Beer Growlers – Opportunity for pub patrons during the pandemic, or just another restricted measure?

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What is a Growler?

A Growler is a container used by a customer to store and transport beer. Once a Growler has been purchased, the customer then visits a retailer (retail store, restaurant, pub or brewery) and requests them to fill their Growler with a beer of their choice. The retailer does so and then seals the Growler, as the beer is intended to be consumed off premises later.

What is the problem?

Presently, the concern is that some Growlers are sold and used in the UK with metric capacities, typically of 1L and 2L. These are not multiples of ½ pint, and so their use may well be causing retailers to be selling unlawful quantities of draught beer.

Although the use of Growlers was on an upwards trend before the pandemic, given the difficulties with pub lockdowns, social gatherings and even available space in premises upon re-opening, the use of Growlers appears to be an attractive alternative for patrons to access draught beer, and it will be important for all to ensure that the law is being complied with.

Which law applies?

Under s.22 of the Weights and Measures Act ("WMA") 1985, an order may be made by the Secretary of State to ensure that certain goods are to be sold or made up for delivery to the consumer in such quantities or containers as may be prescribed. The Weights and Measures (Intoxicating Liquor) Order 1988/2039 ("1988 Order") is such an order and governs the transactions of intoxicating liquor in a variety of circumstances. Importantly, it governs the quantities by which beer can be sold.

But which specific law says you cannot sell draught beer in 1L or 2L quantities?

Article 2 of the 1988 Order provides:

> *"2. -*
>
> *(1) Unless pre-packed in a securely closed container and except when sold as a constituent of a mixture of two or more liquids, beer or cider shall be sold by retail–*
>
> *(a) only in a quantity 1/3 of pint, ½ pint, 2/3 pint or a multiple of ½ pint; and*
>
> *(b) subject to paragraph (2) below, where sold for consumption on the premises of the seller, only in a capacity measure of the quantity in question.*
>
> *…"*

Growlers are not sold for consumption on the premises of the seller. Therefore, Article 2(1)(b) would not apply. We are also not concerned with the selling of beer as a constituent of a mixture of two or more liquids. Therefore, for present purposes, Article 2(1)(a) can be read as*, "Unless pre-packed in a securely closed container … beer … shall be sold by retail – (a) only in a quantity 1/3 of pint, ½ pint ,2/3 pint or a multiple of ½ pint;"*. Therefore, if a Growler does not satisfy the condition of being *"pre-packed in a securely closed container"*, the sale of beer in a Growler in a quantity of 1L or 2L is likely to be contrary to Article 2(1)(a).

Pre-packed?

For the purposes of Article 2, the definition of *"pre-packed"* is most likely governed by s.94 WMA 1985: *"pre-packed" means made up in advance ready for retail sale in or on a container.* This is only "most likely", as Article 2 does not import a clear definition of *"pre-packed"* from a specific source. This is in contrast to, say, Article 6 of the 1988 Order, which imports the definition of *"pre-packed"* in relation to food (which includes intoxicating liquor i.e. beer) from a specific and different source - the food information to consumers regulations, Regulation (EU) 1169/2011.

This is also in contrast to Article 3A of the 1988 Order which contains its own definition: *"Art. 3A … (b) "pre-packed" means made up in advance ready for retail sale or wholesale in a securely closed container."*

However, although there may be ambiguity as to which precise definition may apply, there appears to be two similar core conditions: the sold item needs to be (1) made up in advance ready for retail sale (2) in a securely closed container.

So, is this definition still satisfied?

This is a question of fact. However, at first blush, this definition will likely not be satisfied in the case of selling Growlers as described above. The first aspect of being "*made up in advance ready for … sale*" will not likely be satisfied, as the Growler is made up for delivery to the consumer during the sale.

There may also be a concern as to whether the Growlers are *"securely closed"* containers. That debate likely depends on the specific facts of the case and is for another time. In any event, it would appear that the sale of beer by Growler as described above is likely contrary to Article 2(1)(a).

What are the consequences?

