

Age restricted products

- Alcohol
- Cigarettes, shisha and other tobacco/smoking products
- E-cigarettes and vaping products
- Fireworks
- Knives and other weapons
- Acids and other dangerous chemicals
- Age restricted DVDs, Blu Rays and video games
- Certain over the counter medicines
- And more

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## The rise of alcohol sales online

- One recent report by e-commerce firm Profitero and Nielsen found that 21% of UK consumers have bought alcohol online. This represents the highest proportion found within Europe, with UK consumers coming third after China and Japan in the world rankings.
- Over the five years through 2020-21, industry revenue is forecast to grow at a compound annual rate of 15.9%.
- In the current year, industry revenue is projected to surge by 39.3% to reach £989.2 million, propelled by COVID-19.



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**Types of online sales**

- **Supermarkets / retail** – click and collect, delivered by retailer (e.g. Tesco, Asda, Sainsburys, Ocado).
- **Restaurants** – click and collect, delivery by restaurant.
- **Orders from retailers delivered by courier** e.g. specialist wine shops / Christmas gift packs from Harrods, etc.
- **Third party ordering platform and/or delivery** e.g. Deliveroo, Uber Eats, Just Eat – for retailers, bars and restaurants.



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**Typical third party models (1)**

- Deliveroo and Uber Eats:
  - customers must be aged 18 or older
  - placing an order is confirmation that the person ordering is aged 18 or over
  - age verification by rider and refusal may take place without ID
- Amazon:
  - States that by placing an order for an age-restricted item, a person is declaring that they are 18 years of age or over.
  - Valid photographic ID of the recipient required upon delivery.
  - An age restricted item can be delivered to another adult over the age of 18 at the same address.

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**Typical third party models (2)**

- Hermes:
  - Terms and conditions carve out liability for any consequence of its users (the entity/person sending the package) sending alcoholic or other age-restricted products or potentially harmful or illegal products.
- DPD:
  - Terms and conditions state that its customer (the entity/person sending the package) acknowledges that it will not carry out any age verification upon delivery and it is the customer's responsibility to ensure sufficient age verification checks at the point of purchase.

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### Complications with online sales

- Complex structure e.g. platform – seller – delivery company – driver.
- Situational variations in structure e.g Deliveroo:
  - Deliveroo as platform, and restaurant selling **and** delivering; **or**
  - Deliveroo as platform and delivering, restaurant only selling (effectively just a kitchen).
- How does the courier know there is an age-restricted product inside? Labelling requirements in relation to parcels are non-existent.
- How can retailer be sure that the courier will check age on delivery?
- Payment methods make age unclear. Under 18s can use pre-payment cards, their parents' online accounts, Apple pay (double-click button).

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### Licensing online sale of alcohol

- Section 190 of the Licensing Act 2003 provides: "the sale of alcohol is to be treated as taking place where the alcohol is appropriated to the contract".
- It is typically the business premises from where the alcohol is dispatched that must be licensed for online sales. This may be the fulfilment partner rather than the on-line retailer/ platform.
- The person applying for a premises licence is usually: "a person who carries on, or proposes to carry on, a business which involves the use of the premises for the licensable activities to which the application relates", i.e., in this case the retail sale of alcohol.
- **Licence holder must ensure compliance with licence conditions and requirements for underage sales.**

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### Underage sales of alcohol

- Section 146 of the Licensing Act 2003 makes it an offence to sell alcohol to an individual aged under 18. The penalty is a fine (unlimited by statute).
- It is a defence if a person can show:
  - They believed that the individual was aged 18 or over; and
  - either—
    - had taken all reasonable steps to establish the individual's age; or
    - nobody could reasonably have suspected from the individual's appearance that they were aged under 18.
- Further it is a defence where a person is charged with the above offence by reason of the act or default of some other person, it is a defence that the accused exercised **all due diligence** to avoid committing it.
- NB note that it is also an offence to knowingly allow the sale of alcohol to under 18s (section 147 of the Licensing Act 2003)

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### Delivery of alcohol to underage individuals

- Section 151 of the Licensing Act 2003 – it is an offence to knowingly deliver alcohol sold on licensed premises to an individual aged under 18, or if you knowingly allow any other person to do so.
- BUT 151(6) of the Licensing Act 2003 – it is **not** an offence to deliver alcohol to an individual aged under 18, provided that:
  - the sale itself was made to an adult; and
  - the subsequent delivery is to that adult's home or place of work.

