

Re-thinking licensing

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Summary

This article is written at a moment when the social economy is moribund, with some of it artificially ventilated by furlough, grants, business loans and rates moratoria. The question of what happens when the ventilator is switched off is of fundamental importance, for it is becoming clear to policy-makers that the patient will not be flying out of intensive care. The post-Covid landscape will be radically different. The social economy will be fragile. In many places, unaided, it will rapidly collapse.

Therefore, local authorities will need to adapt to head off incipient disaster. There are three main elements to this.

First, they should treat the social economy as a social good to be supported and propagated, not a pandemic to be controlled.

Second, they should reconsider their approach to regulation. What was appropriate to promote the licensing objectives before the decimation of the high street may well not be appropriate now.

Third, they should plan positively for their social economy, utilising all the tools at their disposal.

A respectable argument for each of these could have been made, and in many instances was made, before. But Covid-19 is the greatest social and economic waterfall of most of our lifetimes, when the placid currents of our society enter a torrent of acceleration and transformation. Therefore, what was an ideology has now become a pressing necessity. The policy decisions authorities take now, i.e. immediately, will to a large extent determine the future of our social economy in particular and our town centres in general.

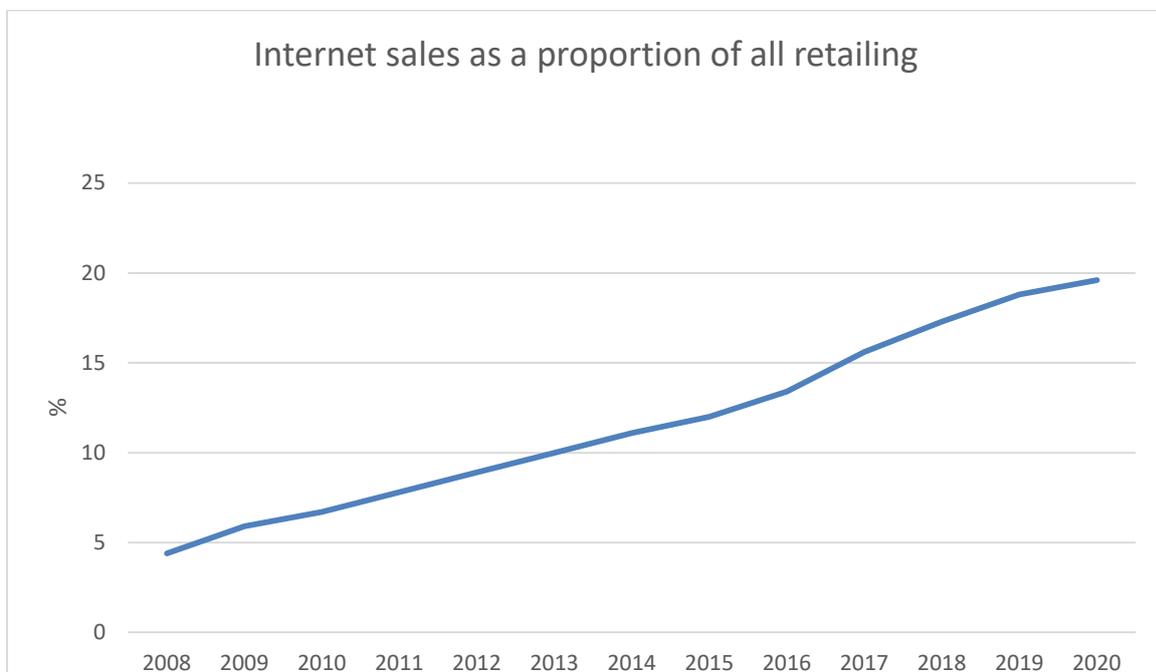
The placid currents

While the previous currents governing high street economies are here described as placid, they were insistent and flowing in one direction over many years. It would be wrong to describe the high street crisis as having been a slow car crash. It has been more glacial than that. But, just as for receding glaciers, what was formerly understood only by glaciologists and their academic counterparts in climatology and geology, became visible on casual inspection.

The elements of change were explored in more detail in my joint paper: *Covid's Metamorphosis*.¹ They comprise a decrease in high street retail, a reduced interest in alcohol, a growth in home entertainment, the rise of urban gentrification and austerity, with falling incomes and rising costs (particularly rent and rates), hitting drinking establishments, nightclubs, music venues, LGBT venues and retail establishments particularly hard.