If the selling of Growlers as described above is contrary to Article 2(1)(a) of the 1988 Order, a criminal offence is potentially being committed. Section 25 of the WMA 1985 details the relevant offence:

> *25.— Offences relating to transactions in particular goods.*
>
> > *(1) … where any goods are required, when not pre-packed, to be sold only by quantity expressed in a particular manner or only in a particular quantity, any person shall be guilty of an offence who—*
> >
> > > *(a) whether on his own behalf or on behalf of another person, offers or exposes for sale, sells or agrees to sell, or*
> > >
> > > *(b) causes or suffers any other person to offer or expose for sale, sell or agree to sell on his behalf,*
> >
> > *those goods otherwise than by quantity expressed in that manner or, as the case may be, otherwise than in that quantity.*

In essence, if the 1988 Order specifies that draught beer for consumption off premises can only be sold by retail in particular quantities of ½ pint, 1/3 pint etc., it is a strict liability offence to sell such beer not in those quantities. The punishment for such an offence is an unlimited fine.[1] The usual defences in sections 33 – 37 of WMA 1985, including exercising due diligence, would also apply.[2]

[1] s.84(6) WMA 1985 and s.85 Legal Aid, Sentencing and Punishment of Offenders Act 2012

[2] s.25(6) WMA 1985

Surely it is ok if the publican and patron know what they are entering into?

There is a potential carve out in section 44 of the WMA 1985 which relates to making the quantity and price known to the purchaser beforehand:

> *"44.*
>
> *Where any goods are required by or under this Part of this Act to be sold only by quantity expressed in a particular manner —*
>
> *(a) it shall be a sufficient compliance with that requirement in the case of any sale of, or agreement to sell, any such goods if the quantity of the goods expressed in the manner in question is made known to the buyer before the purchase price is agreed; and*
>
> *(b) no person shall be guilty of an offence under section 25(1) above by reason of the exposing or offering for sale of such goods at any time if both the quantity of the goods expressed in the manner in question and the price at which they are exposed or offered for sale are made known at that time to any prospective buyer.*

At first blush, this may appear to assist. However, section 44 only applies to goods that *"are required … to be sold only by quantity expressed in a particular manner"*. This is only one of the two strands of relevant specification for goods in section 25. The section 25 offence applies to (1) goods that *"are required … to be sold only by quantity expressed in a particular manner"* and to (2) goods that are required to be sold *"only in a particular quantity"*.

Given that section 44 applies to only one of the two strands of goods, this begs the question 'what is the difference between those two expressions'? With a few examples, the nuance of this distinction becomes apparent.

An English case has provided general assistance by indicating that selling food by net weight constitutes selling goods by *"quantity expressed in a particular manner"*.[3] Dealing with beer specifically, albeit only a Scottish case, there has been an indication that the requirement to sell beer by way of ½ pint etc. was in reference to selling goods *"only in a particular quantity"*.[4]

From this, the distinction appears to be that the *"quantity expressed in a particular manner"* refers to a general requirement (selling beer by volume or food by net weight), whereas the requirement of

[3] *Lucas v Rushby* [1966] 1 W.L.R. 814 at 817 as per Lord Parker CJ

[4] *Dean v Scottish and Newcastle Breweries Limited* 1977 J.C. 90 as per Lord Justice-Clerk (Wheatley)

selling goods *"only in a particular quantity"* would apply to specific prescribed quantities (selling beer by volume of ½ pint, 1/3 pint etc.). In the case of Growlers, it would therefore appear that we are dealing with the sale of goods *"only in a particular quantity"*.

Given this, it would appear that the section 44 WMA 1985 carve out would not likely apply to the cases of Growlers.

Concluding remarks and recommendations

Given that attempting to avoid potential liability for a criminal offence is not straightforward and may require niche arguments of fact and law, approaching the situation by erring on the side of caution may be preferable:

(i) If a customer asks you to fill a Growler with beer to consume off premises, that beer can only be sold to the customer in quantities that are multiples of ½ pint, or just as a 1/3 or 2/3 pint. One cannot simply fill up to the line if the line is, for example, a 1L mark on a Growler, as that beer will have been sold in an unlawful quantity.

(ii) If a customer insists on using their Growler which does not have the relevant pint markings, you can first measure a lawful quantity of beer using ordinary pint measures before transferring that volume into the Growler. This is because the restriction is in relation to quantities sold, not measures used in the sale.

(iii) The restriction in Article 2 of the 1988 Order also applies to draught cider. Therefore, the above discussion and recommendations likely apply in a similar manner.