


ER 2023/1EC - Compendium

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Public advice and guidance compendium – ER 2023/1

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This Compendium of comments provides responses to comments received on Draft Excise Ruling ER 2022/D2 *Excise: the meaning of ‘legally and economically independent’*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO’s general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	<p>Ruling’s broad principles</p> <p>We agree with the broad principles outlined in the draft Ruling.</p>	Noted.
2	<p>Legal and economic independence – applies only to ‘manufacture’ and not downstream activities</p> <p>It is apparent in the regulations and guidelines, that qualification for excise remission is concerned with the manufacturing of an excisable good.</p> <p>The legal and economic independence qualification criteria should only be applied to the manufacturing processes of an alcohol manufacturer. The downstream functions such as sales, marketing, distribution, hospitality and the like are not relevant considerations. This delineation is critical for brewing businesses as it will allow them to establish cooperative structures to gain efficiencies from these ancillary functions.</p> <p>Brewers should be able to adopt operating models which allow a degree of cooperation with other brewers with confidence that they can do so without the implicit risks of disqualification from the remission, fines and substantial penalties.</p>	<p>The Explanatory Statement to the <i>Excise Amendment (Alcohol Manufacturers Remissions) Regulations 2021</i> (the 2021 ES) adopted 4 eligibility criteria for the remission scheme from the former refund scheme without change. Under the remission scheme, an alcohol manufacturer:</p> <ul style="list-style-type: none"> • must be a licensed manufacturer and manufacture and enter an alcoholic beverage • be legally and economically independent of any other entity that has received a remission or refund for the financial year under the scheme • ferment or distil at least 70% of the alcohol used in products they produce, and • meet the still ownership test if the alcoholic beverage is obtained from distillation. <p>Each test must be satisfied and the former refund scheme’s Explanatory Statement to the <i>Excise Amendment (Refund Scheme for Alcohol Manufacturers) Regulations 2017</i> (the 2017 ES) stated that:</p> <p style="padding-left: 20px;">Alcohol manufacturers are legally and economically independent of one another if they have the capacity to take business decisions independently.</p>

Issue number	Issue raised	ATO response
		<p>While no one factor is decisive, indicators that they may be legally and economically independent of one another include:</p> <ul style="list-style-type: none"> • Each manufacturer develops, labels and sells its own product and uses its own sales network without relying on the other alcohol manufacturer to undertake any of these activities on its behalf. <p>We consider that it is clear that the policy intent of the legally and economically independent test is to give regard to all aspects of the manufacture, marketing and distribution of a product. However, it is recognised that various manufacturers may manufacture and sell beer (bearing their separate trademarks) to the same retailer; or may have a common distributor. These factors, in isolation, will not prevent manufacturers from being legally and economically independent from one another.</p> <p>No changes were made to the final Ruling.</p>
3	<p>Legal independence – ‘Business decisions’ and ‘influence’ are too wide and a catch-all</p> <p>It does not appear to be the intent of the draft Ruling to apply a strict definition of these terms as evidenced by the additional criteria in the Regulations which seek to clarify the meaning of legally independent as when 2 manufacturers ‘have the capacity to take business decisions independently’ and in the draft Ruling as meaning that 2 parties would not be legally independent if ‘one manufacturer is legally capable of exerting influence over the other’.</p> <p>The terms ‘business decisions’ and ‘influence’ are so broad that nearly any contractual relationship between 2 manufacturers could be seen to breach the legal independence test.</p> <p>It is recommended that the reference to ‘exerting influence’ be removed so that the condition is clear that the issue is one of ‘control’, which is a more precisely defined legal term in Australian corporation’s law.</p>	<p>The intent of the Ruling is to provide clear guidance on the phrase ‘legally and economically independent’ – a phrase that is not defined in the Excise legislation. The policy intent for this principle is that an alcohol manufacturer must have the capacity to take business decisions independently as provided in the 2017 ES and adopted without change in the 2021 ES. In our view, a factor that must be considered to apply this test and achieve the policy intent is whether one manufacturer is legally capable of exerting influence over another. This would clearly be the case where one manufacturer has a controlling interest by voting rights or a third party has a controlling interest in both manufacturers. However, in terms of determining if one manufacturer is capable of exerting influence over another, other factors when considered collectively, may indicate that the necessary influence exists even though one entity may not technically ‘control’ the other as that term is legally understood.</p> <p>We consider that our view is supported by the inclusion of the word ‘influence’ in the judgment of the European Court of Justice in <i>Gluckauf</i></p>

