



Law Society
of Scotland



Consultation Response

Reforming the UK packaging producer responsibility system

May 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Environmental Law sub-committee welcomes the opportunity to consider and respond to the joint consultation from the Department of Environment, Food & Rural Affairs, Scottish Government, Welsh Governance and the Department of Agriculture, Environment and Rural Affairs on *reforming the UK packaging producer responsibility system*¹. We have the following comments to put forward for consideration.

General comments

With respect to all of the ongoing consultations (including this consultation, the consultation on reforming the UK packaging producer responsibility system and the consultations on deposit return and collection consistency which do not apply to Scotland), it is important that there is consistency across the UK and that the expectations and considerations for consumers, producers, retailers and the public sector across the UK are taken into account. This may be an appropriate matter for a common framework covering the UK to be agreed. Such a framework need not cover all of the substantive policy requirements but the underlying elements of the form of documentation, classification of materials, labelling etc would benefit from consistency across the UK so that everyone in the supply chain is working within the same system.

The Scottish Government has already consulted on the introduction of a deposit return system and so, from a regulatory perspective, achieving the necessary level of legislative consistency across the UK may be challenging. In particular, the Government needs to consult further with the Scottish Government regarding what will happen in the intervening period between a DRS scheme being introduced in Scotland and a DRS scheme being designed and introduced across the UK more widely (for example, how will fraud and waste crime be prevented in that period?).

Given the remit of our organisation, we have only responded to those questions which are of relevance to that remit. The questions on which we have 'no comment' have not been included in our response below.

¹ <https://www.gov.uk/government/consultations/plastic-packaging-tax>

Consultation questions

Q6. Do you agree with the principles proposed for packaging EPR?

Yes, but we suggest that the following should also be considered as principles:

- (1) simplicity for all involved – whilst it is appreciated that there are complex factors involved here and a number of policy outcomes to achieve, the legislative measures introduced need to be as clear and simple as possible;
- (2) creation of a level playing field – it may be the design of a system which is ‘understandable and fair’ will go some way towards achieving this but it should be a principle in itself;
- (3) rewards and penalties – the principles included in the consultation focus on the costs/fees to be charged and the penalties for non-compliance but do not mention any form of reward for achieving innovation etc.

Any measures for monitoring and compliance will require careful consideration to ensure that they are both: sufficiently robust, and appropriate and proportionate. The Government should consider what additional resource will be required in order to effectively enforce and penalise non-compliance with the scheme, particularly in relation to export control. Ultimately, the effectiveness of any enforcement will be dependent on the clarity of the legislation which is brought in to implement the scheme (hence the comment above regarding simplicity).

Q7. Do you agree with the outcomes that a packaging EPR should contribute to?

Yes, but we suggest that one additional outcome should be to: improved capture and use of data relating to packaging (at all relevant points in the supply chain). This would also assist with the outcomes sought in relation to the imposition of a plastic packaging tax. The consultation does recognise that better data collection and management is necessary.

Q8. Do you think these types of items not currently legally considered as packaging should be in scope of the new packaging EPR system?

Yes. Considering that behavioural change is required, we consider that all materials which are used for ‘packaging’ should be included within the definition.

Q13. We would welcome your views on whether or not producers subject to any DRS should also be obligated under a packaging EPR system for the same packaging items.

While DRS has the potential to overlap with an EPR system, they do have different primary purposes: the purpose of EPR being to alter the way in which packaging is produced and used throughout the supply chain and the purpose of DRS being to drive behavioural change at the consumer level. It is possible for the schemes to work on a complementary basis, provided that they are carefully designed. It would be difficult to manage and monitor the exclusion of producers from the EPR system and it would be better to have all packaging subjected to the regime in order to drive the design and practical innovation at the front end of the process. DRS does not assist with the removal of unnecessary products from the supply chain or improve the recyclability of products (which EPR is designed to achieve).

Some potential options to ensure that the systems are complementary would be: (1) building modulation into the DRS scheme to reward better recyclability and (2) ensuring that some value from unredeemed deposits in the DRS system is 'passed back' to producers to balance out the 'double cost' element. The suggestion in the consultation that unredeemed deposits could be utilised by those collecting packaging means that the producers of those materials would receive no benefit passed back to them.

Q16. Do you think there could be any unintended consequences in terms of packaging design and use arising from: (a) Modulated fees (b) Deposit (for recyclable packaging) and fee (for non-recyclable packaging)?

