

Approach to test purchasing - England and Wales only

May 2011

1 Introduction

- 1.1** Test purchasing is one method by which the Gambling Commission (the Commission) may measure the compliance of licensed operators, or groups of licensed operators, with aspects of the Gambling Act 2005 (the Act).
- 1.2** The purpose of this advice note is to set out the Commission's approach to test purchasing in England and Wales, providing clarity to operators, co-regulators and others about how they might reasonably expect the Commission to act.

2 Test purchasing – the Commission's approach

Test purchasing as a regulatory tool

- 2.1** It is the responsibility of operators to manage the risks to the licensing objectives that their activities may present. The Commission expects this to be managed in the same way as any other core risk to their business. It is a matter for each operator to determine how they best manage risk. The Commission's focus of attention is with the outcome of the operator's actions.
- 2.2** Test purchasing is one means by which the Commission can measure the effectiveness of licensees' efforts to control risks to the licensing objectives. It is a targeted activity focused upon what the Commission considers to be important aspects of managing risk. Examples include the effectiveness of self exclusion procedures, controls on underage gambling and anti-money laundering policies and procedures.
- 2.3** The Commission will generally not prioritise test purchasing in sectors and on themes where it is satisfied that operators have in place their own arrangements for monitoring compliance, that those arrangements are effective and the results are made available to the Commission.
- 2.4** The Commission is most likely to use test purchasing for the following purposes:
- to assess thematic compliance of operators (with selected characteristics, eg from a sector) with aspects of the legislation and/or licence conditions and codes so as to be able to assess risk to the licensing objectives. This enables us to advise on the way in which gambling regulation is working and to take any necessary regulatory action whether in the form of advice or sharing of best practice or further refinement of licence conditions and codes
 - in an enforcement context, to gather evidence in relation to breaches committed by individual operators.

- 2.5** It is anticipated that the majority of circumstances where the Commission carries out test purchasing will be under the first of the modes set out above, although it will act in the second mode where necessary.
- 2.6** Whatever the mode of operation, the Commission will conduct test purchasing in a way that is fair and objective. When assessing thematic compliance focused upon sectors, our aim is to build an understanding of specific risk within a sector and the degree of compliance with regulatory requirements, it is not to ‘catch out’ individual operators. Test purchasing activity will be designed so as to provide sufficient opportunity for operators to demonstrate compliance.
- 2.7** Normally when conducting thematic compliance test purchasing the Commission will give the sector potentially affected notice of its intentions in general terms before the exercise starts.
- 2.8** It is the responsibility of operators to manage the outcome of such testing in relation to their staff and the means by which future compliance is secured.
- 2.9** Dependent on the results of a test purchasing exercise operators may be requested to supply details of an improvement programme, if they are not already doing so, and to demonstrate, at a later date, the effectiveness of such a programme.

Test purchasing by the Commission and by licensing authorities (LAs)

- 2.10** The Act created a framework for licensing, compliance and enforcement in which the Commission and LAs have overlapping but distinctive responsibilities. The most obvious distinction is between LAs who are the primary agency responsible for issues related to premises and the Commission who are responsible for the licensing of operators (and individuals), and this is reflected in the sources of income each agency receives to finance their duties under the Act. However, the matter is more nuanced than this.
- 2.11** The Act also makes LAs the agency responsible for either being notified of or granting permissions and permits for gambling activity that is predominantly ‘local’ in nature. Examples include occasional use notices, temporary use notices, club gaming permits and machine permits and small society lottery registrations.
- 2.12** This distinction between what is essentially localised and what has wider significance and the potential to have impact at a regional or national level is reflected in the Co-Regulators Concordat (March 2010) which states:
‘The Commission’s resources are prioritised on risks that are identified which are high in impact and of regional or national significance. LAs are concerned with risks within their geographical boundaries and which would have a high impact at a local level.’
- 2.13** This approach is expanded in the Compliance and Enforcement Protocol (which accompanies the Concordat) as follows:
‘LAs are best placed to monitor and ensure compliance with the Act at a local level. For example, they are generally in the best position to proceed against individual licensed premises, where the impact is high in that local situation, although the Commission will consider compliance activity against operators who have a large regional or national presence and where the failing is more widespread.’
- 2.14** It therefore follows that in relation to compliance and regulatory effort generally, and test purchasing in particular, the Commission’s focus is on operators whose scale of activity is such that non-compliance would have either a regional or national impact.

2.15 Both regulatory bodies work to the principles contained in the Hampton Report¹, something also explicitly acknowledged in the Concordat:

‘We aim to achieve regulatory outcomes in a way that minimises burdens imposed on business. Key to this is that we are risk based and proportionate in our decision making and transparent and accountable for our actions. Both LG Regulation² and the Commission recognise that, in keeping with the Hampton principles of better regulation, we must minimise the risk of duplication or over-regulation and make the most efficient use of our resources.’

