

Better Regulation of Age-Restricted Products



Better Regulation of Age-Restricted Products:

A RETAIL VIEW

Prepared by business representatives in response to a call from the Local Better Regulation Office for an independent and evidence-based review of the regulation and enforcement of age-restricted products.

This report makes recommendations to assist the government in reducing access to age-restricted products and cutting costs by:

- **Making the law simpler and fairer through deregulation**
 - **Recognising and supporting business compliance**
 - **Promoting consistent, fair and effective enforcement**
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Foreword

To the Board, LBRO

In response to your request that businesses that sell age-restricted products should provide more detailed views on the law and enforcement practices governing those products, I am pleased to enclose the report of the review group.

The report sets out a number of unanimous recommendations in relation to the relevant legislation and the manner of its enforcement. These are summarised on pages 5 and 6.

The review group considers that the recommendations collectively have the potential to simplify and improve the law, to introduce greater consistency and proportionality and thereby to ease the burdens on business and enforcers. They would also bring law and practice in the field of age-restricted sales into line with better regulation principles and modern enforcement practice. We see resultant financial benefits for both the public and private sectors.

Whilst all the recommendations are important, I commend in particular the development of a single piece of legislation to replace the plethora of existing laws and regulations (which has obvious potential cost and deregulatory benefits) and the creation of a statutory enforcement code between all the relevant parties, including the police, and which has at its core a risk-based approach to enforcement rather than one centred on prosecution (which offers the prospect of delivering cost savings to enforcers and to business).

On behalf of the review group I urge that LBRO takes forward our recommendations with the relevant enforcement bodies and departments of state. I confirm the readiness of review group members to assist in this endeavour. I believe that if the retail sector is embraced by policy formers, regulators and enforcement agencies in partnership as part of the front line in addressing problem areas, rather than being treated as the cause of those problems, a more efficient and effective regime can be achieved.

I take this opportunity to thank: first the members of the review group who have given so freely of their time, expertise and experience, secondly those representatives of government departments, agencies and enforcers who met with us to share their perspectives, and thirdly those employees of LBRO who have provided technical input.



Geoffrey Budd MBE
Chair

25th August 2010

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Executive Summary and Recommendations

In late 2009 the Local Better Regulation Office¹ set up a Business Reference Panel made up of representatives of most of the UK trade associations with an interest in the regulations enforced by local authorities. At the first meeting of the Panel members were asked to identify the issues falling within the LBRO remit that were of most concern to them. The top issue raised by a number of the trade associations was enforcement of legislation surrounding age-restricted products.

In response to this concern LBRO invited the trade associations involved to carry out a review and prepare an independent, evidence-based report for LBRO setting out their concerns and potential solutions.

The review group is representative of most sectors of retail selling age-restricted products from newsagents, hardware, pet shops, cookshops and convenience stores through to the pubs, major supermarkets and on line retailers. The list of review group members is at Annex A.

The review group took evidence from a wide range of bodies including the Home Office, Department for Culture, Media and Sport, Department of Health, Department for Business, Innovation and Skills, Trading Standards Institute, Local Government Regulation (formerly LACoRS) and Camelot. The review group also considered documentation and surveyed the experiences of members of the organisations involved. The results of the survey are given at Annex E.

This report summarises the review group's findings, recommends a number of ways in which they could be resolved and indicates to LBRO how they might be taken forward.

Summary

There are 13 separate categories of age-restricted products sold by the retailers involved in this review. These include alcohol, tobacco, aerosol spray paint, knives and fireworks. The sale of these products is governed by 18 separate pieces of legislation that span the responsibilities of six government departments. This legislation has developed piecemeal over time and as a consequence there are a number of different rules that apply, particularly in terms of offences and defences. The complexity of the legal requirements increases the training and vigilance required by businesses that sell more than one product category which our survey found many retail businesses do. This has obvious cost implications for businesses and enforcers.

From a legal perspective, the law does not provide defences for employees that can be relied upon to secure fairness. The available defences lack a satisfactory 'reasonableness' test, which would provide fairness for those staff that make an isolated, honest mistake. In addition there is no consistent deterrent for prospective under-age purchasers of these products as the focus of penalties is very much on the seller – only alcohol has a penalty for the buyer attempting to buy under the required age. Similarly, other than for alcohol and intoxicating substances, often referred to as solvents, there are no direct offences for those buying on behalf of young people ('proxy purchasers').