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### Best practice (1)

**BIS' (now BEIS) Better Regulation Delivery Office – Age Restricted Products and Services: A Code for Practice for Regulatory Delivery**

"Enforcing authorities should ensure that their compliance and enforcement approach to age restricted products and services legislation, including their approach to targeting their compliance and enforcement activities in this area, is transparent."

"Where an enforcing authority is considering conducting a test purchase exercise, consisting of one or more test purchase attempts, it should consider the statutory requirements for authorisation under the Regulation of Investigatory Powers Act 2000, as amended. It is unlikely that authorisations under RIPA for covert methods will be considered proportionate without demonstration that overt methods have been attempted and failed."

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### Best practice (2)

**The Retail of Alcohol Standards Group – Guidance for on-line retailers of alcohol**

- online businesses that sell or supply alcohol must have an age verification policy that relates to that business. Relying merely on asking a customer for their date or birth is unlikely to be sufficient, nor can you assume that a payment made by credit card is made by someone 18 or over
- The age verification policy must as a minimum, require individuals who appear to be under the age of 18 year to produce, on request, before being served or supplied alcohol, a proof of age document that bears their photograph and date of birth along with either a holographic mark or an ultraviolet feature.

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## Best practice (3)

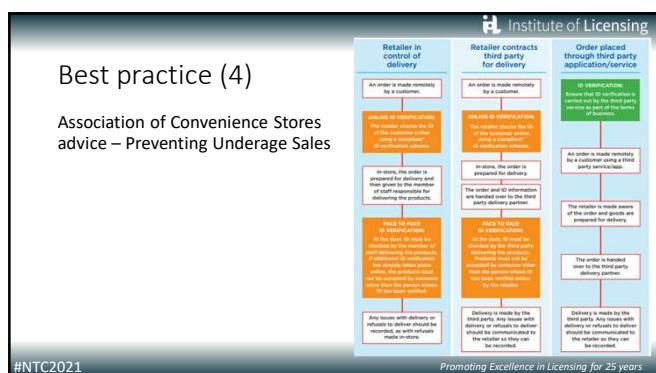
### **The Retail of Alcohol Standards Group – Guidance for on-line retailers of alcohol**

- Recommendations include:

- The inclusion of information and age verification steps at the stage of browsing – commonly described as an 'age gate'.
- Placing Drinkaware branding on websites and a link to Drinkaware.co.uk.
- Considering third party technological solutions that sit behind registration and billing pages, which enable age to be verified.
- Robust, independent, standards-based age checks at the point of sale online.
- Requiring customers to make a mandatory account.

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## Knives - case study – the Law

- Section 141(A) Criminal Justice Act 1988 as amended makes it an offence to sell to a person aged under 18 years:

- any knife, knife blade, razor blade, axe; or
- any other article which has a blade or which is sharply pointed and which is made or adapted for use for causing injury to the person.

- It is a defence for a person charged with the offence to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

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## Case study – the facts

- Remote purchase of a utility knife via a website.
- The knife was ordered for the local authority by an underage person using a fictitious name with a fictitious address.
- Payment was made on what appeared on the computer system of the seller to be a Mastercard credit card (indicating 18+) however it was later disclosed by the local authority that this was a pre-paid Mastercard registered in the same fictitious name and at the same fictitious address.
- Pre-paid credit cards are available to those under 18 years of age. There is currently no way for banks to verify if a card holder is 18 or over.
- At no point did the knife come into the possession of an underage person, nor was it intended by the local authority that it would. It was delivered to a PO Box and later collected by a Trading Standards office [over 18].

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## Case study – the submissions – defence (1)

### Abuse of process

- The decision to prosecute was in breach of the local authority's own enforcement policy.
- It is an abuse of process for an enforcement authority to bring criminal proceedings in breach of its own enforcement policy (*see R v Adaway [2004] EWCA Crim 2831*). It falls within the category of abuse where it would not be fair to try the defendant.
- The use of a false name, a false address and a card registered in a false name and address, by an underage test purchase volunteer encouraged by enforcement officers, was a breach of all recognised guidance in relation to the use of underage test purchasers and the breach is so serious that it amounts to an abuse of the process of the Court.

