

## Approach to test purchasing England and Wales only February 2015

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### 1 Introduction

- 1.1 Test purchasing is one method by which the Gambling Commission (the Commission) or licensing authorities (LAs) can measure the compliance of licensed operators, or groups of licensed operators, with aspects of the Gambling Act 2005 (the Act). In conducting test purchasing, the Commission may work in partnership with LAs which have the primary responsibility for issues related to individual gambling premises. Test purchasing is also a means by which operators themselves can demonstrate the effectiveness of their policies and procedures.
- 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.
- 1.3 This advice note was originally issued in May 2011 and has been updated to reflect developments since that time.

### 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, and LAs as co-regulators, 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. Test purchasing is, however, most usually deployed in the context of monitoring the effectiveness of policies and procedures designed to prevent underage gambling.
- 2.3 The Commission is less likely to prioritise test purchasing in sectors and on themes where there is satisfactory evidence 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. For example, test purchasing can be arranged by licensees (or via their trade associations) as a means of assuring themselves that their controls are effective.

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- 2.4** The Commission is therefore most likely to use test purchasing for the following purposes:
- to assess operators' (with selected characteristics, eg from a sector) compliance with aspects of the legislation and/or licence conditions and codes in order 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. In conducting test purchasing to assess compliance under key themes among operators, the Commission will usually work in partnership with LAs.
- 2.6** Whatever the mode of operation, and when working in partnership with LAs or otherwise, test purchasing will be conducted in a way that is fair and objective. When assessing compliance focused upon sectors, under key themes, our aim is to build an understanding of the specific risks within a sector and the degree of compliance with regulatory requirements, it is not to 'catch out' individual operators. Test purchasing activity is designed so as to provide sufficient opportunity for operators to demonstrate compliance.
- 2.7** Normally when conducting test purchasing under the first of the modes set out at 2.4 above, the Commission will give the sector potentially affected notice of its intentions in general terms before the exercise starts. Where the Commission conducts a rolling programme of test purchasing, it will notify the relevant sectors of results and its intentions going forward through regular press notices.
- 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 required by the Commission or LA 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 distinct responsibilities. The most obvious distinction is between LAs which are responsible for issues related to premises and the Commission which is 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.
- 2.11** In conducting test purchase exercises to assess compliance under key themes (for example, the prevention of underage gambling) it is therefore appropriate for the Commission to work in partnership with LAs at all possible opportunities, given the overlap in responsibilities in these areas. That is, the LA will have primary concern for any underage gambling risks identified at the individual licensed premises within their geographical boundaries and which would have a high impact at a local level; the Commission's primary concern will be the overall picture of risks that is developed from a programme of test purchasing work undertaken across several LA areas.

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- 2.12** In terms of regulatory activity that may follow a test purchase exercise, the Commission would therefore anticipate that the LA would be the primary mover in considering any action that may be necessary against individual premises licensees. The Commission will of course need to consider whether the overall results of the exercise requires intervention on a wider policy basis, for example through strengthening *Licence conditions and codes of practice* (LCCP) - the underage gambling test purchase results from the Commission's work with LAs in 2013 and 2014 led to a review of the code provisions for preventing access to gambling by children and young people.
- 2.13** Where there are serious failings or widespread vulnerabilities in the policies and procedures of an individual operator, however (for example, where an operator fails test purchases across a number of LA areas), the Commission may consider taking formal regulatory action against that operator in addition to any action being taken by the licensing authority in relation to the premises licence.
- 2.14** In preparing a programme of test purchasing work with LAs, the Commission will maintain an assessment of the relevant risks across the gambling industry to ensure that test purchase work is focussed on those operators or sub-sectors that are not satisfactorily demonstrating that they have in place their own arrangements for monitoring compliance. This helps to ensure, and in accordance with Hampton principles, that regulatory outcomes can be achieved in a way that minimises burdens to businesses and reduces the risk of regulatory duplication.
- 2.15** Such an assessment in relation to underage gambling risks also ensures that test purchasing is conducted by the Commission and LAs in accordance with the [Better Regulation Delivery Office's \(BRDO\) Code of Practice on Age Restricted Products](#). This requires that "where an enforcing authority chooses to allocate resources to proactive checks on business compliance with legal age restrictions, these should be targeted on the basis of a robust model, scheme or framework for risk assessing the business". The guidance states that risk assessment may be on the basis of a nationally produced risk methodology, which takes account of all relevant, available information and intelligence (eg past compliance records, retailer self-testing or third-party tests) to make an informed assessment.
- 2.16** 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.
- 2.17** LAs may also conduct test purchasing without the assistance of the Commission. The LA, whether acting as a licensing authority or through another function such as trading standards, should in the first instance consult with operators where they have concerns about the underage access and age verification policies or whose premises they plan to test purchase.