¹ www.lbro.org.uk

Businesses are investing significantly in compliance through training, point of sale systems, display material and monitoring by 'mystery shopping' in support of their due diligence controls. Our survey indicated at a conservative estimate that the amount invested by businesses in the retail and pub trade on compliance is in the region of £20 million each year.² The efforts made by businesses, large and small, to comply with age-restrictions should be recognised and built in to enforcement approaches, to save public money and also to engender trust between businesses and enforcement bodies.

Enforcement practice makes extensive use of a technique known as 'test purchasing', where a young person (often under the permitted age) is sent into a retail outlet under the supervision of enforcement personnel to attempt to buy age-restricted products. Retailers' faith in the technique has been undermined, primarily through the widely held perception that it is not used in a fair way and is seen as entrapping businesses into offences that would not ordinarily have occurred.

The Enforcement Concordat and the statutory Regulators Compliance Code in England set out principles of good enforcement namely that enforcement activity should be transparent, accountable, proportionate, consistent and targeted.³ The retail sector considers that it has not been given adequate opportunity to contribute to the scope and content of guidance on test purchasing to implement these principles in relation to age-restricted products.

A number of principles should underpin the use of test purchasing. It should be intelligence-led, and should not, save in the most exceptional circumstances, use lying or other deceptive practices. Furthermore the principles should include clear and transparent selection criteria for youngsters and prompt feedback to businesses should be provided as a matter of course irrespective of the result of the test purchase. In short the review group would like to see more adherence to the Hampton principles as enshrined in the Regulators Compliance Code by those charged with enforcing under-age sales legislation.

Businesses are widely engaged in community-based, partnership approaches to tackle the antisocial behaviour issues posed by the under-age use of these products. There is evidence that suggests integration of enforcement activities into these approaches leads to better results. Businesses are staffed by people from their local communities and can therefore play a key role in supporting achievement of policy objectives provided that there is dialogue and mutual trust.

Recommendations

Making the law simpler and fairer through deregulation:

1. The current piecemeal legislation should be consolidated into a single piece of legislation to provide simplicity and greater consistency across the product categories with standardisation of offences and defences. This would provide a framework by which any new controls can be easily implemented in a consistent way to ensure future coherent development of the law. The legislation should include a binding code of practice (see recommendation 10).
2. A simple general due diligence defence should be available for retail employees across all product categories to provide fairness where a genuine and reasonable mistake in judging age has been made.

² Calculation based on cost data submitted to the review group survey, further details at Annex E. This gave a simple average of £5.81 invested per employee. This figure multiplied by the number of employees in the pub and retail trade, estimated at 3.5 million, gives a crude estimate of the total cost of compliance as £20 million. See also footnote 5 & 6.

³ <http://www.berr.gov.uk/policies/better-regulation/improving-regulatory-delivery/implementing-principles-of-better-regulation/the-regulators-compliance-code>

3. In order to provide a better deterrent all persons aged 14+ should be liable to a risk of sanction for deliberately attempting to obtain products to which they are not legally entitled.
4. Offences of buying on behalf of a young person, and conversely for a young person asking an adult to purchase on their behalf, should apply to age-restricted products having no justifiable use by the young person.

Recognising and supporting business compliance:

5. The compliance efforts of businesses should be fully taken into account when determining enforcement priorities and approaches.
6. Local licensing conditions should not be used to gold plate legal requirements by making 'voluntary practice' mandatory as this undermines trust and deters voluntary initiative.
7. Enforcers should be encouraged to be more active in seeking opportunities to work with business and the communities in which they operate to tackle the wider agenda surrounding age-restricted products.
8. The Primary Authority system should be extended to cover all age-restricted product legislation including alcohol. Inspection plans should take retailer 'self testing' and other compliance activity fully into account.
9. Enforcers should be encouraged to develop partnerships with sectoral trade associations to provide a better communication channel to support compliance by their members including the dissemination of 'assured guidance' on which businesses should be entitled to rely.

Consistent, fair and effective enforcement:

10. LBRO should coordinate development of a binding code of practice dealing with all aspects of the use, conduct, prompt notification and follow up of test purchasing exercises with input from local authorities, police, business, government departments and consumers. The code should reflect the principles of good enforcement as set out in the Regulators Compliance Code and the Legislative and Regulatory Reform Act 2006.
11. To support business compliance efforts, businesses should always receive prompt notification of the results of any test purchasing carried out in their premises.
12. Test purchasing where lying or use of other deceptive practices is contemplated should only take place in the most exceptional circumstances and require specific independent authorisation. No independent authorisation is currently required.

