

EU Batteries Directive – have you complied with your obligations?

A new regime governing the supply of batteries (or products containing them) within the European Economic Area (“EEA”) came into force in 2006 under the EU Batteries Directive. The regime affects all those involved in the batteries supply chain wherever they are based. This includes overseas companies who operate within EEA markets.

Member states of the EU had until September 2008 to implement the Batteries Directive into their national laws. So, while this is an EU-wide scheme, your compliance obligations will vary by the jurisdictions in which you operate.

Importantly, there are **country-specific registration and/or scheme membership requirements for battery producers applying from this autumn**. Those who have not already complied with their obligations, should do so as a matter of urgency.

In this Legal Alert, we focus on the compliance obligations of battery producers operating in the UK market. However, if you need advice on any other aspect of the Batteries Directive (e.g. the requirements applying to battery distributors, treatment operators or exporters) or affecting any jurisdiction outside the UK, please let us know using the contact details at Q.9 below.

UK battery producers

The Waste Batteries and Accumulators Regulations 2009 (the “**Batteries Regulations**”) implement in the UK a system for the collection, treatment and recycling of waste batteries as required under the Batteries Directive. The following frequently asked questions aim to help battery producers understand their key compliance obligations.

1. What kinds of batteries are affected?

All batteries, regardless of their shape, volume, weight, material composition or use and whether or not they are incorporated into an “appliance” (see Q.3 below) are affected. To understand their compliance obligations, battery producers need firstly to establish which category of batteries they are handling (see Q.2 below).

The only general exemptions relate to batteries used in:

- equipment connected with the protection of the essential security interests of EEA states, such as arms, munitions and war material, and intended for specifically military purposes; or
 - equipment designed to be sent into space.
- The application of these exemptions needs to be considered carefully by battery producers, taking appropriate legal and technical advice.

2. How are batteries categorised?

All producers need to identify whether their batteries are:

- industrial batteries;
- automotive batteries; or
- portable batteries.

The Batteries Regulations apply differently to each of the above categories. Differentiating between the three categories will not necessarily be an easy task. The UK Government has prepared guidance to help producers apply the classification tests but there is still likely to be uncertainty in some areas. There can be particular confusion between industrial and portable batteries, so appropriate legal and technical advice should be taken to ensure that the producer’s obligations are complied with.

In Table A below, we set out the basic tests to determine the battery type, together with some examples of the batteries commonly found in each category.

Table A: Differentiating between battery types		
<p>Industrial batteries are any battery or battery pack which is:</p> <ul style="list-style-type: none"> • designed exclusively for industrial or professional uses; • used as a source of power for propulsion in an electric vehicle; • unsealed but is not an automotive battery; or • sealed but is not classified as a portable battery. 	<p>Portable batteries are any battery or battery pack which:</p> <ul style="list-style-type: none"> • is sealed; • can be hand-carried by an average individual without difficulty; and • is neither an automotive battery nor an industrial battery. 	<p>Automotive batteries are batteries used for automotive starter, lighting or ignition power.</p>
Examples		
<ul style="list-style-type: none"> • Batteries used in offshore oil rigs and lighthouses. • Batteries designed exclusively for handheld terminals used in shops. • Batteries used in professional video equipment and studios. • Batteries used as a source of power and propulsion to drive the motor in an electric forklift truck. 	<ul style="list-style-type: none"> • AA or AAA batteries used to power a portable CD player or minidisk player. • The battery used to power a laptop or mobile phone. • The button cell fixed to the motherboard of a personal computer or laptop, or used to power a wristwatch. 	<ul style="list-style-type: none"> • A motorcycle battery – i.e. the battery used for starting, lighting or ignition. • A truck, bus, or coach battery - i.e. the battery used for starting, lighting or ignition.

3. Where a battery is incorporated into an “appliance”, what appliances are covered?

The “appliances” covered are any “electrical or electronic equipment” as defined by the EU Waste Electrical and Electronic Equipment (“WEEE”) Directive which is fully or partly powered by batteries or is capable of being so.

The WEEE regime covers a wide range of electrical and electronic products. Most manufacturers will already have assessed their obligations under the WEEE regime (and relevant national schemes) and the Batteries Regulations are designed to complement that regime.

4. Who is a battery “producer”?

A battery producer is:

“...any person in the United Kingdom that, irrespective of the selling technique used [...], places batteries, including those incorporated into appliances or vehicles, on the market for the first time in the United Kingdom on a professional basis”.

The term producer does not necessarily refer to the manufacturer: the emphasis is on whoever is placing the item on the UK market first.

According to the Government guidance, “any person in the UK” refers to any person with a physical presence in the UK. For distance sellers, this could include a PO Box, a UK trading arm or office.

The following are examples of battery producers:

- A company with a UK presence that imports laptop computers (which include batteries) into the UK and then sells them wholesale in the UK.
- UK manufacturers of mobile phones (which include batteries) that sell to the general public and/or to retailers.

The following would not be producers under the Batteries Regulations (although they may have obligations in other EU jurisdictions):

- A company that imports batteries into the UK and then sells them overseas without placing any on the UK market.
- A company that buys batteries wholesale from another company inside the UK.
- A company that imports mobile phones into the UK without batteries and then buys the batteries for the phones from another UK company.

A company that sells batteries from overseas directly to UK consumers via the internet and has absolutely no physical UK presence.

Worked example: who is the battery producer?

By way of a further example, how would a US company be treated where it places an electrical product on the UK market containing a battery – the battery being purchased in the UK from another company?