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This will enable them to discover what programmes they may have in place to manage the business risk and take these into account in planning a test purchase exercise. To do otherwise would not be compliant with the Hampton principles. This approach is analogous to what is sometimes called 'earned recognition'.

**2.18** Local authorities should also consult with the Commission before planning such exercises in order to ensure that there is no conflict between any ongoing investigation or enforcement activity that we have initiated related to either the premises or the operator, and the test purchase operation. Local authorities in England and Wales must also adhere to Primary Authority agreements (see section 3 below).

**2.19** However, local authorities will have in place democratically determined priorities and resource allocations as well as the ability to respond to complaints and intelligence related to specific premises. As a result, irrespective of the actions of an operator on their overall estate, test purchasing may be deemed to be an appropriate course of action.

**2.20** Local authorities are requested to share any test purchasing results with the Commission.

### Sample size and methodology

**2.21** 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.

**2.22** The Commission's test purchasing methodology, which it uses when conducting test purchasing work in partnership with LAs, is designed:

- to ensure that the work is conducted in a standardised way irrespective of the personnel employed. 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

**2.23** 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.

**2.24** The Commission or LA must 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.

**2.25** The expectation is that it is the responsibility of the operator to inform their staff of any test results as they see fit.

- 2.26** While the Commission will normally publish the results of 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).
- 2.27** For test purchase exercises the Commission may disclose, in aggregate terms, an operator's result but will not publicly disclose details relating to specific premises.
- 2.28** Both as a matter of courtesy and to allow for the correction of any factual errors, operators or their trade associations may be offered advance sight, or given advance warning, of a press release.
- 2.29** 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.

### 3 Primary Authorities

- 3.1** The Primary Authority scheme, administered by the BRDO, provides for a statutory partnership to be formed between a business and a single authority (eg a local authority). That single authority, the Primary Authority (PA), can provide a national inspection strategy within which other local regulators can operate ie to improve the effectiveness of visits by local regulators and enable better sharing of information between them. The PA scheme therefore aims to ensure that local regulation is consistent at the national level.
- 3.2** Since October 2013, the Primary Authority scheme has been extended to include age-restricted sales of gambling in England and Wales (it currently does not apply in Scotland). It does not apply to any other aspect of the Gambling Act. This means local authorities in England and Wales must follow any 'age-restricted sales of gambling' national inspection plans and strategies that are published on the [Primary Authority register](#) when considering proactive age-restricted sales (gambling) activity, including test purchasing. Primary Authority plans do not prohibit local authorities undertaking reactive test purchasing. Primary Authority does not apply to the police or the Gambling Commission and therefore such bodies are still able to undertake proactive test purchasing on any operators signed up to the scheme.
- 3.2** The Commission fully supports the development of PA schemes between gambling operators and local authorities, and worked closely with PAs in the development of their national inspection strategies for the major bookmakers with whom they entered into partnerships. The inspection plans are designed to be largely uniform, and to bring consistency to proactive test purchasing in those betting shops.
- 3.3** But the PA scheme does not, of course, transfer responsibility for the regulation of age-restricted gambling to PAs. The PA inspection plans have the potential to help gambling businesses achieve high standards while also provide for more efficient and consistent regulation; these arrangements underpin the primary objectives of the Gambling Act in relation to protecting children from gambling-related harm and preventing them from accessing gambling facilities. The regulatory frameworks for gambling and for PA are therefore complementary.

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