To illustrate the thesis, it is worth taking just two indicia, on-line retail and alcohol consumption.

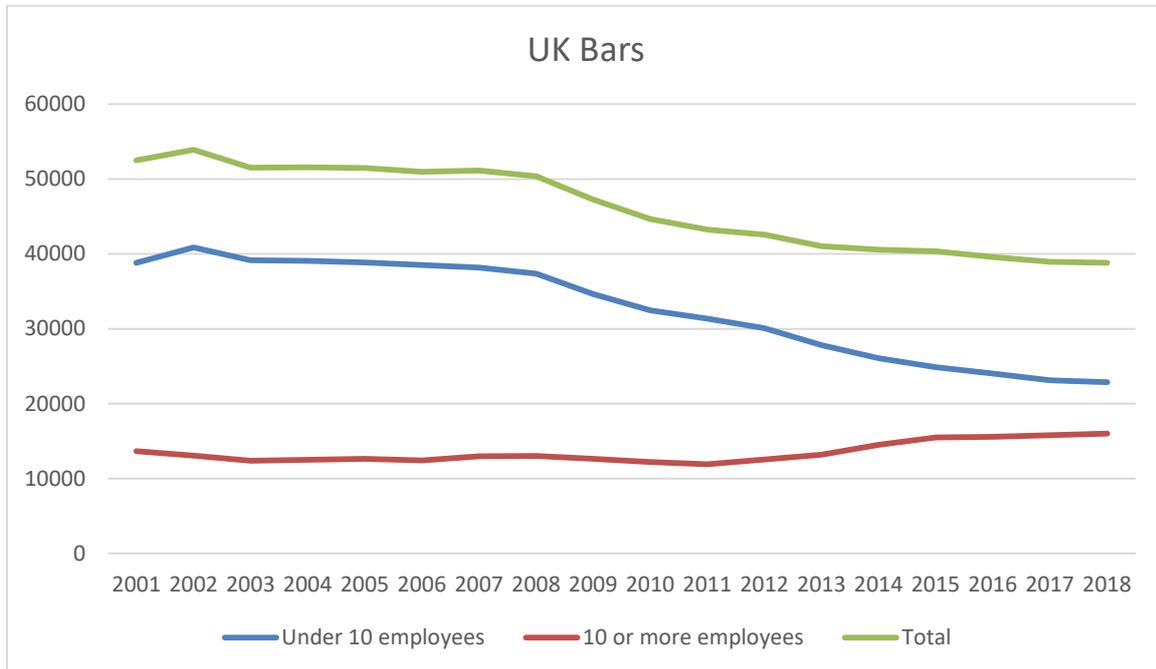
First, on-line retailing has increased from a very low base at the beginning of the millennium to a fifth of all sales now, as the figure below demonstrates. Coupled with unsustainable increases in town centre rents and rates and a younger generation more interested in experiences than things, it is not at all hard to imagine why seemingly every month brings another loss of a household retail name.



Meanwhile, the reduced propensity of young people to drink, the rise of home consumption and, again, rising rent and rates have conspired to produce a persistent egress of bars from our society, as the following figure illustrates. It is fair to say that loss of bars does not always equate to loss of social venues, since the rise of the experiential economy has led to the development of premises which are not alcohol-led – competitive socialising, street food, gelaterias, coffee-houses and the like – which many would judge to be not a bad thing. In some cases, the opening of larger bars has coincided with the loss of smaller bars, so the phenomenon is as much consolidation as cull. Nevertheless, it is undeniable that pubs, for

¹ <https://www.instituteoflicensing.org/news/covid-19-licensing-issues-covid-s-metamorphoses-the-future-of-the-social-economy/>

two centuries community hub and high street mainstay, are, if not yet an endangered species, then certainly on the decline. And this was before the baleful influence of the pandemic.



The offset by the rise of a more diverse social economy has helped compensate for loss of traditional retail and hospitality. Nevertheless, even pre-Covid, high street vacancies reached a 5 year high of 12.2%, that figure masking regional woes: for example the north east rate was 16.7%.² These figures, which have been on a rising curve for three years, should not be viewed complacently, particularly in the face of a catalysing pandemic.