In this instance, the company placing the electrical product on the market would not be considered a producer. Rather, the company that first places the battery itself on the market is the producer. So, in determining whether a company is a producer, it is important to consider the source of the batteries used in your products

5. What are our compliance obligations?

Having established the battery type, a producer can then understand its compliance obligations. The key requirements are summarised in Table B below.

Table B: Summary of key compliance obligations		
Industrial batteries	Automotive batteries	Portable batteries
<ul style="list-style-type: none"> Register with the Department for Business, Innovation and Skills (“DBIS”). An application to register must be made within 28 days of the first date on which the producer places batteries on the market for the first time in the UK after 15 October 2009. Comply with the producer take-back obligations. Publish details on or before 1 December each year of how end users may request the take back of waste batteries. Ensure the responsible treatment of waste batteries (e.g. by ensuring they are delivered to an approved battery treatment operator or exporter for treatment and recycling). The disposal of whole and untreated waste industrial and automotive batteries by land-filling or incineration is prohibited after 1 January 2010. Report to the regulator every year relevant sales data (including the tonnages and chemical types of batteries placed on the UK market). The first report must be made by 31 March 2010. Comply with a number of other reporting and record-keeping requirements in relation to waste batteries. 	<ul style="list-style-type: none"> Register with DBIS within the same timescale as for industrial batteries. Comply with obligations in relation to the collection on request of waste automotive batteries free of charge from final holders (e.g. garages, scrap yards, end-of-life vehicle facilities). Publish details on or before 1 December each year details of how a final holder of waste automotive batteries may request the take-back of those batteries. Ensure the responsible treatment of waste in a similar way to industrial batteries. Comply with sales data reporting and other reporting and record-keeping requirements in a similar way as for industrial batteries. 	<ul style="list-style-type: none"> Join a Battery Compliance Scheme (“BCS”). This applies to producers who place more than 1 tonne of portable batteries on the UK market in any compliance year. Those placing batteries on the market in 2010 must have joined a BCS by 15 October 2009. New producers (i.e. those who do not know by 15 October if they will be placing portable batteries on the market in 2010), have up to 28 days from the date on which they first place batteries on the market to join a BCS. A BCS will generally carry out all its members’ producer obligations, including registration, reporting of sales data, publicity, collection, treatment and recycling. Each BCS will offer different services and will have a different fee structure, so it is recommended that producers compare at least two schemes to ensure that they are suitable. Producers are required to pay a proportion of the net costs arising from the collection, treatment and recycling of its share of the portable battery market and this will generally be factored into the BCS application fee. Provide the BCS with information for registration purposes and on sales and battery types. Special arrangements apply for the reporting of sales data in the first two years of the scheme (i.e. 2009-2011).

There are special arrangement for small producers of portable batteries (i.e. those placing 1 tonne or less of portable batteries on the UK market in any year). Small producers do not need to join a BCS but must register with the relevant Environment Agency for their area. Registration must be made within 28 days of the first day after 15 October 2009 that they place batteries on the UK market. Small producers have a number of other obligations, including reporting sales data.

6. How can we find out more about joining a BCS or registering our company?

A list of approved BCS can be found at: <http://www.environment-agency.gov.uk/business/regulation/107939.aspx>

Further information about registration as a battery producer can be found at: <http://npwd.environment-agency.gov.uk/Public/BatteriesHome.aspx>

7. Are there any penalties for non-compliance with the Batteries Regulations?

Yes, failure to comply with many obligations under the Batteries Regulations (e.g. the requirement to join a BCS) is criminal offence which may be punishable by an unlimited fine. In certain cases, directors, officers and other individuals can be guilty of an offence.

8. What if we place batteries or products containing batteries on other EEA markets?

Battery producers need to assess the obligations across the EEA. Although the compliance obligations are intended to be harmonised across the EU, there will be differences between the national schemes and certain obligations (e.g. the registration obligation) need to be carried out in each relevant jurisdiction. We can help to co-ordinate local law advice, wherever needed.

A range of guidance has been produced by UK and other authorities. However, it is important to remember that the obligations under the Batteries Directive establishes a new and complex area of regulation, therefore a precautionary approach should generally be taken to meeting your obligations. In certain cases, you may need to seek a regulatory opinion to give your company additional comfort (e.g. in relation to determining the battery type) and we can help in taking this forward, where needed.

9. How can we find out more?

For further information, please contact:

Michael Hutchinson

Partner – Head of Environment Group (London)

Georgina Seward

Senior Associate – Environment Group

Mayer Brown is a leading global law firm with approximately 1,000 lawyers in the Americas, 300 in Asia and 500 in Europe. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest investment banks. We provide legal services in areas such as Supreme Court and appellate; litigation; corporate and securities; finance; real estate; tax; intellectual property; government and global trade; restructuring, bankruptcy and insolvency; and environmental.

OFFICE LOCATIONS AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, São Paulo, Washington
ASIA: Bangkok, Beijing, Guangzhou, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai
EUROPE: Berlin, Brussels, Cologne, Frankfurt, London, Paris

ALLIANCE LAW FIRMS Mexico, Jáuregui, Navarrete y Nader; Spain, Ramón & Cajal; Italy and Eastern Europe, Tonucci & Partners
Please visit our web site for comprehensive contact information for all Mayer Brown offices.
www.mayerbrown.com

© 2009. Mayer Brown LLP, Mayer Brown International LLP, and/or JSM. All rights reserved.

Mayer Brown is a global legal services organisation comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; and JSM, a Hong Kong partnership, and its associated entities in Asia. The Mayer Brown Practices are known as Mayer Brown JSM in Asia. "Mayer Brown" and the "Mayer Brown" logo are the trademarks of the individual Mayer Brown Practices in their respective jurisdictions.