	<p>Suggest paragraph 10 of the draft Ruling be amended, as follows:</p> <p>To determine whether one manufacturer is legally independent from another requires consideration of factors indicating whether one manufacturer is legally capable of controlling the other.</p> <p>Suggest paragraph 11 of the draft Ruling be amended, as follows:</p> <p><i>Shareholding</i></p> <p>Where a common shareholder has control of more than one alcohol manufacturer, those manufacturers will not be legally and economically independent.</p> <p>Furthermore, the extension of the concept to ‘management’ is problematic. For example, 2 manufacturers could have a common board member or adviser (such as an accountant). It is suggested that this be specified to be concerned with control as evidenced by a contractual obligation to act.</p> <p>Suggest paragraph 11 of the draft Ruling be amended, as follows:</p> <p>Another indicator that 2 or more manufacturers are not legally independent is if there is contractual obligations between them which would legally require a manufacturer to act in accordance with the directions of another manufacturer.</p>	<p><i>Brauerei</i>¹ (at paragraph 39) in the draft Ruling which considered a similar statutory test. The conclusion in <i>Gluckauf Brauerei</i> at [36] was (emphasis added):</p> <p>In the light of the foregoing, the reply to the question referred is that Article 4(2) of Directive 92/83 must be interpreted as meaning that a situation characterised by the existence of structural links in terms of shareholdings and voting rights, and which results in a situation in which one individual, performing his duties as manager of a number of the breweries concerned, is able, independently of his actual conduct, to exercise influence over the taking of business decisions by those breweries, prevents them from being considered economically independent of each other.</p> <p>We consider that further support for the relevance of ‘influence’ when considering legal and economic independence is found in paragraph (xxii) in the commentary to control in the Australian Standard AASB 1024 <i>Consolidated Accounts</i> in this way:</p> <p>Sometimes an entity is regarded as being economically dependent on another entity. This is usually the case when the viability of the ongoing operations of one entity depends on funding by, or on a significant volume of business with, another entity. However, it ought not to be assumed that economic dependence is synonymous with control. While economic dependence would usually give rise to a relationship based on influence it is unlikely, in the absence of some very restrictive contractual condition, that it would enable an entity to dominate decision-making in relation to both the financial and operating policies of the other entity as would be necessary for control to exist.</p> <p>One entity may therefore be dependent upon another without necessarily being ‘controlled’ by that entity.</p> <p>No changes were made to the final Ruling.</p>
4	<p>Legal independence – should not include a third party that is not a manufacturer</p> <p>The draft Ruling and Regulations clearly identify that the test for legal independence is solely concerned with the relationship between 2 or more manufacturers (and the shareholders in those manufacturers) and that a common</p>	<p>The legal independence test for a third party is whether that third party has the ability to influence the decision making of 2 or more alcohol manufacturers. The test applies to any third party regardless of whether it is an alcohol manufacturer. This means, for example, that in Example 2 of the final Ruling, the legal and economic independence test would have been failed regardless of whether Parent Alcohol Co was itself a manufacturer. Example 7M contained in the <i>Excise Guidelines for the</i></p>

¹ *Gluckauf Brauerei* (Approximation of laws) [2009] EUECJ C-83/08 (02 April 2009) at [39].

