

Click and Collect businesses and the Coronavirus restrictions

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Introduction

On Thursday 26th March 2020, the Secretary of State for Health, Matt Hancock, made The Health Protection (Coronavirus, Restrictions) (England) Regulation 2020/350 (“the Regulations”) for the purpose of preventing, protecting against and controlling the spread of infection or contamination in England and Wales, pursuant to s.45C Public Health (Control of Disease) Act 1984.

The Regulations continue to take effect during “the emergency period”. The emergency period began on 26th March 2020 and will end on a direction from the Secretary of State, whenever that may be. The decision to give that direction is reviewed every 21 days, and that is why the emergency period was initially reviewed and extended on Thursday 16th April 2020 and is due to be reviewed again on 7th May 2020.

The Regulations detail two sets of restrictions. Everyone is likely to be familiar with the first set, whereby people are restricted from leaving the place where they are living without reasonable excuse, and Regulation 6(2) contains a non-exhaustive list of what may constitute a reasonable excuse. The second set of restrictions is in relation to business closures, and the urgency of the situation has meant that, in response, some businesses have fully shut up shop, whereas others have opted for other methods, such as Click and Collect, as a bid to generate some revenue in these difficult times.

What is Click and Collect

Click and Collect is a method of purchasing goods where a consumer first orders goods online. They will then be given a time when they can collect their order at a physical location. The location is typically the physical premises of the relevant retailer that is geographically convenient to the consumer. This article addresses what the position is in relation to businesses that offer a Click and Collect service for the selling of (i) food and drink, and (ii) other goods.

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The issues

The first question to ask is whether a business (other than the exempted “Essential” businesses – see below) can legally operate a Click and Collect service. The second question which then flows is, if it is legal, how does that business operate a compliant Click and Collect service. This article addresses these questions and touches on the consequences of non-compliance.

Question 1 - Requirements to close premises and businesses

Broadly speaking, the Regulations contain three lists of business type in Parts 1, 2 and 3 of Schedule 2. The lists do not have official names, but can be thought of as the following:

- (i) Part 1 - Eateries - Restaurants, cafes, bars pubs etc.
- (ii) Part 2 – Entertainment and leisure – cinemas, theatres, beauty salons etc.
- (iii) Part 3 - Essentials – supermarkets, pharmacies, petrol stations etc.

The extent and scope of the restrictions on businesses differs depending on which Part applies.

Part 1 – Eateries – Click and Collect for food and drink

If the business is listed in Part 1 of Schedule 2, Regulation 4(1) specifies that the person responsible for carrying on the business must close any premises in which food or drink is sold for consumption on premises and cease selling food and drink for consumption on premises.

However, if the business sells food or drink for consumption off the premises, the person only needs to cease selling food or drink for consumption on its premises. There is no requirement to close the premises, and there is no requirement to cease selling food and drink for consumption off the premises.

Therefore, eateries which offer Click and Collect can legitimately keep premises open and provide a Click and Collect service.

Part 2 – Entertainment and Leisure

Regulation 4(4) requires businesses listed in Part 2 to close and cease operating, save for those who are broadcasting performances to people outside their premises over the internet or radio. These restrictions are not relevant to Click and Collect.

Part 3 – Essentials – Click and Collect for selling non-essential goods

Regulation 5(1) specifies restrictions for businesses that offer goods for sale or hire. The Regulation 5(1) restrictions do not apply to selling hot or cold food for consumption off premises, as that is already dealt with in Part 1 and Regulation 4, and the “Essential” businesses that are listed in Part 3 (supermarkets, pharmacies etc.) are exempted. However, the businesses that are not in the exempt list (e.g. clothing retailers) must:

“(a) cease to carry on that business or provide that service except by making deliveries or otherwise providing services in response to orders received—

(i) through a website, or otherwise by on-line communication,

(ii) by telephone, including orders by text message, or

(iii) by post;

(b) close any premises which are not required to carry out its business or provide its services as permitted by sub-paragraph (a);

(c) cease to admit any person to its premises who is not required to carry on its business or provide its service as permitted by sub-paragraph (a).”

Sending out orders by delivery is clearly permitted, but the relevant words for the purposes of Click and Collect would be “*cease to carry on that business ... except by ... otherwise providing services in response to orders received through a website, or otherwise by on-line communication...*”. The specific inclusion of responding to orders other than by just making deliveries strongly suggests that processing orders by Click and Collect is within its scope, and only premises that are not required for processing orders need to be closed.

There may be an issue with this conclusion based on the wording of Regulation 5(1)(c), as customers cannot be admitted to the premises to make their collection. However, a simple solution, which is within the scope of the legislative language, would appear to be that the customers can wait off the premises before they receive their orders. An employee or agent of the business can then bring the order out to the customer. Therefore, provided a business does not allow the customer onto its premises, facilitating a Click and Collect operation appears to be permissible under the Regulations.