As with any environmental measure which requires record-keeping, appropriate checks will need to be put in place to ensure that the data evidencing the levels of recycling is accurate and reliable. This is a good example of where a common framework would be advisable.

Q25. Do you think that requiring operators of online marketplaces to take the legal responsibility for the packaging on products for which they facilitate the import would be effective in capturing more of the packaging that is brought into the UK through e-commerce sales?

Have the legal complications and implications of this approach been fully considered? At what point in the supply chain would the fee be levied on imported products?

Q27. Do you think we have considered all of the costs to local authorities of managing packaging waste?

It appears that there has not been full consideration of the variances in the costs of collection, management and treatment: (1) of different types of materials and the ultimate value achievable from those materials and

(2) between different local authorities depending on the systems which they already have in place as well as the other fluctuating factors relating to the composition of households in a given geographical area (such as rural compared to urban and levels of deprivation).

Q30. Are there other factors, including unintended consequences that should be considered in determining payments to: (a) Local authorities? (b) For the collection and recycling of household-like packaging waste?

Having two different payment mechanisms for household and business waste is complicated and should be avoided if possible given that many local authorities (rather than private companies) collect business as well as household waste.

Q40. Do you agree it should be mandatory for producers to label their packaging as Recyclable/Not Recyclable?

Yes, but it will be fundamental that the system introduced is clear and consistent. This is a good example of where a common framework may be merited.

The inclusion of imported products and how they will be labelled needs to be considered.

Q44. Do you have experience to suggest an appropriate lead-in time for businesses to incorporate any mandatory labelling requirements?

The timeframe for implementation needs to take into account how long it will take businesses, of all sizes, to adjust their practices to comply with the scheme.

Q51. Do you foresee any issues with obtaining and managing nation specific data?

As with any environmental measure which requires record-keeping, appropriate checks will need to be put in place to ensure that the data evidencing the levels of recycling is accurate and reliable. This is a good example of where a common framework may be merited.

Q56. Overall, which governance model for packaging EPR do you prefer? Please briefly explain your preference.

All of the models have some issues and some benefits and it may be necessary for Government to consider a composite model which draws on those/takes those into account.

Model 1

- If the body/scheme setting the fee is also responsible for compliance, that could cause an issue for the producers designing the products and prevent innovation;
- the requirement to use a compliance scheme, whilst it will assist smaller producers, may not be the preferred route for large (brand) producers who prefer direct registration;
- depending on the scale and size of compliance schemes, smaller producers could ultimately be disadvantaged by this approach from a competition perspective;
- this model may struggle to deliver a level playing field in the direct negotiation with local authorities (both for compliance schemes and local authorities depending on their size, scale, location, quality of recycling etc.)

Model 2

- Indirect reporting (to a compliance scheme) would result in an increased level of administration;
- depending on the scale and size of compliance schemes, smaller producers could ultimately be disadvantaged by this approach from a competition perspective;
- this model may result in more cost to the consumer overall;
- there will be a loss of local knowledge and expertise in the current system;

Model 3

- See comments in relation to model 1 regarding the use of compliance scheme;
- indirect reporting (to a compliance scheme) would result in an increased level of administration;
- this model may result in more cost to the consumer overall;
- this model is likely to be significantly more complicated for local authorities who deal with both household and commercial waste;

Model 4

- Likely to be the most effective in driving performance via the deposit- based mechanism;
- this model would be difficult to make work with devolved administrations.

Q58. Do you have any concerns about the feasibility of implementing any of the proposed governance models? If yes, please provide specific reasons and supporting information for each governance model that you have concerns about.

Please see our response to Q56 above.

Q59. Do you think that any of the governance models better enable a UK-wide approach to packaging producer responsibility to be maintained whilst respecting devolved responsibilities?

Please see our response to Q56 above.

Q83. Do you support the broadening of legally enforceable notices to obtain required information?

Yes. However, ultimately, the effectiveness of any enforcement will be dependent on the clarity of the legislation which is brought in to implement the tax. Consideration should be given to legislation relating to existing waste and resource management activities (across the UK) and the scope for interpretation and dubiety which it has created in a number of instances. The legislation implementing EPR needs to be adequately considered and clear to avoid similar issues arising in practice.

For further information, please contact:

Alison McNab

Policy Team

Law Society of Scotland

DD: 0131 476 8109

AlisonMcNab@lawscot.org.uk