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## Case study – the submissions – defence (2)

### Regulation of Investigatory Powers Act 2000 ("RIPA")

- The actions of the local authority, because the underage test purchase volunteer was being observed by enforcement officers, amounted to "Directed surveillance" and no RIPA authorisation for directed surveillance was sought by the local authority.

### Other submissions

- If the Court disagreed with the submissions to stay the proceedings on the first 2 grounds then the defence argued:
  - The relevant offence is the *sale* of a relevant article to a **person** under the age of 18.
  - "Sale" in the context of the 1988 act includes "possession". The underage person never had possession of the knife and there was never any possibility or risk of the underage person coming into possession of the knife.
  - The purchaser was not, in fact, a person. They were fictitious.
  - The mere act of enforcement officers directing which buttons on a computer an underage person should press, in the circumstances of *this* case, did not amount to the offence alleged.

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Section 18(1) Criminal Justice Act 2003

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## Case study – the submissions – prosecution (1)

### Abuse of process

- Argued that the first point to determine was whether in fact the magistrates' court enjoyed the jurisdiction to stay the proceedings on any of the grounds advanced.
- In *R v Beckford [1996] 1 Cr. App. R. 94*, the Court of Appeal recognised two limbs of abuse – (1) where the accused is unable to receive a fair trial, and (2) where it is unfair to try the accused. The defence sought to stay the proceedings on the basis of the second limb.
- In *Nembhard v DPP [2009] EWHC 194 (Admin)*, it was held that “*on the authorities, in a summary trial, the magistrates or a District Judge can only stay by reference to the first limb and not the second, which is a matter for the High Court*”. (See paragraph 14)

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## Case study – the submissions – prosecution (2)

- The guidance of the Crown Prosecution Service states:
- *“A decision to bring a prosecution may be judicially reviewed, but only where there are exceptional circumstances, such as demonstrable fraud, corruption, mala fides (bad faith), or failure to follow settled policy on the part of the decision-maker”* (emphasis added). The courts have reasoned that judicial review is inappropriate where an alternative remedy exists, in that the matters complained of could be considered by the criminal court on an application to stay the prosecution as an abuse of process.”
- The defence had advanced its abuse of process argument on the basis of at least two of the matters referred to above – bad faith and a failure to follow a settled policy.
- Submitted that the defence’s remedy lay in a judicial review of the decision to prosecute on those points, not a stay on the grounds of abuse of process.

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## Case study – the submissions – prosecution (3)

- Further, even if the decision to prosecute can be shown to have been in consequence of wrongly applying the enforcement policy, that of itself would not be sufficient grounds for a stay of the proceedings. The defendant was required to show a level of oppression 'above and beyond the ordinary consequences of initiating a prosecution'. (*R (Baron's Pub Co. Ltd.) v Staines Magistrates' Court*, paragraph 47)
- The use of a false name and address was not in breach of 'all recognised guidance'. The guidance advised that a child test purchaser should not lie about their age or produce false identification. This test purchase involved no such lie.

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## Case study – the submissions – prosecution (4)

- Despite the knife being an age-restricted product, at no point was the test purchaser required by the website to confirm their age. This was a wholesale absence of a system of **due diligence** designed to protect against offences of this kind being committed.
- Further, the local authority had a duty of care to the test purchaser which could not be met if they were required to provide their real name and address.

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## Case study – the submissions – prosecution (5)

### RIPA

- The surveillance was not covert. In 2018, the Home Office issued guidance entitled 'Covert Surveillance and Property Interference' in which they advised that *'where a public authority has taken reasonable steps to inform the public or particular individuals that the surveillance is or may be taking place, the activity may be regarded as overt and a directed surveillance authorisation will not normally be available'*.
- The defendant was informed in writing by the local authority that it was undertaking a test purchase operation of age restricted products including knives and bladed articles and that it was likely within the next 90 days that a test purchase would be carried out.

