any other substance on the premises, or (ii) a device to be used for the recreational inhalation of nicotine or any other substance on the premises.

***Food and drink premises***

*For consumption on the premises*

As before, in Tier 4 a person responsible for carrying on a restricted business must close any premises (or that part of it) in which food or drink are provided for consumption *on* the premises.

In addition to pubs, bars, restaurants, social clubs, cafes and canteens (with certain exceptions e.g. hospital cafes), this restriction also applies to hotel dining rooms and bars. However, food or drink provided by a hotel or other accommodation as part of room service is not to be treated as being provided for consumption on its premises.

References to food or drink being for “consumption on premises” include references to consumption on an *adjacent* area where: (a) seating is made available for its customers (whether or not by the business or the provider of the service), or (b) which its customers habitually use for consumption of food or drink served by the business or service.

Exceptions cater for users of motorway service areas, airports (and on airplanes), maritime ports, and international rail terminals.

*For consumption off the premises*

The following specified premises may continue to sell food or drink (alcoholic or non-alcoholic, in so far as their premises licence permits) for immediate consumption *off* the premises (because they are expressly not a restricted business and are included in the list of premises permitted to remain open as set out in para.17 of Sch.3A). They include:

* Food retailers, including food markets, supermarkets, convenience stores and corner shops.
* Off licences and licensed shops selling alcohol (including breweries).
* Pharmacies (including non-dispensing pharmacies) and chemists.
* Newsagents.
* Petrol stations.

In relation to other venues that will be closed for consumption of food and drink *on* the premises, for example, pubs, bars, restaurants, social clubs, cafes and canteens, the question then arises: what food and drink for consumption *off* the premises are permitted and when? The position has changed significantly from the earlier iteration of the Tier 4 provisions. Alcohol off-sales have become further restricted as explained below.

In relation to food and non-alcoholic drinks, pubs, bars, restaurants (etc) may sell food and drink for take-away or delivery (and the rules change depending on the time of day) in these circumstances:

* Food or drink (but not alcohol) for consumption off the premises between the hours of 05:00 and 23:00 (and customers may enter the premises to order and collect the takeaway during these times only);
* Food or drink (but not alcohol) for consumption off the premises between the hours of 23:00 and 05:00 but only through one of the following methods of sale:
  1. making deliveries in response to orders received:
     1. through a website, or otherwise by online communication,
     2. by telephone, including orders by text message, or
     3. by post.
  2. providing food or drink to a purchaser who collects the food or drink that has been pre-ordered by a means mentioned in paragraph (a) above, provided the purchaser does not enter inside the premises to do so (e.g. click and collect), or
  3. providing food or drink to a purchaser who collects the food or drink in a vehicle, and to whom the food or drink is passed without the purchaser or any other person leaving the vehicle (i.e a drive-thru facility).

In relation to alcohol off-sales from pubs, bars, restaurants (etc), this is now only permitted (at any time of the day subject to the terms of the premises licence) by making *deliveries* in response to orders received:

* through a website, or otherwise by online communication,
* by telephone, including orders by text message, or
* by post.

There is likely to be a lively legal debate as to whether, for example, a pub, bar or restaurant that reconstitutes itself as an off-licence is permitted to remain open for off-sales of alcohol from the premises itself. Ultimately, each case will be fact-specific.

***Licensing Act 2003: off sales extensions***

For the purposes of sections 172F to 172J of the Licensing Act 2003, where a restricted business or restricted service is carried on from, or provided at, licensed premises, the premises are to be treated as open for the purposes of selling alcohol at any time when the premises licence for those premises would, but for paragraph 11(1) of the Tier Regulations, authorise the sale by retail of alcohol for consumption on the premises.

***Other facilities to close***

This eclectic mix of facilities must also not operate (as set out in para 15(7) of Sch.3A):

* Indoor dance studios, fitness studios, gyms, sports courts, swimming pools, playgrounds, soft play centres or soft play areas.
* Other indoor leisure centres or facilities, including indoor games, recreation and entertainment venues.
* Casinos, betting shops, bingo halls, amusement arcades (including adult gaming centres).
* Bowling alleys and skating rinks.
* Riding centres.
* Cinemas, theatres, and concert halls.
* Circuses.
* Water parks and aqua parks, theme parks, fairgrounds and funfairs, adventure parks and activities, aquariums, and zoos (including safari parks), animal attractions at farms, wildlife centres (and any other place where animals are exhibited to the public as an attraction), and model villages.
* Kitchen, bathroom, tile and glazing showrooms.
* Museums and galleries.
* Indoor attractions at visitor attractions such as: sculpture parks, landmarks (including observation wheels or viewing platforms), botanical or other gardens, biomes or greenhouses, stately or historic homes, castles or other heritage sites. (“Indoor” is defined by reference to the smoking legislation under the Health Act 2006).
* Visitor attractions at film studios.
* Conference centres and exhibition halls (so far as they are used to host conferences, exhibitions, trade shows, private dining events or banquets, other than conferences, trade shows or events which are attended only by employees of the person who owns or is responsible for running the conference centre or exhibition hall).
* Spas, tanning salons, nail salons, beauty salons, hair salons and barbers, massage parlours, tattoo and piercing parlours.
* Carpet stores, showrooms and other premises, including outdoor areas, used for the sale or hire of caravans, boats or any vehicle which can be propelled by mechanical means.
* Car washes (except for automatic car washes).
* Auction houses (except for auctions of livestock or agricultural equipment).
* Markets (except for livestock markets, stalls selling food and any other essential retail).
* Outdoor sportsgrounds and facilities, including outdoor gyms, sports courts, swimming pools, water sports, shooting and archery venues, golf courses, and driving ranges.
* Retail travel agents.