1. Making the Law Simpler and Fairer Through Deregulation

Overview

There are 13 separate product categories that are sold by the retailers involved in this review. These are listed in full at Annex B, and include alcohol, tobacco, aerosol spray paint, knives and fireworks.⁴

Sale of these products is covered by 18 separate pieces of legislation that span the responsibilities of six government departments. This legislation has developed piecemeal over time: for example the controls relating to fireworks stem from the Explosives Act 1875 and tobacco products from the Children and Young Persons Act 1933. As a consequence there are a number of different rules that apply.

Across all the legislation, there are penalties for the sale of products to children and young people. These include fixed penalty notices, formal cautions or prosecutions resulting in a criminal record for individual sales staff and the business, and licence reviews.

The complexity and lack of consistency in the law is amply demonstrated by referring to Annex C which sets out the age limits, offences, defences and penalties that currently apply.

Overall the review group found the law in this area to be overly complex, inconsistent and in need of consolidation into a single piece of law governing all aspects of the sale of age-restricted products.

Does complexity matter?

Given the range in minimum age requirements, from 12 to 18, across so many product categories, retailers face a major challenge to train staff to understand and apply the rules.

The average rate of annual turnover of customer-facing retail staff is typically 30%-50%. In the pub trade staff turnover is even higher at around 60%. All staff have to be properly trained and supervised. Currently there are in the order of 600,000 staff employed in pubs and bars.⁵ BRC survey information indicated that 2.9 million people are employed in the UK's 293,000 retail outlets.⁶

From the level of investment identified in the survey of £5.81 per employee, and taking into account the levels of staff turnover, a conservative estimate of the total cost of compliance for the retail and pub trade is £20 million annually.⁷ Simplifying the requirements will assist retailers in achieving effective training and compliance and thereby significantly reduce costs.

Businesses invest heavily in training staff and further details are given in chapter 2.

A fairer defence for the sales person

The review group was unanimously of the view that the current offence and defence provisions are unreasonably harsh in respect of individual employees. Current provisions effectively criminalise people for no reason other than their making an error in judgement as to the age of the intending purchaser. The following is a typical example from a middle aged mother and part time supermarket checkout operator:

⁴ These are the products sold by 50 per cent or more of the 42 businesses surveyed as part of the review, covering nearly 600,000 employees. For further details see Annex E.

⁵ Beer and Pub Association http://www.beerandpub.com/pub_home.aspx

⁶ BRC Retail Stats and Info www.brc.org.uk

⁷ See footnote 2 and Annex E.

'It happened on a Friday night – I was sat at my till and was working until 9.00 as I do on a Friday. I was quite busy but coping. A girl came to my till with a 4 pack of lager. I looked at her, she said hello and smiled, I scanned the lager and asked her for £2.99, she handed me a £5 note and I gave her change and she said thank you and left. Two minutes later I was called off my checkout by the store manager and introduced to two police officers. I was told that I had sold alcohol to someone underage acting as a 'test purchaser' – I then thought must have been that girl – I was shocked I thought she was at least 21. I was cautioned and asked for comments – all I could say was that I was very sorry – I knew I'd let myself and everybody else down. I've always worked hard and never been in trouble with the law before – I cried for days. I can't explain how it happened – I've been trained – we all know about it – its raised all the time and I always ask for ID and refuse sales when I need to'.

The only defence available under the Licensing Act 2003 for example, is that the seller requested ID and that it was in all the circumstances reasonable for them to have relied on it or that nobody could reasonably have suspected from the individual's appearance that he/she was aged under 18.

To ensure fairness for retail workers a standard due diligence defence should be provided across all product categories to protect an individual where they have made a mistake in judging the age of the purchaser that a reasonable person could have made in all the circumstances of the sale.

A due diligence defence would also be able to test whether in respect of 'test purchasing', correct procedures had been followed. Test purchasing is discussed further in chapter 3.

Deterrents for the buyer

Whilst there are penalties for the *sale* of age-restricted products across all product categories, this is not replicated for the *purchase* of these products. Only alcohol has a penalty for the buyer when under the required age, which is currently up to £1000 (level 3). Therefore there is no consistent deterrent for prospective under-age purchases of these products, and the focus of penalties is very much on the seller.

The existence of a deterrent for the purchaser would in our view act to reduce the likelihood of some young people attempting purchases and also make others less confident and thus easier to identify. There is also a precedent for this under the Gambling Act 2005 penalising those aged 16+ for gambling. In the opinion of the review group all persons aged 14+ should be liable to a risk of sanction for deliberately attempting to obtain any products to which they are not legally entitled.

The review group would not favour criminalising children but the introduction of a sanction at the age threshold of 14 could help to redress the imbalance in liabilities between sellers and purchasers, introducing a greater sense of equity and consistency. The review group notes that there are no specific sanctions for lying or using fake identification.