	relationship with a third party that is not a manufacturer is not a consideration for assessing legal independence.	<p><i>Alcohol Industry</i> further explains that 2 alcohol manufacturers that may otherwise appear to be independent from one another will fail the legal and economic independence test where a third party (Investor Co) has a controlling interest (60%) in both companies, and can therefore make decisions in respect of each company. This interpretation is supported by the 2017 ES that states 'entities that are alcohol manufacturers may also not be legally and economically independent of one another, even if they do not have common ownership between them'.</p> <p>No changes were made to the final Ruling.</p>
5	<p>Economic independence – ‘financially reliant’ and ‘influencing’ are too wide and a catch-all</p> <p>The criterion in paragraph 12 of the draft Ruling captures nearly any contractual relationship between 2 manufacturers or between a manufacturer and a third party due to the broad scope of the first sentence and the terms ‘financially reliant’ and ‘influencing’ in the second sentence. The implication of the first sentence is that nearly any circumstance where 2 manufacturers cooperate would mean disqualification from excise remission.</p> <p>Suggest paragraph 12 of the draft Ruling be amended, as follows:</p> <p>If one entity is financially reliant upon the other, the 2 manufacturers will not be economically independent. It does not matter whether the reliance is because of direct financing or access to premises, equipment or other resources. Where ‘financially reliant’ and ‘reliance’ is defined as a manufacturer having the contractual ability to force another manufacturer to act at their direction.</p>	<p>It is necessary to consider for economic independence whether, through the legal and economic connections between 2 or more alcohol manufacturers, they each have a capacity to take business decisions independently. It is our view that an independent decision cannot be made if one alcohol manufacturer is financially reliant on another, or 2 alcohol manufacturers are financially reliant on the same third party such that the third party is capable of influencing the decision making of both manufacturers. We take this view from the 2017 ES which provides that a subsidiary of another entity (parent entity) is not independent where the subsidiary entity is subject to the control of, and is generally ‘financially dependent’ upon, the parent entity. Also, that an entity that is an alcohol manufacturer may not be legally and economically independent of another manufacturer even if there is no common ownership between them. Our use of the term ‘influence’ is explained at Issue 3 of this Compendium.</p> <p>Our purpose is to ensure that, consistent with the policy intent stated in the 2017 ES, an entity that divides its manufacturing operations across multiple entities will receive the same remission that would be available had the manufacturing activities been centralised in a single entity.</p> <p>No changes were made to the final Ruling.</p>
6	<p>Economic independence – ‘financially reliant’ will catch most distribution agreements in the beer industry</p> <p>‘Financially reliant’ is problematic because it can be argued that most distribution agreements in the beer industry would meet this very broad definition. For example, most beer manufacturers would be financially reliant to some extent on maintaining a relationship with large retailers such as Coles Liquor Group and Endeavour Drinks Group who together</p>	<p>The meaning of ‘financially reliant’ is discussed at Issue 5 of this Compendium.</p> <p>It is necessary to consider whether, through the economic connections between 2 alcohol manufacturers, they <i>each</i> have a capacity to take business decisions independently. Or, if 2 alcohol manufacturers rely upon a same third party, whether that third party is capable of influencing the decision making of both manufacturers such that each of the 2 alcohol manufacturers have a capacity to take business decisions independently.</p>

