

Packaging Regulations

Background

In 2008 the Environment Agency gave notice that it planned to interpret the term "importer" differently under the packaging regulations. We have been working with members, the Environment Agency and our lawyers to seek to provide greater clarity for the trade.

This document sets out our communication with the Environment Agency to date and the legal advice which we have sought. As there is still a certain lack of consensus on the definition of importer we propose to arrange a meeting with interested members, the Environment Agency and our legal team.

Environment Agency Advice - General

June 2009

WSTA requested that the Environment Agency provide advice for the trade on the revised guidance of packaging regulations:

Who is responsible for compliance with the packaging regulations?

Under the Packaging Regulations, any organisation that has a turnover greater than £2m AND handles more than 50 tonnes of packaging or packaging materials (individually or as a group of businesses) must register with one of the environment agencies or one of 20+ private sector Producer Compliance Schemes e.g. Valpak. Public registers of producers and the public registers of producer compliance schemes are available online here: <http://npwd.environment-agency.gov.uk/>

There are several packaging activities which are relevant for determining whether a business handles 50 tonnes of packaging or packaging materials, these include: converting packaging materials into packaging, pack-filling, importing or selling.

What constitutes packaging?

In the case of wines and spirits, packaging includes the bottles, corks, caps, labels and the secondary and transit packaging such as pallets, boxes and shrink wrap.

Why the change in interpretation of the definition of 'importer'?

In the past, when goods entered the UK and were placed into bonded warehouses, there was a broad consensus by trade that it was the company that removed them and paid duty that would need to account for the packaging. Following legal advice in connection with enforcement action that the Environment Agency was undertaking in some cases, the guidance was reviewed to clarify the point at which obligations for importation was incurred. This was not the result of lobbying by any company or trade body.

The Packaging Regulations do not include a separate definition for 'import(er)' to take into account the use by some traders of bonded warehouses: therefore, it was deemed inappropriate to link the importer obligation to the payment of duty. Instead, the terms 'importer' and 'imported' have their normal meaning. This is considered to link to 'ownership' and - in contractual terms - the passing of 'consideration' from one legal person to another.

Producer Compliance Schemes were informed of the revised position in early 2008 and were asked to communicate it to their members.

Who is the importer?

The first company based in, or with a legal presence in, the United Kingdom which takes ownership of the products and the associated packaging is considered to be the importer for the purpose of the packaging regulations. Importing agents, who act on a commission basis and who do not take ownership of the products or packaging will not be the party which has the producer responsibility obligations. A test of ownership is to ask to whom the 'consideration' (ie money) is paid for the imported product. **If the payment is made direct by the buyer to an overseas supplier, that buyer would be the obligated importer. If payment is made to a sales office in UK (as opposed to a commission agent), then that suggests that the UK sales office would have been the first person in the UK to take ownership of the products from the overseas supplier.**

How does the change affect businesses?

Applying the ordinary meaning of 'import(er)' to the wine and spirits sector has a number of consequences for individual businesses. Some businesses will have a lower obligation than before, and some a higher obligation. There will be some businesses that will fall below the threshold for packaging handled and won't need to register as a producer others may need to register for the first time.

Companies need to consider if, in light of the change, they were an importer in 2008 and whether, as a consequence, they meet both of the threshold tests for registration in 2009. If detailed information is not available in respect of imports and the tonnage of imported packaging, a reasonable estimate will be acceptable for the 2009 registration round. Companies are advised to retain a record of their assessment and an explanation of how they have derived their figures.

Registration is an annual process; in future years, all producers will be expected to meet the usual standards of data accuracy.

Registration:

The deadline for Registration with the Environment Agencies or Compliance Schemes for 2009 was 7 April 2009. However, the Agency has confirmed that companies can register with a compliance scheme after that date, within reason.

Next Steps:

Given the legal advice already received by the Association about the definition of Importer, it is unlikely that further clarification can be achieved in the short term. However, there is likely to be a public consultation on amendments to the Regulations in 2009 and the Association will take the opportunity to seek a change in the definition to take account of the duty suspense system and the point at which the levy should be paid.

More information on the packaging regulations is available online here: www.environment-agency.gov.uk/packaging

WSTA Legal Advice

July 2009

WSTA sought further legal advice from Berryman on the definition of importer.