2.16 It is to mitigate this risk that the Protocol on Communication states the following:

‘... it is important that information is shared at an early stage where there is any risk to the duplication of effort of regulatory activity. One party will inform the other where there are either matters of non-compliance or illegality for which the other party is primarily responsible and/or where the other partner has the most appropriate powers to deal with it. Details of any ongoing action and the outcome of action taken on the basis of such reports will be shared subsequently.’

and the Protocol on Compliance and Enforcement states:

‘Information which arises from compliance and enforcement activity, including test purchasing operations, will be shared between the Commission and the LAs where possible. This may include action plans produced by operators to address any shortcomings that were identified by the exercise.’

2.17 In summary therefore, in the normal course of business, the Commission would inform relevant LAs (those who have premises within their geographical boundaries which are planned to be included in a test purchasing operation) of the detail of the operation in advance. A similar expectation applies to such operations when the lead agency is a LA.

2.18 Forward planning of this kind ensures that, for example, the following do not occur:

- an operator or an individual premises is unnecessarily tested twice in a short period of time
- an operator who has been tested by one regulator, and has recently implemented an improvement plan, is then retested whilst implementing the plan
- an operator who is managing their business risk in a responsible manner by employing an independent third party to conduct test purchasing, and who is sharing those results and improvement plans with a regulator is tested without consideration first being given to the operator’s actions to date (and taken into account in terms of risk assessment)
- a test purchasing exercise conflicts with other compliance or enforcement work that may be in process in relation to an individual operator, premises or personal licence holder.

2.19 The Commission has engaged with the Local Better Regulation Office (LBRO) and the Better Regulation Executive (BRE) on the subject of Primary Authority³ schemes for some time. Whilst the question as to whether aspects of gambling regulation may be suitable for inclusion within the scheme are subject to further consultation it may be helpful to consider the Commission as acting akin to the Primary Authority. This applies particularly to aspects of compliance that are most likely to be of interest to LAs in relation to test purchasing – for example age verification. The operators concerned are the larger ones who have either a significant regional presence or a national footprint. As noted above (2.16), the Commission and LAs are committed to the sharing of information in advance of test purchasing exercises and that is the occasion when such issues can be discussed.

¹ Reducing administrative burdens: effective inspection and enforcement (March 2005)

² Formerly LACORS

³ www.lbro.org.uk

2.20 A further two factors are also relevant. Firstly, whilst a gambling operator with multiple premises may be actively promoting compliance with policies and procedures, for example age verification training, and improving their results nationally, an individual premises that is a part of their estate may still be considered a significant risk by a LA. As noted above (2.12) the Concordat states that:

‘LAs are concerned with risks within their geographical boundaries and which would have a high impact at a local level.’

2.21 Secondly, it should be recognised that LAs work within a wider local authority structure and set of policy priorities which will influence the approach they take to gambling in general and test purchasing in particular. As the Concordat notes:

‘The Commission recognises that LAs will each have different priorities and that this will have a bearing on their approach to the licensing of premises and to compliance. It is a matter for the local democratic process to make such decisions and to reflect local concerns.’

2.22 For premises based operators tests may be conducted in conjunction with LAs and other local authority departments.

Sample size and methodology

2.23 Sample size will vary and will, at least in part, be dependent on the purpose of the exercise. In general terms the Commission seeks to minimise regulatory effort (and any consequent burden on operators) whilst maximising the impact of that effort in improving regulatory outcomes.

2.24 The Commission’s test purchasing methodology is designed:

- to ensure that the work is conducted in a standardised way irrespective of the personnel employed. It is in part informed by the existing LG Regulation Guide to Test Purchasing (July 2009). The methodology is designed to ensure that tests are conducted fairly, for example an age verification exercise would not use a young person who appears to be older than they are and also avoids the risk of entrapment
- to ensure that the Commission complies with all relevant legal requirements, including but not limited to the Human Rights Act, Data Protection Act and Regulation of Investigatory Powers Act
- in such a way as to achieve an answer to the question being set – for example how effectively a policy and procedure is being implemented. Were a different question to be asked, a different methodology might apply.

Information sharing and disclosure

2.25 The Commission is committed to operating in an open and transparent manner. The inclination is to disclose information rather than retain it. Set against this there are a number of issues that require consideration. They include the following:

- legal requirements
- commercial confidentiality
- information which it is not in the public interest to disclose
- information which, if disclosed, may impede the desired regulatory outcomes.

2.26 The Commission will aim to inform the operator at the earliest opportunity once the testing of all of their premises (those that we plan to test) is complete to enable them to conduct any investigation that they consider necessary and to enable them to inspect records such as CCTV footage before it is deleted.

- 2.27** The expectation is that it is the responsibility of the operator to inform their staff of any test results as they see fit.
- 2.28** While the Commission will normally publish the results of thematic test purchase exercises at the earliest appropriate time, the Commission will not normally comment on specific enforcement activity until and unless formal regulatory action is taken (for example a formal warning or imposition of another sanction).
- 2.29** For test purchase exercises the Commission would expect to disclose, in aggregate terms, an operator's result but will not publicly disclose details relating to specific premises.
- 2.30** Both as a matter of courtesy and to allow for the correction of any factual errors operators may be offered advance sight of a press release.
- 2.31** When an exercise has involved joint working with LAs the relevant authorities could expect to be supplied with a copy of the Commission's press release in advance of publication. Should the LA decide to issue their own press release the expectation is that similarly, it will be shared with the Commission in advance of publication.

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