In addition, the review group noted that apart from alcohol and solvents there are no direct offences for those buying on behalf of someone who is underage, (also known as 'proxy purchasers') which might assist in reducing demand for products for which a young person has no justified use (for instance tobacco, fireworks or butane lighter refills).

Recommendations

Making the law simpler and fairer through deregulation:

- 1.** The current piecemeal legislation should be consolidated into a single piece of legislation to provide simplicity and greater consistency across the product categories with standardisation of offences and defences. This would provide a framework by which any new controls can be easily implemented in a consistent way to ensure future coherent development of the law. The legislation should include a binding code of practice (see recommendation 10).
- 2.** A simple general due diligence defence should be available for retail employees across all product categories to provide fairness where a genuine and reasonable mistake in judging age has been made.
- 3.** In order to provide a better deterrent all persons aged 14+ should be liable to a risk of sanction for deliberately attempting to obtain products to which they are not legally entitled.
- 4.** Offences of buying on behalf of a young person, and conversely for a young person asking an adult to purchase on their behalf, should apply to age-restricted products having no justifiable use by the young person.

2. Recognising and Supporting Business Compliance

Business investment in compliance

It is clear to the review group that responsible retailers treat the issue of underage sales very seriously and invest significant time and resources to support the decisions that have to be made by their employees at point of sale millions of times each day throughout the UK.⁸

The total level and nature of investment in staff training, point of sale systems, display material and monitoring through 'mystery shopping' for example, varies according to the size and type of business.

The British Beer and Pub Association members alone have spent £8.1 million on promotion and training on 'Challenge 21' since 2008.

The members of the Retail of Alcohol Standards Group invested over £3 million in the introduction of 'Challenge 25' in 2009.

The total annual cost of compliance was nearly £4 million for the 33 businesses providing detailed cost data to the review; these businesses ranged in size from 270,000 employees to single proprietors.

Businesses can and do meet their compliance needs in many different and innovative ways. Some examples of business activities to ensure compliance are given below:

Large national petrol and convenience retailer

One example retailer has 503 company owned stores, just under half of which are company operated by 3,300 employees. All sell petrol and tobacco and a large proportion also sell alcohol and national lottery products. The annual cost of training staff and testing internal systems is estimated to be just over £500,000, with nearly £1 million stand alone investment in developing training materials. The process to ensure compliance is as follows:

- Training, made up of many different methods, for example e-learning, 1-2-1 with manager, paper based material or interactive 'guess the ages'
- Refusal book entries
- Challenges made entries
- Point of sale material, badges
- Till prompt for staff
- Challenge 25 'mystery shopper', sometimes targeted. This costs in the region of £32,000 per year.
- Senior manager 'congratulations' letter when a store passes an official test purchase.

Small pub company and licensing consultancy

Another example is a company which has 65 staff and operates in Lincolnshire and East of England. It estimates that it spends approximately £6,000 per year on staff training and external test purchasing to test its Challenge 21 policy. All employees undertake the BIIAB National Certificate for Personal Licence holders as a minimum which the company pays for.

⁸ This report provides an overview of what drives businesses to comply: 'Drivers of compliance and non-compliance with competition law', Office of Fair Trading, May 2010.

Public Houses in the UK turn away between 800,000 and one million people appearing to be under the age of 21 and unable to produce required ID as part of the Challenge 21 initiative each month.⁹

Thirty of the businesses surveyed by the review provided information about the number of times per week that they requested ID before a sale and the number of times they refused a sale per week. In total these 30 businesses requested ID an estimated 341,665 times per week. On average from these 30 businesses, one in eight requests for ID resulted in a refusal.

A British Beer and Pub Association survey showed awareness of Challenge 21 among 18 to 24 year olds stood at 91% in 2008.¹⁰

Owner-operator – Tile shop – BHF-BSSA group member

A third example is a sole proprietor who runs a shop selling tiles, fitting products and accessories and runs a fitting service. Age-restricted products include bladed items and intoxicating substances. BHF-BSSA group is his only source of in depth information. The business operates to the BHF-BSSA group Knife Pack scheme and also displays a poster about solvents – which the proprietor spotted in a trade catalogue then made his own version to save cost. It does not operate electronic point of sale tills but records any sales refusal.

Supporting businesses compliance

In terms of anti social behaviour associated with under-age purchasers, nearly half of the businesses surveyed by the review had encountered verbal abuse as a result of requesting proof of age and refusing sales. A third had encountered criminal damage and just under a third had encountered physical violence.