	control over 50% of the beer retailing in Australia. Therefore, taking a strict definition of 'financially reliant' would mean that every beer manufacturer who did business with these parties would not qualify for the remission.	<p>We recognise that 2 or more alcohol manufacturers may sell a significant proportion of their product to the same retailers and/or through the same arm's length distributor. Where each manufacturer operates independently, the mere fact that each manufacturer has entered into commercial sales contracts with the same distributor, or retailer, will not cause the independence test to be failed. An example of where financial dependence may exist is where one manufacturer is reliant upon financing from another manufacturer and under the terms of the financing arrangement the lender is capable of exerting influence over the borrower in relation to what the borrower manufactures, how that manufacture will take place, and to whom the product is sold.</p> <p>No changes were made to the final Ruling.</p>
7	<p>Economic independence – 'other resources' is too wide and a catch-all</p> <p>'Other resources' is so broad as to encompass nearly any other situation. For example, 2 breweries could share a cool room facility (not an uncommon circumstance) which on the face of it should not disqualify either brewery from the remission.</p>	<p>The reference to 'other resources' is a catch-all to encompass other things that may be used in the manufacture process in addition to premises and equipment that may be indicative of a lack of financial independence in circumstances where there is no direct financing. Its meaning is described through the factors that are listed in paragraph 13 of the final Ruling which are based on our interpretation of the 2017 ES. No single factor will necessarily be determinative in its own right but must be considered collectively.</p> <p>We agree that 2 alcohol manufacturers may remain economically independent where one manufacturer leases a cool room facility from another manufacturer when the arrangement is entered into on commercial (arm's length) terms and allows each manufacturer to carry on its operations separately without being subject to the requirements of the other.</p> <p>No changes were made to the final Ruling.</p>
8	<p>Economic independence – 'influencing' in commercial relationships</p> <p>The term 'influencing' is similarly problematic, as many commercial relationships have elements which allows one party to influence the behaviour of another through the course of making sensible commercial decisions.</p>	<p>Refer to Issue 5 of this Compendium for an explanation about why influence can indicate a lack of economic independence. In each case, a balanced analysis of relevant factors against the particular facts and circumstances is necessary to determine whether an alcohol manufacturer meets the phrase 'legally and economically independent'.</p> <p>No changes were made to the final Ruling.</p>
9	<p>Economic independence – access to premises is contradictory to distinct facilities</p>	<p>We consider that access to premises needs to be extended to the requirement that there must be distinct facilities for alcohol manufacturers that are legally and economically independent of each other. In support,</p>

	<p>'Access to premises' can be interpreted as contradictory to the 'distinct facilities' guidance in paragraph 13 of the draft Ruling. It is suggested the 'distinct facilities' guidance is removed because this condition is better handled by the provisions of the Ruling relating to contract brewing.</p>	<p>the 2017 ES states that while no one factor is decisive, indicators that alcohol manufacturers are legally and economically independent of one another include:</p> <p>each manufacturer pays for their use of manufacturing facilities, even if they share use of the same facility (jointly owned premises would not qualify as one party could not act without consent of the other or would be subject to the direction of the other).</p> <p>Further, we note that the Ruling does not address 'contract brewing'. Rather, the <i>Excise Guidelines for the Alcohol Industry</i> includes a section titled 'Manufacturing alcoholic beverages under contract'.</p> <p>No changes were made to the final Ruling.</p>
10	<p>Economic independence – independent process and product should not include the sales network</p> <p>It is suggested the reference to 'sales network' in paragraph 13 of the draft Ruling be removed as outsourcing distribution is a common shared function and the sales function is not part of the manufacturing process for which the legally and economically independent criteria apply.</p>	<p>Support for requiring an independent sales network is taken from the 2017 ES which states that alcohol manufacturers are legally and economically independent of one another if:</p> <p>each manufacturer develops, labels and sells its own product and uses its own sales network without relying on the other alcohol manufacturer to undertake any of these activities on its behalf.</p> <p>We recognise that on occasion, various alcohol manufacturers may independently enter into contracts with the same distributor or retailer. This in itself will not cause the manufacturers to fail the independence test. Similarly, where an alcohol manufacturer enters into an arm's length distribution agreement with a distributor that is associated with another alcohol manufacturer, that connection in isolation will not fail the independence test. The sharing of sales networks is one factor to be considered when determining whether 2 or more alcohol manufacturers are legally and economically independent from one another. In addition, 2 or more manufacturers can have their 'own' sales networks when they have separately contracted on an arm's length basis with the same distributor or retailer.</p> <p>No changes were made to the final Ruling.</p>
11	<p>Economic independence – independent finance</p> <p>It is suggested paragraph 13 of the draft Ruling be amended, as follows:</p> <p>At the end of the sentence, insert 'for avoidance of doubt, it is accepted that similar types of financial arrangements</p>	<p>We recognise that 2 or more manufacturers may obtain finance from the same financial institution on an arm's length basis (for example, a major bank). This alone will not cause the independence test to be failed. However, where, for example, one manufacturer obtains finance from an entity that controls another manufacturer, there is likely to be a lack of economic independence.</p>