The immediate response

By the time this article is published, the government plan to restart the hospitality sector will be known, as will how much of the sector considers re-opening (as opposed to closing or mothballing) worth the candle. There is no point crystal-ball gazing as to the precise constituents of the plan, not least because the gestation from embryonic thought to ministerial policy announcement presently seems measurable in hours, and sometimes more according to the exigencies of the press round than any careful weighing of competing priorities for which the Civil Service is globally renowned.

It is fair, however, to say that, whatever the protestations of being led by the science, and whatever that now well-worn phrase actually means, the response to the different stages of the pandemic have been principally political and not clinical. That is not a criticism, for if the

² Local Data Company.

overriding objective was the removal of all known scientific risk, nobody would be let out at all and the economy and much else would collapse.

Partly for this reason, it is observable that the terms of emergence from lockdown have varied considerably from nation to nation. For example, at the time of writing, Spain, which was badly hit by the virus, is allowing outdoor events of up to 400 people, whereas The Netherlands, which was less affected, is not permitting mass outdoor events at all.

The discussion about the immediate response has understandably taken up most of the political and media bandwidth, but the socio-economic ramifications of the virus require a horizon measurable in years if not decades, and the precise mechanism by which one moves from lockdown to re-opening is not the concern of this article.

When, however, premises do start to re-open, the economic landscape will be bleak. There will be possibly unprecedented public and private debt, higher unemployment and, for a proportion of the population, an aversion to going out and rubbing shoulders with fellow citizens. Of course, there will also be an element of physical distancing, be it imposed or voluntary, together with other reminders to customers that the absence of the virus in any given space cannot be assumed, such as Perspex screens, masked waiting staff and so on. None of that bodes well for an industry which relies on spend, fun, proximity and sociability.

Therefore, what is needed now is a far more imaginative long term plan which turns the problems likely to beset the social economy into opportunities, and perhaps even reconceives the very nature of hospitality and its regulation to keep town centres alive. The solutions are not pre-election fixes but the long-term restructuring of thinking, planning and approaches to regulation within local authorities.

The social economy as a social good

In 350 BCE Aristotle wrote that a social instinct is implanted in all men by nature³, and no doubt in women too. Aristotle would have been as familiar with the agora as a forum for exchange of goods, ideas and pleasantries as we are with the town centre. The interplay between business and socialising is inherent in the etymology of the very word commerce which, even by Shakespeare's time could mean either business or social intercourse. Those towns and cities which lack full physical provision for the latter would be said by many to lack a heart or a soul.

Town and cities were created by humans for humans, not just as places to trade, but as hubs where we may indulge our basic impulse to meet, celebrate, commiserate, share ideas and form social bonds.

³ Aristotle: Politics.

As western society has developed, so the locations where such commerce occurs have become private facilities, open to all on payment of the price. The price of a coffee bears no relation to the cost of the beans, water and milk, but represents the price of rental of the space one occupies for the average length of the sojourn.

In general political theory, when discussing social goods, one considers goods which are the right of everybody to access and where the use by one person does not exclude the right of another. Common examples would be drains, lighthouses, parkland and air.

I would argue that, while each licensed venue may not be a social good, the social economy as a whole most certainly is. If it were not provided by the private sector, the state would be under compulsion to provide its equivalent to assuage the desires of its populace.

If proof were needed, the current health crisis has proved it. How many of us engaged with friends and family on Zoom or Teams before March 2020? Now these words have become the *lingua franca* the world over. This is not because none of us have anything better to do. It is because we crave commerce with those close to us, the sharing of news, jokes and feelings, the consolation of human company. Virtual outreach may be a poor second, but it proves the absolute necessity of the first.

For this reason alone, public authorities should be inspired and humbled by the fact that what they have in their hands is something ancient and precious, as vibrant and meaningful on a species level now as it was to Aristotle.

I have been working in this field for decades, for public authorities, communities and applicants. Just sometimes, my anecdotal experience is that some authorities view the social economy, particularly the alcohol economy, with suspicion, as a beast to be tamed, rather than a gift to be nurtured.