An example of the sort of incident that can be triggered by either a challenge to produce proof of age or a refusal of sale in a typical convenience store is as follows:

This incident involved a full time Sri Lankan team member working in a central London store. At approximately 10.00pm the team member politely challenged a young man attempting to buy a bottle of wine to produce identification in line with company policy. CCTV shows the young man immediately picking up the bottle by the neck and striking the team member violently on the head with it. The team member suffered a cerebral haemorrhage and spent ten days in intensive care and a long hospital stay before being able to return to work six months later. Whilst CCTV shows the incident the young man was not known to the Police and has not been traced.

A further example occurred at a convenience store in Essex:

During the afternoon a team member challenged a young man to produce proof of age identification. He took exception to this and produced a firearm from under his jacket. The young man then spent a number of minutes brandishing the weapon and terrorising various members of staff before leaving the premises. A panic alarm button was pressed. The Police arrived after a period of thirty minutes. The young man was captured on CCTV but not known to the Police and has not been traced.

⁹ British Beer and Pub Association – http://www.beerandpub.com/pub_home.aspx

¹⁰ BBPA Research – http://www.beerandpub.com/newsList_detail.aspx?newsId=253

Businesses were asked in the review survey if they or their staff had ever refused a sale and then reported the young person to the police or local authority. 70% had not and the comments illustrate the issue from the business perspective, namely that they feel nothing is done with the information:

If fake or tampered ID is taken from an individual then our company rewards the employee with £10. A copy of the fake or tampered ID is then forwarded to the local police and licensing authority. Normally all that happens is that if we are lucky the individual is traced and a PCSO visits them at home. This does not however happen to everyone. (Pub company and licensing consultancy)

... Where young persons are refused having shown fake ID, the information is reported to the police; some [are] not interested, whilst others appear to take action. (Convenience store)

Nothing seems to happen unless there is a confrontational situation. (Convenience retailer)

In the view of the review group strong support in dealing with such behavior will make it less likely that sales will take place.

Partnership approaches

It is clear that despite the focus on retailers and test purchasing by enforcement bodies, the wider issues posed by age-restricted products remain, whether in terms of anti-social behaviour or ill-health in our communities. There is evidence however that where enforcement of age-restricted sales is integrated within wider community-focused, partnership approaches, there is greater success in tackling these bigger, societal issues.¹¹

Just under half of the businesses surveyed as part of the review had worked collaboratively with enforcement bodies to resolve societal issues arising from age-restricted products. The majority of the examples given were continuing initiatives. The examples are provided in full in Annex E. At local level there is clearly considerable multi-agency work involving the business community to tackle societal problems with the engagement of businesses through for example Crime and Disorder Reduction Partnerships and Community Alcohol Partnerships. Businesses also provided ideas of approaches that could be adopted by local authorities and the Police, other than test purchasing. Some examples are given below:

More work needs to be done with the young people themselves. ... Perhaps the effects of alcohol should be brought into the National Curriculum at the age of 10 – educate them to realise the harms and effects of alcohol. The authorities should visit schools to reinforce the learning in this area. (Wholesale and retailer)

Collaboration with retail towards joint goals. ... Tackling underage access to alcohol through specific local knowledge (i.e. proxy purchasing looked at together with retail, possibly using retail CCTV with officers 'working' in the store at vulnerable times to identify and deal with known proxy purchasers). Foster an environment where retail can trust enforcement and enforcement can trust retail. (Retail supermarket)

I feel that my staff would respond better to a short training visit once a year from an approved body. Willingness to take part in such a scheme would indicate to the authorities the responsible retailers and help eliminate them from those less reputable businesses allowing the Police to focus on those. (General hardware retailer)

The review group took the view that the reach and visibility of these activities could be higher.

¹¹ See 'Protecting Young People from Alcohol Related Harm', Research by Design, April 2009 – <http://www.lbro.org.uk/docs/protecting-young-people-from-alcohol-related-harm.pdf>

It is the opinion of the review group that enforcers need to recognise the role that businesses can play in community focused partnership approaches including the provision of:

- a communication route to young people and adults
- intelligence as to youth congregation and on specific individuals and practices, for example through reporting refused sales or suspicions of proxy purchasing.

Recognising compliance

The role of Primary Authority

The Primary Authority scheme was introduced as part of the Regulatory Enforcement and Sanctions Act 2008.¹² Its inspection plan system provides a potential route to ensuring that the compliance efforts made by a business are reflected in a more targeted approach by local authority enforcers.