***Other exceptions***

With some minor modifications, familiar exceptions apply to the restrictions on the use of premises and businesses, including those relating to:

* Premises used for the making of a film, television programme, audio programme or audio-visual advertisement.
* Essential voluntary or urgent public support services (e.g. food banks, blood donation sessions).
* Facilities for training by elite sportspersons.
* Fitness and dance studios, and skating rinks by professional dancers and choreographers.
* Outdoor sports facilities for permitted organised outdoor sports gatherings (e.g for disabled persons).
* Supervised activities for children or disabled persons at gyms or sports facilities (etc.).
* Theatres and concert halls for formal education or training, rehearsals, or performances without an audience for broadcast or recording purposes.
* Premises used for making deliveries in response to orders received through a website, by phone or text message or by post (e.g. Amazon delivery centres).
* Purchasers who collects goods that have been pre-ordered provided the purchaser does not enter inside the premises to do so.

***Holiday accommodation***

Hotels, hostels, B&Bs, holiday apartments (etc.), campsites, caravan parks, boarding houses, canal boats must cease to carry on that business. However, certain exceptions are specified in cases including where the accommodation is used by people:

* Unable to return to their main residence.
* As their main residence or during a house move.
* In order to attend a funeral or life commemorative event.
* Self-isolating.
* For work purposes.
* For education and work training purposes.
* For refuge
* Any purpose requested by the Secretary of State or a local authority.

***Goods for sale businesses, libraries, community centres & offices***

Other than premises specified as permitted to remain open (set out below), premises offering goods for sale or for hire in a shop, or providing library services (subject to some exceptions), must cease to carry on that business or provide that service except :

* By making deliveries in response to orders received through a website, by telephone of text message, or by post,

Or,

* To a purchaser who collects goods that have been pre-ordered (by a means mentioned above), provided that the purchaser does not enter inside the premises to do so

This restriction does not prevent any business from continuing to provide hot or cold food for consumption off the premises, or goods or services to the homeless, or to open the premises for the purposes of making a film, television programme, audio programme or audio-visual advertisement.

Community centres must close, unless for a specified purpose including: for essential voluntary or urgent public support services (e.g. food banks), for education or training or support groups, registered childcare, weddings, funerals or commemorative events, voting or election counts.

Unless otherwise specified, other service providers, including, of utmost importance, lawyers’ offices, can theoretically remain open since they are not restricted businesses and do not offer “goods” for sale (assuming the legal advice proffered by solicitors and barristers is not properly to be considered as “goods”). However, this is subject to the important requirements relating to people movement and gatherings. It must be reasonably necessary for those attending the office to do so for work purposes *and* where it is not “reasonably possible” for the person to work, or to provide those services from home.

The ability to work remotely from home, increasingly honed by us all since March 2020, may impact on the statutory test of reasonableness.

***Other premises that can remain open***

Essential businesses and venues can remain open and are specified in para.17 of Sch.3A as:

* Food retailers, including food markets, supermarkets, convenience stores and corner shops.
* Off licenses (including, presumably, correctly spelt “off-licences”).
* Licensed shops selling alcohol (including breweries).
* Pharmacies (including non-dispensing pharmacies) and chemists.
* Newsagents.
* Animal rescue centres and animal boarding facilities.
* Building merchants and suppliers of products and tools used in building work and repairs.
* Petrol stations.
* Vehicle repair and MOT services.
* Bicycle shops.
* Taxi or vehicle hire businesses
* Banks, building societies, credit unions, short term loan providers, savings clubs, cash points, undertakings which by way of business operate currency exchange offices, transmit money (or any representation of money) by any means or cash cheques which are made payable to customers.
* Post offices.
* Funeral directors.
* Laundrettes and dry cleaners.
* Dental services, opticians, audiology services, chiropody, chiropractors, osteopaths and other medical or health services, including services which incorporate personal care services and treatments required by those with disabilities and services relating to mental health.
* Veterinary surgeons and pet shops.
* Agricultural supplies shops.
* Storage and distribution facilities, including certain delivery drop off or collection points (where the facilities are in the premises of a business included in this Part).
* Car parks.
* Public toilets.
* Garden centres.
* Automatic car washes (but not hand car washes).
* Mobility and disability support shops.

**Offences & Enforcement**

The familiar offences and enforcement powers under the All Tiers regulations continue to apply under the amended lockdown provisions.

Fixed Penalty Notices of £200 for a first offence can be issued, doubling for further offences up to a maximum of £6,400. If you hold, or are involved in holding, certain illegal gatherings of over 30 people, the amount can be £10,000.

Prosecutions may also be instigated by the Crown Prosecution Service or local authorities and unlimited fines can be meted out by the magistrates’ court on conviction.

**Conclusion**

See you all on the other side.

1. The Government has indicated that elite sports can continue to be played, e.g. premiership football matches behind closed doors, however there may well be a discrepancy in the amending regulations that purport to categorise outdoor sports grounds and facilities as types of premises that must close, whilst the exemption for elite sportspersons appears to apply to using such sports grounds for training purposes, rather than competitive playing. This may well be rectified if spotted by the draftsman, however given the Government’s stated intention it would take a brave regulator to seek to close down a premiership match and the Court may be persuaded to interpret the amended regulation charitably if challenged. [↑](#footnote-ref-1)