Initial confusion with enforcement and compliance

Relevant persons, including police constables and individuals designated by local authorities - i.e. Trading Standards Officers - have three enforcement options available to ensure that restrictions are complied with: (i) prohibition notices – requiring immediate cessation of activities, (ii)

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summary criminal proceedings for an unlimited fine, and (iii) fixed penalty notices – the popularised £60 “fines” which rise to £120 and a maximum of £960 for repeat offending. Given the significance of these penalties and the initial lack of legislative guidance accompanying the Regulations, it is understandable how there has been a mixed response from businesses and enforcers.

Initially, there was confusion as to whether the Regulations permitted non-essential businesses to operate a reduced service with Click and Collect. The confusion mainly arose out of a publication by the College of Policing on the reasonable excuses for people leaving the place where they are living (the first set of restrictions mentioned above). *“Buying tools and supplies to repair a fence panel damaged in recent bad weather.”* was likely to be reasonable as far as the Police were concerned, but *“Buying paint and brushes, simply to redecorate a kitchen”* was not likely to be reasonable.

The problem was the overlap between the two sets of restrictions. As above, businesses have always been permitted to operate Click and Collect. However, under the first set of restrictions – and according to the College of Policing, individuals were not permitted to leave their house to pick up paint for redecorating a kitchen, even if the business could legitimately operate Click and Collect for that paint. As a result, some businesses stopped operating, whereas others persisted and faced threats of closure and criminality from enforcers. Equally, it is understandable that, if the College of Policing issues enforcement guidance in a time where there is a general lack of guidance, then that could legitimately form a basis of enforcement action for all enforcers.

Fortunately, the College of Policing’s guidance has been amended, and the conclusion noted above is now supported by the government. On 1st May, the government updated its information on the webpage *“Closing certain businesses and venues in England”*. In respect of food and drink, it states:

“Food delivery and takeaway can remain operational. This can be a new activity supported by the new permitted development rights in England. This covers the provision of hot or cold food that has been prepared for consumers for collection or delivery to be consumed, reheated or cooked by consumers off the premises. ... Businesses are encouraged to take orders online or by telephone, and businesses must not provide seating areas, indoors and outdoors, for customers to consume food and drink on. Ordering in advance is strongly encouraged to avoid waiting in, as per Public Health England guidelines.”

In respect of selling non-essential goods, *“All retail, other than those exempt, must close their premises to members of the public. However, staff may be present to make deliveries or provide services in response to orders such as those through telephone, online, or mail”*.

Therefore, provided a business obeys other requirements, it may operate a Click and Collect service for non-essential goods.

Question 2 – Ensuring a compliant Click and Collect

Although Click and Collect is permitted, the language of the Regulations is clear that customers cannot be admitted to the premises. Therefore, the next question becomes what are the premises? The answer is straightforward for businesses that only occupy a physical structure, as the boundaries of that structure will be quite clear. However, what about businesses that own car parks. Even if the customer waits in a large and empty car park and does not enter the structure, has that business admitted a customer to its premises, in contravention of the Regulations?

The Regulations do not define premises. However, the interpretation provision of the main act, s.74 Public Health (Control of Disease) Act 1984, provides:

““premises” includes any place and, in particular, includes–

(a) any vehicle, train, vessel or aircraft,

(b) any tent or movable structure, and

(c) any offshore installation (as defined in section 12(1) of the Mineral Workings (Offshore Installations) Act 1971);”

This appears to be a broad definition, and “place” does not appear to be limited to structures, fixed or otherwise. As a result, the car park of a business, or any outdoor and definable place serving as a basis for selling goods, would likely be included in the scope of that business’ premises.

Although this may illogically suggest that a spacious car park cannot be used for Click and Collect, as far as criminality under the Regulations is concerned, a business is always afforded the “reasonable excuse” defence. The defence can be raised in response to any of (i) alleged non-compliance with a prohibition notice under Regulation 8, (ii) summary criminal proceedings under Regulation 9 and (iii) disputing a Fixed Penalty Notice under Regulation 10.

It is arguably, and in my view likely, a reasonable excuse to contravening the requirements of Regulation 5 to allow a customer to wait in a car park whilst an employee retrieves a Click and Collect order. The main focus behind the restrictions has been to stop people congregating in confined spaces i.e. inside stores and within 2 metres. Having customers wait in a car park, adopting the typical 2m spacing between them and ensuring that no customer enters the store appears to be sensible and reasonable.

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Clearer guidance on the Regulations is welcomed, as a business which is technically contravening a requirement under Regulation 5 but is not committing an offence as they have a reasonable excuse to contravene the requirement seems clunky and undesirable. However, that is perhaps an apt reflection of the unprecedented situation that the country currently faces.

Conclusion

In summary, for the purposes of Click and Collect, businesses can operate Click and Collect for (i) food and drink, and (ii) goods to be sold or hired. However, the food and drink must be consumed off premises, and for selling goods, the customer cannot enter the premises to collect the order. They can instead wait outside the premises and be handed their collection by a worker.

As far as the definition of those business premises is concerned, it likely that it includes any outside areas owned and occupied by the business such that customers cannot even be allowed to wait there. However, it is possible and likely that allowing a customer onto a car park to facilitate a Click and Collect order is a reasonable excuse such that no criminal offence is committed.

Disclaimer: This article is for informational purposes only and does not constitute legal advice. It will always be necessary to consider the specific facts of a case before reaching a conclusion.