Partnership working requires mutual trust and understanding. Trust requires relationships which is why the review group considers the Primary Authority relationship to be so important. If a business has confidence in its contact with local authorities it will be more willing to share its internal compliance data and systems. Three of the large, multi-site retailers on the review group have Primary Authority relationships in other areas of regulation which they currently cannot extend for example to sales of alcohol.

Given the investment made by businesses in compliance, the review group took the view that the Primary Authority scheme should be extended to cover all age-restricted products, including alcohol. This offers the recognition of business efforts to prevent under-age sales in inspection plans and enforcement activity. There is little to be gained from 'test purchasing' at public expense in a business that already funds its own scheme of a similar nature and acts upon the results. This offers scope for efficiency savings and the ability to release public funds to target less responsible businesses.

It is noted that the Primary Authority scheme as currently constituted does not apply to activity undertaken by the police.

The role of trade associations

Trade associations are keen to play their part on behalf of their members to make it easier for them to comply with the law. For example, the BHF-BSSA group has developed and disseminated to its members a knife sales support pack based on the Home Office six point knife code. The Wine and Spirit Trade Association both directly, and through providing secretariat support for the Retail of Alcohol Standards group, has been heavily involved in developing and supporting Community Alcohol Partnerships.¹³ The British Beer and Pub Association works with the EU Directorate General for Health and Consumers to develop a European Alcohol strategy and recently reaffirmed the commitment to enforcement of age limits for selling and serving drinks under the Challenge 21 scheme. The National Federation of Retail Newsagents produces guidance packs and point of sale materials for its members and provides a free helpline. The British Retail Consortium initiated development of the Proof of Age Standards Scheme (PASS) a national guarantee scheme for proof-of-age cards.¹⁴

¹² Details of the Primary Authority scheme can be found at <http://www.lbro.org.uk/lbro-projects-primary-authority.html>

¹³ <http://www.wsta.co.uk/Community-Alcohol-Partnerships.html>

¹⁴ <http://www.brc.org.uk/pass/default.asp>

Considerable resource efficiencies are possible if enforcement bodies were to engage more actively with businesses through their trade bodies. The review group is of the opinion that extension of the Primary Authority to trade associations acting on behalf of their members offers a valuable way to provide more proactive compliance support to a large number of smaller businesses. The development of guidance between regulators and trade associations with the assurance that acting in line with it by member businesses will be accepted by all local authorities would help to support their compliance in a cost effective manner.

The review group found a number of instances where voluntary initiatives had been seized upon by Local Licensing Authorities and turned into legal requirements by their inclusion in operating schedules as mandatory licensing conditions. Examples included requirements to participate in a Pub watch scheme or to apply a Challenge 25 scheme. Such 'gold plating' of legal requirements can undermine the trust and willingness to help on which the success of voluntary initiatives depends.

Recommendations

Recognising and supporting business compliance:

5. The compliance efforts of businesses should be fully taken into account when determining enforcement priorities and approaches.
6. Local licensing conditions should not be used to gold plate legal requirements by making 'voluntary practice' mandatory as this undermines trust and deters voluntary initiative.
7. Enforcers should be encouraged to be more active in seeking opportunities to work with business and the communities in which they operate to tackle the wider agenda surrounding age-restricted products.
8. The Primary Authority system should be extended to cover all age-restricted product legislation including alcohol. Inspection plans should take retailer 'self testing' and other compliance activity fully into account.
9. Enforcers should be encouraged to develop partnerships with sectoral trade associations to provide a better communication channel to support compliance by their members including the dissemination of 'assured guidance' on which businesses should be entitled to rely.

3. Consistent, Fair and Effective Enforcement

Test purchasing

An enforcement technique known as ‘test purchasing’ appears to have become almost universally applied by local authorities to enforce the law on age-restricted products.

Test purchasing is where young people, often under the legal age are sent in to premises by enforcers in order to attempt to purchase age-restricted products.

Ninety four per cent of all formal enforcement challenges for underage sales were reported to be as a result of test purchases by the businesses surveyed, indicating that the vast majority of formal challenges they received resulted from use of this enforcement technique.¹⁵ Whilst based on a small number of businesses, this indicates that test purchasing is a large driver of formal challenges, and this is certainly the experience of the review group members.

Test purchasing is a controversial technique due to the widely held perception that the technique is sometimes used in an unfair way and is used to secure prosecutions rather than promoting compliance. Whilst the businesses surveyed by the review were evenly split in their opinion of test purchasing, those that did consider it to be a valid tool often heavily qualified their opinion. A cross-section of views is given below. The full set of views can be found at Annex E.