	may exist between several alcohol manufacturers and third parties who are not alcohol manufacturers’.	No changes were made to the final Ruling.
12	<p>Economic independence – independent staffing and accounting</p> <p>It is suggested the reference to ‘staffing’ in paragraph 13 of the draft Ruling be removed. A manufacturer could choose to utilise contract personnel to perform some functions and it is unclear as to how this would reduce the ability of a manufacturer to control its own manufacturing process.</p>	<p>We recognise that workers may enter into separate contract arrangements with one or more manufacturers where the worker provides discrete services to each manufacturer at discrete times. This will not cause the independence requirement to be failed.</p> <p>No changes were made to the final Ruling.</p>
13	<p>Operating models – common distributor</p> <p>In this scenario, 2 or more brewing companies (BrewCo’s) choose to utilise a common distributor (DistroCo) to sell their beer where there is no shareholding between the parties.</p> <ol style="list-style-type: none"> 1. BrewCo’s each have an excise licence to manufacture beer and have their own manufacturing facilities. 2. BrewCo’s have no loans between each other. 3. BrewCo’s do not have common shareholders. 4. Each BrewCo has a distribution agreement which outsources the sales, marketing and distribution function to DistroCo for their beer. 5. Each BrewCo calculates and pays excise and claims the remission on the beer that it manufactures and sells to DistroCo on an excise-paid basis. 6. DistroCo collaborates with each BrewCo to determine the best mix of products made by the BrewCo to meet the demands of the marketplace. 7. DistroCo is not an alcohol manufacturer. 	<p>We agree that 2 manufacturers may be legally and economically independent despite each manufacturer entering into commercial arrangements with the same distributor. We recognise it is common for distributors to enter into distribution agreements with a number of alcohol manufacturers.</p> <p>No changes were required to be made to the final Ruling.</p>

	<p>8. In this circumstance, each BrewCo is legally and economically independent to claim the remission.</p> <p>Diagram 1 – common distributor</p>	
<p>14</p>	<p>Operating models – distribution company owned by BrewCos</p> <p>This scenario is a modification to the common distributor model scenario in Issue 13 of this Compendium, where the BrewCo's own part of the DistroCo and DistroCo provides additional services beyond distribution.</p> <ol style="list-style-type: none"> Points 1 to 7 of the scenario in Issue 13 of this Compendium applies. Each BrewCo owns shares in DistroCo. DistroCo owns no shares in any of the BrewCo's or DistroCo may hold shares in a BrewCo but does not have a controlling interest. In this circumstance, each BrewCo is legally and economically independent and qualifies to claim the remission. The fact that each BrewCo owns shares in DistroCo is irrelevant as DistroCo is not a manufacturer and therefore the legally and economically independent criteria do not apply. Similarly, as long as DistroCo does not own a controlling interest in any BrewCo then each of the BrewCos will continue to qualify for the remission scheme. <p>Diagram 2: Cooperative structure</p>	<p>Whether each BrewCo owns shares in DistroCo or DistroCo holds shares in any of the BrewCos will not be relevant unless those shareholdings, in addition to any other relevant factors, are sufficient to establish that either BrewCo can influence the decision making of the other BrewCo; or, a third entity, such as DistroCo can influence the decision making of both BrewCos. A small shareholding in isolation, when it is insufficient to enable an entity to influence the decision making of the other entity, does not, in itself, cause the legal and economic independence test to be failed.</p> <p>No changes were required to be made to the final Ruling.</p>