But the social economy satisfies one of the most basic human urges. It also pays rates which keep local authorities functioning. It is one of the biggest employers in the land, particularly of young people. It keeps alive a network of businesses, including food growers and suppliers, drinks manufacturers and allied industries such as security, transportation and manual and professional services. It is also one of the biggest tourism draws from abroad.

This is not to say that the social economy lacks externalities. Of course there can be negative effects: noise, anti-social behaviour and street congestion being just three. It is obviously the duty of a public authority to mediate out some of these impacts. But it should do so in the context of support for what we should all recognise as a major net contributor to society and our human experience. The singer Joni Mitchell wrote: "You don't know what you've got till it's gone." The remarkable and unanticipated gift of the coronavirus and the lockdown it engendered is that, in the case of the social economy, we very much do.

Until now, the public sector largely relied on the private sector to constitute and develop the social economy. If there is an assumption underlying this approach, it is that of Adam Smith, in whose *Wealth of Nations* was espoused the theory that through market competition is to be attained the conditions of common good for the benefit of all humankind, however elevated or lowly be their rank. But no market economics keep park greens mowed or children safe on our roads, and so the state cannot shuffle off all responsibility for social goods just because they could in theory be provided by the market. Sometimes the state has to step in.

What is more, Smith's analysis becomes more troublesome when one is considering the economic interplay between markets – in this case the competing demands for urban centre properties, the competition between home and town centre socialising or between on- and off-trade products, between neighbouring urban centres or even between local socialising or holidaying abroad. A local authority would be remiss if it stood by in the name of market capitalism as its social economy crumbled. Its political and moral imperative would be to intervene in a supportive capacity. This is one such time.

The approach to regulation

There will be those to which the idea of regulators actually supporting those they regulate as anathema, even heresy. It is not, and it is rooted in principle. The first provision of the Better Regulation Delivery Office's Regulatory Code⁴ is:

Regulators should carry out their activities in a way that supports those they regulate to comply and grow.

Those are very fine sentiments. What would they mean in practice?

In the planning context, the idea of a regulator setting out to support a sector is non-contentious. It may provide for land allocation and presumptions in favour of development in an authority's development plan. Then, section 70(2) of the Town and Country Planning Act 1990 enjoins the planning authority to have regard both to the development plan and to other material considerations. In the classic case of *Stringer v MHLG*⁵ Cooke J said: "*any consideration which relates to the use and development of land is capable of being a planning consideration.*" That might be a positive consideration, such as that the construction of a barn might support an agricultural operation. It might also be negative such as the undesirability of a heavy industrial use in a quiet residential street. Either way, the planning authority must specifically balance out the positive and the negative to determine where the public interest lies.

⁴ April 2014.

⁵ [1970 1 WLR

Under the Licensing Act 2003, the correct approach is by no means so clear even though it is 15 years since it came into force. The philosophical underpinning of the Act was a concept which would have been familiar to Adam Smith himself, but came to be known as neo-liberalism, whereby left to itself the market will conduce to the common good, and should only be interfered with where necessary. The notion of necessity as the prerequisite for regulation of commercial aspirations found its expression in section 18(3) of the Licensing Act 2003, whereby the authority could only interfere with the operating plan if, and to the extent that, it considered it necessary for the promotion of one of four defined licensing objectives. In short, you only clip businesses' wings if you have to.

Come a change of government, come a new approach. In 2010, allegedly in response to a "growing concern" that Tony Blair's café culture had failed to materialise but that the Act was leading to behavioural excess, the government proposed to rebalance the Act in favour of communities, including by removing the need to show that intervention was necessary, rather than for the benefit of, promotion of the licensing objectives.⁶ This culminated in the substitution of "appropriate" for "necessary" in the Police Reform and Social Responsibility Act 2011. Whether and the extent to which this supposed exercise in bar-lowering actually influenced decision-making is a matter for conjecture.