It is a valid inspection tool if it is understood that human error does not equal poor company due diligence. It would be advantageous if companies were informed of all test purchase successes as well as failures. (Food retailer)

I do not believe test purchasing gives an accurate reflection of any specific business, due to it being a manufactured purchase. (Convenience retailer)

I don't believe any retailer encourages sales to under age people. Sending in a person made to look 18+ undermines all the hard work we put into signs and checks. (DIY hardware retailer)

I would only consider it valid if there had been an incident or complaint about goods being sold to underage users. (General hardware retailer)

Yes if carried out correctly and not set out to ‘entrap’ the operator. (Brewer and Pub operator)

A theme that emerges from the comments about test purchasing is the perception that those involved are setting out to ‘entrap’ sales staff into committing offences that would ordinarily not have occurred.

The Trading Standards Institute advised the review group that they considered retailers had made huge advances in recent years in bringing test purchase failure rates down from 30-40% to only 6-7%, but a need was claimed to ‘keep the plates spinning’.¹⁶ It is also apparent from the low failure rate claimed that activity is not rigorously intelligence led and targeted.

The review group believes that a refusal rate of over 90% is a very considerable achievement and that to seek to go beyond that may not be realistic, practical or cost effective.

¹⁵ Average proportion of challenges being in respect of matters other than test purchases was 6 per cent, n=11. For further details see Annex E.

¹⁶ The Trading Standards Institute met the review group, 19 May 2010.

Promoting consistency in test purchasing

Another theme emerging from the survey is lack of consistency in use of test purchasing between local authorities, a view unanimously shared by the review group members. There is also concern within many businesses that test purchasers are sometimes encouraged to lie about their age, which undermines the fairness of the technique. Some comments illustrating these points are below.

The problem with test purchases is that each authority follows different guidelines and rules so test purchasing is very inconsistent. (Wholesale and retailer)

Not where the test purchaser is told to lie. (Hardware retailer)

Promoting consistency and fairness in test purchasing is a key issue for the review group on the basis that 'compliance by consent' has been the general framework in which trading law operates in the UK. The way in which test purchasing is currently used to secure prosecutions rather than to verify compliance is seriously undermining the relationship of trust between local authority regulators, trading standards in particular, and business. The wider consequences of this are significant in that it means that retailers may become less likely to seek advice and guidance and more difficult to reach when new measures and campaigns require their assistance to implement.

It was clear from discussions between the review group and policy leads from various government departments that the latter did not see it as their responsibility to oversee or influence the application of the rules and they believed this to be a matter for local authorities and the Police rather than something they could influence.

During constructive discussions between the review group and Local Government Regulation (formerly LACoRS) and with the Trading Standards Institute it became apparent that these bodies do not have the authority to remedy the situation.

The review group is convinced of the need for a binding code, to which businesses have contributed, to ensure that test purchasing is properly controlled. The review group acknowledges that since their discussion, Local Government Regulation has recognised the value of inclusion of the retail sector in production of a revised test purchasing code of practice.

In our view development of such a code should be coordinated by LBRO and be a joint enterprise between business, Local Authorities (LGR), government, Police and consumers.

Such a code should embody the principles of good regulation set out in the Regulators Compliance Code and Legislative and Regulatory Reform Act 2006 and should recognise the following principles.

Principles for test purchasing

- ***Intelligence-led:***

Test purchasing must be informed by tangible information on genuine underage sales relating to specific retail premises.

- ***Following prudent inquiries:***

Inquiries should be made of the business or via its Primary Authority to ascertain the due diligence procedures in place and to alert the business to potential concerns. The key point is that before any test purchasing takes place, the business in question should be approached by enforcement bodies to share or confirm intelligence.

- ***Use of lying and deceptive practices only in extreme circumstances:***

The group considered that use of lying or false ID during a test purchase should be restricted to very limited circumstances where genuine intelligence clearly suggested deliberate underage sales are taking place (legal experts advising the group considered that courts were likely to rule that prosecutions based on such procedures would be halted as ‘an abuse of process’, or that such evidence should be excluded on the basis that it was unfair). The review group considered that it would be appropriate for such activity to require independent testing of the evidence justifying its use and specific authorisation. No independent testing or authorisation is currently required.

- ***Selection of individuals:***

To ensure fairness the binding code of practice should cover all aspects of the selection of individuals: height, appearance, demeanor, dress, make up etc.

- ***Feedback:***

Businesses were asked in the review group’s survey if they had ever been told that a test purchase had been carried out and that their premises had successfully refused a sale; nearly two thirds stated that they had not. Several businesses commented that it would be useful if companies were informed of all test purchases – successes as well as failures.