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## Case study – the submissions – prosecution (6)

### Other submissions

- There was no need to consider whether the ordinary English meaning of "person" as the position was considered and definitively resolved in *Wm Morrison Supermarkets plc v Reading BC [2012] EWHC 1358 (Admin)*. As was the meaning of sells.
- Lloyd Jones J (Divisional Court) concluded:
- *"I am persuaded that Parliament did not intend to limit the application of this provision to a case where a child or young person acts as principal and therefore property passes to him. On the contrary, I have come to the clear conclusion that... where a child or young person enters into a transaction of sale, whether as a principal or on behalf of someone else, whether disclosed or undisclosed and whether or not property passes to him."*

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## Case study – court ruling and sentencing (1)

- There was a sale to an underage person pursuant to *Wm Morrison Supermarkets plc v Reading BC [2012] EWHC 1358 (Admin)*.
- There was no guidance on sentencing these cases and there was no analogous guidance. The Judge therefore had wide discretion. Examples of previous fines were provided to assist the Judge.
- Sentencing:
  - Companies culpability – **negligent** (rather than reckless or deliberate)
  - degree of harm caused – **no actual harm** but substantial public interest; and
  - the size of the company – **small company in financial difficulty** and not so culpable as to be “fined into oblivion”.

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## Case study – court ruling and sentencing (2)

- Sentence was a £1,000 fine, plus surcharge and legal costs. To be paid within 28 days of the judgment.



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## Case Study - Discussion

- Can online sales of age restricted products be “test purchased”?
- The final hearing of the 17 prosecutions taken by Croydon Council for the online sales of knives to children saw company found guilty and fined £10,000 with £15,000 costs on Tuesday 1 June 2021.
- The prosecutions brought to a conclusion National Trading Standards’ test purchasing programme, which was funded by the Home Office and started by Croydon Trading Standards in 2018. The funding supplemented routine work delivered by local authorities in England and Wales to prevent knife sales to children.
- During the pilot test purchasing programme, a 13-year-old volunteer working under the guidance of Croydon Trading Standards made 100 attempted test purchases online, of which there were 41 sales. From these 41 sales, 17 prosecutions were taken, and all 17 resulted in a conviction.
- In total, £179,755 of fines were issued under this project which targeted those selling knives to children online.

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## Enforcement

- If retailer/ restaurant does not have appropriate procedures in place this may lead to:
  - Prosecution for Breach of Licence Condition.
  - Prosecution for Underage Sale.
  - Prosecution for Underage Sale for Test Purchase Failure.
  - Review of Premises Licence (could lead to: new conditions added to Licence, suspension/revocation of Licence).
- Prosecution would be in the Magistrates' Court.



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## Typical Licence Conditions – Premises Licence

- Documented staff training regarding requirements under the Licensing Act in respect of the:-
  - Retail sale of alcohol
  - Prevention of underage sales
  - Age verification policy
- The licence holder to operate a Challenge 25 Age Verification Policy.
- The only acceptable proof of age identification to be a current Passport, photo card Driving Licence, Military ID card, or identification carrying the PASS logo (until other effective identification technology e.g thumb print or pupil recognition, is adopted by the Premises Licence Holder).

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## Licence Conditions for online sales (1)

- Only accepting orders for alcohol to be delivered to a residential/business address (not to a public place, or PO Box).
- Where the ordering process for deliveries is operated by the premises licence holder:
  - Clearly advertised age verification policy (including challenge 25)
  - Internet ordering sites and promotional material for delivery service to clearly state that alcohol should only be purchased for delivery to over 18s; and to remind customers that it is a criminal offence for a person under 18 to purchase or attempt to purchase alcohol on behalf of a person aged under 18 (proxy sales).
  - Requiring a declaration from the person placing the order at the time of order that that person is aged over 18 years of age, and that and the intended recipient is over 18 years of age.
- Where the ordering process for deliveries is operated by a third party, to ensure that the third party operate appropriate age verification procedures.

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## Licence Conditions for online sales (2)

### Age verification procedures on delivery:

- For deliveries made directly by the seller, the seller to have appropriate age verification in place to check the person accepting the delivery must be aged 18 years or over.
- Where the seller contracts a third party to deliver alcohol on their behalf, they to ensure that deliveries containing alcohol are identified or marked and that the third party:
  - only employs delivery employees or agents aged 18 and over;
  - operates an appropriate proof of age policy on delivery; and
  - Retains/safely disposes/returns any alcohol where delivery is refused on the basis of age.
- NB - for deliveries where the alcohol is delivered by a third party courier and product is concealed in a secure sealed package - seller has no direct supervision or control over the delivery, so there cannot be an age verification challenge on delivery (reliance must therefore be placed on age verification procedures on ordering only).

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