The impact of the Act, though, whether in its initial or subsequent iteration, has clearly tended to lean against the careful balancing of considerations which is the hallmark of the planning system, a system in which the downsides of a proposal can be acknowledged and weighed evaluatively against its benefits so as to reach an overall assessment. Rather, in licensing hearings, licensing sub-committees have tended to focus on the reasons why applications should not be granted rather than why they should. In a subversion of the popular song,⁷ they "*Ac-Cent-Tchu-Ate the negative and eliminate the positive.*"

In fairness, they are encouraged to do so by statutory wording which throws focus onto the licensing objectives. What is more, nothing in the section 182 Guidance appears to presage a different approach. In planning, the concept of proportionality means striking a fair balance between competing interests.⁸ In licensing, it means something else altogether. In teaching authorities how to go about exercising their powers, the Guidance states: "*The authority's determination should be evidence-based, justified as being appropriate for the promotion of the licensing objectives and proportionate to what it is intended to achieve.*"⁹ In other words, proportionality is like an advance to a field surgeon: "don't amputate more than you need to."

⁶ *Rebalancing the Licensing Act a consultation on empowering individuals, families and local communities to shape and determine local licensing* (Home Office).

⁷ By Arlen and Mercer.

⁸ *Lough v First Secretary of State* [2004] EWCA Civ 905.

⁹ Paragraph 9.43.

In a world in which the social economy is to be treated as a social good, it is time to view the Act through a different lens. The Act does not in fact say that nothing which might harm a licensing objective can possibly be granted. If that were the case, nothing could ever be permitted. Nor does it say that the authority must take all steps required to obviate any harm to the licensing objectives. Its target is rather more nuanced. It must take the steps which it considers “appropriate” to promote the licensing objectives. It does not state that anything less than full cauterization of the risk to the licensing objectives is *verboden*. Rather, it asks the authority to appraise the risk to each of the licensing objectives and then decide what is appropriate, not to obviate the risk, but to promote the objectives in question.

Take Pavarotti in the Park. Most people would be thrilled to know the event is happening at all. Some will be lucky enough to be there. Some won’t care. Some will judge the music purely in decibels, regarding any heightened levels as a monstrous assault on their liberty. On the traditional approach, the poor licensing sub-committee has to behave as the linguistic equivalent of a contortionist, finding that, despite an obvious interference with local amenity, the event is not a public nuisance as properly so understood, even though it is the law that low level interference with the amenity of a few can constitute such a nuisance.¹⁰

In a brave new world of supporting the social good, the authority does not need to engage in sophistry. It can acknowledge that people may be disturbed, but do so with equanimity, making it clear that it is simply not appropriate on the facts of the case to curtail the proposal. In other words, while the licensing objectives are an important material factor, they do not enjoy exclusivity when it comes to deciding what is relevant.

If this is right, its effect is that, through consideration of what is appropriate, the authority has full power to take into account all factors, positive and negative, in favour of a proposal. Some authorities do this already, by writing considerations concerning public health into their licensing policies. But few if any openly take account of the positive virtues of a proposal as outweighing any negative implications. As a matter of law they can, and in some cases undoubtedly should.

It is cardinally important that authorities grasp this nettle now, for the hospitality sector is in desperate need of latitude when it comes to exterior consumption. Physical distancing, whether set at 2 metres or (as the World Health Authority has it) 1 metre, will render many licensed premises unviable. The only way they will get through the next year, devoutly praying for a vaccine, is to expand their operation both in terms of hours and exterior space. It follows as night follows day that there is an increased risk of disturbance to local residents, which may result in shorter hours than are prescribed for the interior. But may the authority hold that it can live with increased disturbance in the early part of the evening

¹⁰ R (Hope and Glory) v City of Westminster Magistrates’ Court [2009] EWHC 1996 (Admin).

so as to save the hospitality sector, the jobs, the culture, the social cohesion and the rest of it? In my view it plainly may, on the basis that to do so is “appropriate”.

In these extreme times, there is a human urge to shrink to what is comfortable and familiar. But that won't be enough. We will need to do things differently and do different things.

Let me take two different examples.

First, few of the larger towns and cities in England and Wales are without their cumulative impact policies which, depending on their language, operate as anything from a hurdle to surmount as an impregnable portcullis. But all of these cumulative impact policies were conceived and born before the coronavirus. They are weapons trained on different enemies in former times. They are as apt as the Light Brigade in an aerial dogfight.

In many cases such policies were designed to deal with issues of over-consumption of alcohol by too many people in a saturated economy. But what if the economy is no longer saturated but slip-sliding away, visited by people deeply relieved to be out at all, and sitting chatting outside at tables for two in the early evening? As a matter of lexicology, you might not be able to say that the policy does not apply. But, in the new world, there is no statutory obligation to follow a cumulative impact policy, and no political imperative to do so, especially where the policy stands in the way of necessary social progress. Therefore, there is no just cause or impediment preventing an authority holding, very simply, that preventing early evening exterior consumption is not inappropriate, despite a formal breach of its cumulative impact policy.