We are struggling to understand on what basis the Environment Agency can contend that all UK-based Agents – even those who (a) do not have the wine transported to their own UK premises; and (b) take no real ownership – meet the definition of an importer under the Regulations. The “ordinary everyday meaning” of the word “importer” is not a straightforward concept because some distinction must be drawn between physical and transactional importation. For example, the logistics company that acts as transportation contractor to the UK buyer may be physically bringing the goods into the UK, plainly, but plainly is not the “importer” under the Regulations because it never takes ownership.

In considering the examples below our legal advice is that examples 1-3 the Agent cannot sensibly be said to be the importer.

Example 1

The Agent negotiates with the UK buyer. The buyer agrees to purchase a consignment (credit terms usually apply – e.g. payment in 60 or 90 days) from the winery. The buyer arranges the transportation by which the consignment is brought from the winery and back into the UK. Until the buyer pays for the consignment title to the goods will be governed by the contract (failing which the law steps in to determine the issue). Either way, in this kind of transaction in most instances, title to

the goods remains with the winery – but that is academic because the goods will be in the UK before payment is due, which is to say that they have been imported by the buyer. In this example it matters not whether the winery or the buyer pays the Agent's commission. Other than as a facilitator for the transaction, the Agent has played no part in importing the goods. At no stage has title to the goods passed to him and at no point has he taken ownership.

Example 2

The Agent negotiates with the UK buyer. The buyer agrees to take a consignment from the winery. The buyer arranges the transportation by which the consignment is brought from the winery and back into the UK. In this instance the buyer agrees to pay the Agent for the goods (no doubt on usual credit terms). The Agent then deducts his commission and pays the winery. Until the Agent pays the winery title to the goods - again governed by the contract (failing which the law steps in) – is likely to remain with the winery. As with Example 1, other than as a facilitator for the transaction, the Agent has played no part in importing the goods. At no stage has title to the goods passed to him and at no point has he taken ownership. The means by which he has been paid is to accommodate the deduction of his commission but he has not imported them. The UK buyer has imported the goods into the UK.

Example 3

In this example the facts are the same as in either of the first 2 examples save that the Agent arranges the transportation by which the consignment is brought from the winery and back into the UK. He may have played a greater role in the physical importation of the goods but still at no stage has title to the goods passed to him and at no point has he taken ownership. He has not imported the goods. In each of the above examples the Agent has in essence brokered the deal between the winery and UK buyer, by which the buyer has imported the goods. The finer details of the arrangements and the payment terms may have e.g. financial implications that are not within our remit to advise on. However, in none of the examples can the Agent be an “importer” within the ordinary meaning of the word.

Example 4

The Agent negotiates with the UK buyer. The buyer agrees to take a consignment from the winery. The goods are brought into storage in the UK where the Agent manages the storage arrangements prior to arranging for or assisting in the movement of the consignment out of storage and to the buyer. The Agent is paid by the means described in Example 1 (above). Here, the Agent has taken on a much more participatory role in the handling of the goods but may still fall just short of the essential requirements of an “importer”, although he may have come close.

Example 5

In this example the facts are the same as in the previous Example except that the means of payment is that described in Example 2. In such an instance the Agent has crossed the divide. He has taken on a much more participatory role in the handling of the goods and, significantly, he is being paid for the goods, albeit that he is then

under an obligation to pay the winery for them. Although it is likely that (under the terms of the contract or the application of law) title has remained with the winery, the Agent's position is that he has controlled the imported goods in a manner consistent with ownership.

Environment Agency Advice – Importer

August 2009

WSTA briefed the Environment Agency on our legal advice and requested further clarification on the definition of importer:

I would like to clarify our interpretation of the terms 'importer' and 'agents' under the Producer Responsibility Obligations (Packaging Waste) Regulations 2007.

The use of the word agent or agency is likely to be misunderstood because it can be used to cover many situations. In strict legal terms in England and Wales an agent is someone who is authorised to act on behalf of a principal and to bind the principal. In effect the agent stands in the shoes of the principal. However, there are many "Agents" who would not really fulfill that role and would perhaps be better thought of as brokers. Their role is to bring parties together, perhaps providing incidental services in doing so.