The review group shares the view that test purchasing results should be promptly notified to the business as knowledge where staff have successfully refused a test purchase will help with staff training, reward and recognition and help to raise awareness. Furthermore, the review group believes that full feedback to businesses of the results of all test purchasing activities will help to build mutual trust and understanding between businesses and enforcement bodies. The review group points to the practice adopted by Camelot, where premises are routinely notified of test purchase successes as well as failures.¹⁷

Funding of test purchasing

Several government departments have provided funding for test purchasing campaigns which have included activity on tobacco, alcohol and knives in recent years.¹⁸ Whilst it may be appropriate to use non intelligence led ‘test purchasing’ for market testing purposes, the review group, given the concerns raised above, questions the merit of these campaigns if they are not supported by a consistent methodology or integrated into wider, community-based approaches to tackle anti-social behavior. Such funding may encourage non intelligence-led, numbers based test purchasing activity.

Recommendations

Consistent, fair and effective enforcement:

- 10.** LBRO should coordinate development of a binding code of practice dealing with all aspects of the use, conduct, prompt notification and follow up of test purchasing exercises with input from local authorities, Police, business, government departments and consumers. The code should reflect the principles of good enforcement as set out in the Regulators Compliance Code and the Legislative and Regulatory Reform Act 2006.

¹⁷ Camelot met the review group on 16 June 2010.

¹⁸ For example the Home Office Alcohol Misuse Enforcement Campaign (AMEC) funded test purchasing activity by local authorities.

- 11.** To support business compliance efforts, businesses should always receive prompt notification of the results of any test purchasing carried out in their premises.
- 12.** Test purchasing where lying or use of other deceptive practices is contemplated should only take place in the most exceptional circumstances and require specific independent authorisation.

Annex A

Members of the Review Group

Chair

Mr G. D. Budd MBE (former Company Secretary of DSG international and long standing Chair of the CBI Consumer Affairs Panel)

Representative bodies

Association of Convenience Stores (ACS)

British Retail Consortium (BRC)

BHF-BSSA GROUP Incorporating the British Hardware Federation and the Cookshops & Housewares Association

National Federation of Retail Newsagents (NFRN)

British Beer and Pub Association (BBPA)

Wine and Spirit Trade Association (WSTA)

Retail of Alcohol Standards Group (RASG)

TSI Society of Outside Local Authority Members (SOLAM)

The Petcare Association

Individual businesses

ASDA

B&Q

Home Retail Group

Total

Tesco

The Co-operative Group

Halfords

Wilkinsons

The membership of the group represents in the region of 250,000 retail outlets.

The review has also been supported (on a without cost basis) by:

Gosschalks Solicitors

Margetts and Ritchie Solicitors

Pinsentmasons LLP

Annex B

Summary of product categories, legislation and government departments:

	PRODUCT	STATUTE/SI	DEPARTMENT
1.	Aerosol Spray Paint	Anti-social Behaviour Act 2003	Home Office
2.	Air Weapons and Imitation Firearms	Firearms Act 1968 Violent Crime Reduction Act 2006	Home Office
3.	Alcohol	Licensing Act 2003	Home Office
4.	Butane Lighter Refills	Cigarette Lighter Refill (Safety) Regulations 1999 Consumer Protection Act 1987	Department for Business, Innovation and Skills
5.	Crossbow	Crossbows Act 1987 Violent Crime Reduction Act 2006	Home Office
6.	Caps, Cracker Snaps, Party Poppers etc.	Explosives Act 1875	Department for Business, Innovation and Skills
7.	Films and Video Games	Video Recordings Act 1984	Department for Culture Media and Sport
8.	Fireworks	Fireworks (Safety) Regulations 1997	Department for Business, Innovation and Skills
9.	Liqueur Confectionary	Licensing Act 2003	Home Office
10.	National Lottery	National Lottery etc Act 1993 National Lottery Regulations 1994	Department for Culture Media and Sport
11.	Petrol	Petroleum Consolidation Act 1928 Health and Safety at Work Act 1974	Department for Work and Pensions
12.	Pets	Animal Welfare Act 2006	Department for Environment, Food and Rural Affairs
13.	Publications (considered harmful to children)	Children and Young Persons (Harmful Publications) Act 1955	Home Office
14.	Sale of Knives and Articles with a Blade or Point	Offensive Weapons Act 1996 Criminal Justice Act 1988	Home Office
15.	Solvents	Intoxicating Substances (Supply) Act 1985	Home Office
16.	Tobacco Products	Children and Young Persons Act 1933 (as amended) Children and Young Persons (Protection from Tobacco) Act 1991	Department of Health