Second, the accentuation of the negative has caused the cumulative impact policy to emerge as the principal licensing policy response to the night time economy. These range from the densely licensed area of Soho in the West End of London to suburban areas where it is quite hard to find a drink in the evening. Since such policies have only recently been placed on a statutory footing by the Policing and Crime Act 2017, it would be a quixotic commentator who advocated their abolition.

However, it remains deeply asymmetrical that at both national and local level there is such a strong focus on what should not be permitted and so little on what should. Is the ability to enthuse, advocate, promote and exhort a disqualification from political office, or from practising in licensing at all? It is not. This, then, is precisely the moment for authorities to state loud and clear through policy what they want to see to help the social economy survive and thrive as the malign microbe of Covid-19 recedes from our bodies and our body politic. Whether this is restaurants, cafes, gelateria, table tennis, laser games, escape rooms, trampolines, street food, low alcohol bars, music venues, gay bars, high-tech darts, e-gaming, bingo, warehouse gigs, events in libraries, museums and galleries, pop-ups, markets, microbreweries, gastropubs or community theatres, or all of the above, it is time for authorities to lead the way in listening to what local people want and then driving

provision of it with positive policies. This should now become a litmus test of competence for licensing authorities and their officers.

Positive planning for the social economy

For a Parliament which deliberately brought licensing into the care of local authorities because they were already responsible for regulating what happens in town centres and in the hospitality industry in general, our rule-makers have never descended into detail on the true nature of the interplay between the different functions. The nearest one gets to policy prescription is when the section 182 Guidance instructs us that planning and licensing are to be separated to avoid duplication and inefficiency, which has always begged the question of why planners are a responsible authority at all, a confusion which is reflected in the minuscule proportion of representations coming from that quarter. The non-duplication principle is comprehensible when it comes to regulatory interference: why set out to amputate a limb which has already been removed by a different surgeon?

But the Guidance is incomprehensible when it comes to positive policies to support a type of venue or a sector of the social economy. Why on earth should planning and licensing policies not harness themselves together to pull the social economy in the same direction? What is the logic in trying to decouple them and leave them to go off in separate directions? Surely, if something is worth having, it is worth advocating for both in planning and licensing policy? And if that is true for planning, why is it untrue for highways, regeneration, compulsory purchase or any other relevant area of council policy-making?

Post-covid policies might, therefore, be expected to support extensions of hours or space for particular types of venues, for example those which are family friendly or not alcohol-led. They might particularly express support for a café culture with highways measures to reduce the amount of carriageway assigned to motor vehicles, with greater provision for tables and chairs, cyclists and pedestrians. They might seek to build, or rebuild, the social economy in suburban locations so as to reduce the need to travel, and reflecting the truth, perhaps insufficiently acknowledged, that the fading away of shops and offices from central locations might, whatever is done, mean that the only policy option for some town centres in coming years will be to repurpose them. The best way forward will always be a matter of local choice. This article does not presume to pontificate about the end-game. But it does presume to rebel against self-denying ordinances by local authorities which prevent them entering their licensing policies in the race to make their areas better.

Conclusion

It has been said that Covid-19 is a great leveller, in the sense that it can affect every one of us. That myth has been exploded by evidence as to its disproportionate impact on different

age, gender and ethnic groups. What it is, rather, is a great accelerant, advancing trends which had long been eroding the economic base of the social economy.

Now, at this moment of maximum crisis, of profound change, of infinite risk, authorities can take one of two courses. They can wait for the ship to founder and take on the mantle of the Titanic orchestra as it disappears into the deep. Or they can rush for the bridge and steer the majestic vessel from danger. They need no legislative fiat or ministerial exhortation to do so. They can do it all by themselves utilising the powers they have been given in a creative manner. If this were my political career, I know which course I would prefer.¹¹

¹¹ The author thanks Marcus Lavell (Solicitor, Keystone Law), Professor Guy Osborn (University of Westminster) and Dr. Laurie Johnston for their comments on a draft of this article.