As every situation will be different we do not feel it would be useful to provide our interpretation of individual scenarios, however we can clarify the principles.

If there is a direct link between a winery abroad and a buyer who is the first person to take physical possession (ignoring carriers) in the UK, the buyer will be the importer, even though the movement of the wine or process of payment might be arranged or facilitated by a third party.

If the third party takes physical possession of the wine before it reaches the buyer that third party may be the importer but there are a number of possibilities. If that third party is an agent for the buyer (i.e. acting on behalf of and is authorised to bind the buyer), the buyer is the importer because they would be bound by the acts of their agent. Similarly if the third party takes possession of the wine in the UK and is the agent for the winery (i.e. acting on behalf of and authorised to bind the winery), the winery would be the importer. As the agent is acting as the UK presence on behalf of the winery. Alternatively the third party may be acting entirely independently, for example, storing the wine until a buyer is found, and the third party would be the importer.

The delivery address (i.e. the destination of the goods) is not relevant as goods, in this case wine, may be delivered directly to a retailers customer from abroad, even though ownership will have passed through the retailer. As per our previous advice it is the first UK party to take ownership of the good that will be importer, regardless of

whether the goods have been delivered to a third party or whether payment has been made to the overseas winery through an agent.

WSTA Legal Advice

September 2009

WSTA then asked our legal team to review the advice and received the following response:

It does appear that the EA has moved substantially from its original contention which in broad terms was that Wine Agents would almost come what may equate to "importers" for the purposes of the Packaging Regulations. They continue to say that the first person to take ownership in the UK will be the "importer" but only agents who physically take possession of the wine can be importers, and even then not in every case.

Perhaps as an excuse for its previously broad statement, the EA has highlighted the issue with the word "agent". I agree that the term "agent" may be equivocal as to true status. Whether a person/organisation is an agent under strict legal definition is dependent upon the facts and circumstances of each case and the fact that the person/organisation describes himself/itself as an "agent" is by no means conclusive. I do agree that many who describe themselves as "agents" are really facilitators, brokers, deal-arrangers and the like.

Where the agent takes physical possession of the goods in the UK he is potentially an importer. I agree with EA that if he takes possession before a buyer is found he is an importer for sure. Equally I agree that if he takes physical possession as an agent under strict legal definition (be it as an agent for buyer or winery) then his principal is the importer (i.e. the buyer or winery).

It is not strictly correct to say that the delivery address is not relevant. The status of the agent being a matter for the facts of the particular case it is one of the facts to be taken into consideration, but on its own it is not conclusive.

In common with most regulatory and enforcing bodies the EA won't be drawn into commenting on specific examples/scenarios, which would run the risk of restricting their enforcement capability should the example/scenario arise. I am not sure that the EA has in its own mind clearly demarcated "ownership" and "physical possession". The "owner" may not be the first to take "physical possession".

On balance, I am content that EA is saying (1) that the first person to take ownership in the UK is the importer, and this doesn't have to be the wine agent simply because he takes possession (- the issue of ownership was discussed in my Advice of June this year, which holds good); and (2) that an agent with a UK base who takes physical possession of the goods will be the importer unless he is acting within the strict UK legal definition of an agent, in which case the principal is the importer.

In my June 2009 Advice I gave 5 examples of a wine agent's involvement in a transaction each of which, under the EA's original position, would have equated the agent to an importer. I advised that in the first 4 depicted situations the agent could not be an importer under the Packaging Regulations, but gave a fifth example where he could. The EA appears to now accept that in 1 to 4 the Agent isn't an importer but he is in the fifth. In other words our position is the correct one.

WSTA wine agent members need to be circumspect in the way they describe themselves and their activities if they wish to avoid making it difficult for them to argue that they are not importers under the packaging regulations. Any wine agent bringing goods into the UK before finding a buyer has to be an importer - as previously advised it's irrelevant that the goods go into bond and don't come out until a buyer is found.

Whilst useful evidence, the above advice is unlikely to constitute an actionable "decision" that would enable the member to get a prosecution thrown out or give rise to an actionable judicial review claim. This means that whilst wine agent members may take some re-assurance from the response, it will not prevent them being investigated on the particular facts and EA concluding that they should be treated as an importer (even if the response might appear to exempt them). This is not to say that there is no value in the response - there is.