	<p style="text-align: center;">Cooperative Structure</p> <p style="font-size: small;">DistroCo is a cooperative providing shared services to BrewCo members</p> <ul style="list-style-type: none"> ▪ Sales & marketing ▪ Distribution & warehousing ▪ Hospitality operations ▪ Contract staffing ▪ Bulk purchasing <p style="font-size: x-small;">BrewCo's make beer</p> <p style="font-size: x-small;">BrewCo's have different shareholders</p>	
<p style="text-align: center;">15</p>	<p>Operating models – contract brewing</p> <p>It is common in the industry for a manufacturer to offer contract brewing services to others who lack the equipment or capacity to make their own beer (or sufficient volume of their own beer).</p> <p>For clarification, we advise that 2 terms be adopted:</p> <ul style="list-style-type: none"> • The Brand Owner is the party who is requesting that beer is manufactured by another party. • The Contract Brewer is the manufacturer that makes the beer. <p>The Contract Brewer is always a manufacturer holding an excise license. The Brand Owner may or may not hold an excise license.</p> <p>For a Brand Owner to claim the remission on beer, the following circumstances must apply:</p> <ol style="list-style-type: none"> 1. The Brand Owner must have a lease agreement in place for either a portion of the brewing space or tanks themselves (that is, access to tank space when required). This does not have to be physical but virtual (that is, if the Contract Brewer has 4 × 2000 L fermenters, as long as the Contract Brewer always has access to one of those whenever they need it). This goes to the heart of 'certainty to enable them to carry on their business with confidence into the future without being subject to influence from the lessor'. 2. The Brand Owner must own the intellectual property in the beer being brewed and carry economic risk for the 	<p>We address each point in turn:</p> <ol style="list-style-type: none"> 1. The Brand Owner must undertake the manufacture. It follows that merely leasing tanks will not be sufficient to claim a remission if the manufacture is undertaken by another manufacturer. Where the Brand Owner does undertake manufacture, we agree that the mere storage of that beer in another manufacturer's tanks will not in isolation cause the independence test to be failed provided the Brand Owner leases tanks on a commercial basis. We also recognise that under the terms of a commercial arrangement, different tanks may be made available to the Brand Owner at different times. 2. We reiterate that the Brand Owner must undertake the manufacture of the product. This will require the Brand Owner to have premises (or part of premises), equipment and expertise available for their use under commercial arrangements. 3. We agree that the Brand Owner must hold a licence to manufacture that specifies the premises at which the product is manufactured. If the Brand Owner has leased premises, or part of premises from another manufacturer on commercial terms, there should be no need for the Brand Owner to obtain the written approval of the second manufacturer to specify the premises on the Brand Owner's licence. 4. While a continuous movement permission is not a specific requirement to be entitled to a remission, we agree that to lawfully move product upon which duty has not been paid from one place to another requires that a movement permission must be held and the movement of the product must occur in accordance with that permission.

	<p>end product – including for the actions of the personnel carrying out the manufacturing. This goes to having independent process and product. Note that the Contract Brewer will typically provide support for the brewing process in the way of personnel under a contract agreement, but these personnel only act under the instruction and supervision of the Brand Owner who provides detailed recipes, instructions and processes for carrying out the manufacture.</p> <p>3. The Brand Owner must have the premises of the manufacturing listed as a manufacturing premise on their excise license with the written approval of the owner of the manufacturing premises.</p> <p>4. The Brand Owner must have a continuous movement permission in place to transfer the manufactured product under bond to a bonded warehouse under the control of the Brand Owner.</p> <p>5. The Brand Owner must account for, calculate and pay any excise due. The Brand Owner may claim remission if they otherwise meet the criteria.</p> <p>If these circumstances do not apply, then a Brand Owner does not qualify to claim the remission.</p>	<p>5. We have no concern with the conclusion subject to the previous comments (and provided there are no other factors that would indicate the Brand Owner and other manufacturer are not legally and economically independent).</p>
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