

# Consultation response

The Deposit and Return Scheme for Scotland  
Regulations 2020: accompanying statement and  
proposed regulations

December 2019



## Introduction

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The Law Society of Scotland is the professional body for around 12,000 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 Scottish Government's consultation on *The Deposit and Return Scheme for Scotland Regulations 2020: accompanying statement and proposed regulations*<sup>1</sup>. We have the following comments to put forward for consideration.

## General comments

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We support the principles underlying a deposit return scheme (DRS). However, in order to ensure continuity, we are of the view that such a scheme should be introduced as part of a wider UK-wide extended producer responsibility (EPR)<sup>2</sup> reform and not as a stand-alone Scottish measure dealing with some packaging only. We consider that DRS may have a positive environmental impact on littering and recycling in relation to included containers purchased and used 'on the go' rather than as part of normal domestic life. However, our view is that a DRS as part of a wider UK EPR regime would have a better and more significant environmental impact overall. It is feasible that a stand-alone DRS could adversely influence consumer behaviour in terms of recycling by affording materials that are dealt with under DRS a higher value (contrary to the current position whereby, to consumers, all recyclable material has the same value).

We are keen to ensure that the practical implications of any return system are carefully considered. It is crucial that the necessary infrastructure and logistical arrangements are in place to support the DRS.

We consider that there would be merit in full consideration of the scope of the scheme. It currently appears that charities and community groups could be caught under the regulations, for example, where

<sup>1</sup> <https://consult.gov.scot/environment-forestry/deposit-scheme-for-scotland/>

<sup>2</sup> EPR is the concept that the producer of containers (and other packaging) should meet the overall costs of recycling, treatment and disposal rather than consumers or waste management companies.

purchasing items to sell at an event or similar and “offering for sale” these items. The scheme as currently framed is likely to be unduly burdensome for such a group to adhere to, particularly smaller organisations or those without fixed premises.

Clarity is required as to the action to be taken and the legal responsibilities of waste operators in circumstances where items are not returned by consumers and are included in household waste collections, later processed by waste operators.

It would be helpful to clarify that SEPA are not going to consider the storage of the containers ‘on site’ as storage of waste requiring either a permit or exemption as this could frustrate the objective of the scheme.

Finally, we note the potential for fraud within the regime. While we recognise that in practical terms, it is unlikely that that an item could be processed through the system on more than one occasion, there is a potential for this to happen where a retailer does not have a machine. Retailers in rural or remote areas could be particularly at risk of such actions. It is important that careful consideration is given to reducing the potential for fraud. If environmental schemes such as this fall into disrepute as a result of the propensity for fraud, people may be disinclined to participate.

### **Costs and operational impacts**

In the event that the DRS proceeds as a stand-alone measure, consideration is required as to how cross-border operations will be dealt with – i.e. containers brought into Scotland from elsewhere and vice versa. It would be prudent for there to be liaison between the UK and Scottish Governments in relation to the DRS to be introduced in England which has been subject to consultation<sup>3</sup>.

DRS will directly compete, in respect of included containers, with the existing recycling collection systems in place in Scotland. We suggest that further consideration should be given to how the two systems will interact both from a cost and net carbon impact perspective.

The removal of the included containers from the recycling streams which are collected by local authorities will have a significant impact on the value of their collected material. We question whether the impact, from both a costs and operational perspective, have been factored into local authority budgets following the introduction of DRS.

Finally, we note that consideration requires to be given as to whether there is sufficient reprocessing infrastructure within Scotland for the volumes of included materials expected to avoid them having to be dealt with further afield (which would reduce the positive environmental impact of the scheme).

### **Timing**

In terms of implementation, we consider that 12 months is a fairly tight timescale for the implementation of DRS, particularly considering that many of the elements of administration will be wholly new to the markets involved and additional or alternative infrastructure may require to be put in place.

<sup>3</sup> <https://www.gov.uk/government/consultations/introducing-a-deposit-return-scheme-drs-for-drinks-containers-bottles-and-cans>

## Consultation questions

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### Comments on Part 1 – General

In regulation 3(2), we question whether there may be uncertainty caused as a result of not having a definition of “product”.

### Comments on Part 2 – The deposit and return scheme

We support the use of a uniform deposit amount in order to make it as easy as possible for consumers to understand. However, further consideration should be given to how the charge will apply to multi-packs. The increased cost from a per unit deposit rate could have a negative impact on lower income households. At the same time, we note that multi-packs often generate an additional layer of packaging and an alternative approach to special offers (for example a discount for purchasing a particular number of units rather than buying those units pre-packaged) might also have a positive environmental impact.

### Comments on Part 3 – Producers

We refer to our comments on the scope of the regime above.

In relation to regulation 7, we note that a producer’s registration falls in the event that their scheme administrator’s registration/approval falls. This may be considered to be unreasonable for a producer who would require to take steps to re-register despite them in no way contributing to the deregistration of their scheme administrator.

In respect of regulation 8(4)(b) – (e), it is not clear how these fit with the requirement on a producer to apply within 28 days under regulation 7(2)(b) or (c). For example, if a producer applies 20 days after a specified event, regulation 8 provides that their registration applies from the date on which the application was received by SEPA. In this example, they could have a period of 20 days during which they are operating but not covered by a registration.

In relation to regulation 9(4), it is unclear why SEPA is required to consider any representations made by the scheme administrator but no reference is made to considering representations from a producer itself.

We note that regulation 11(2)(c) requires a directly registered producer to provide information “in such form and at such intervals as SEPA may require”. At present, these powers appear to be unlimited, for example, SEPA could request information daily which may be overly burdensome. We suggest the regulation reflect “as SEPA may reasonably require”.

## **Comments on Part 4 – Scheme administrator**

We agree with the principle of the scheme administrator but consider that further detail is required as to how it will work in practice.

## **Comments on Part 5 – Retailers and Return points**

We note that under regulation 23, notice is required to be given by the Scottish Ministers in the event of an exemption being revoked. We suggest the regulations be amended to reflect a minimum period of notice which must be given.

## **Comments on Part 6 – Appeals or reviews**

We note that the appeal mechanism is by way of an appeal to the Scottish Ministers. We note that other regulatory appeals are by way of an appeal to a court (such as appeals in relation to Scottish Landfill Tax which are to the First Tier Tribunal for Scotland Tax Chamber). There would be merit in a consistent model for the sake of clarity.

## **Comments on Part 7 – Enforcement and offences**

Part 7 contains enforcement powers. We suggest consideration is given as to whether SEPA's existing enforcement powers are sufficient to cover enforcement of the scheme. In the interests of clarity, it would be beneficial not to duplicate enforcement powers in these regulations but rather to refer to the primary legislation containing the relevant powers.

**For further information, please contact:**

Alison McNab

Policy Team

Law Society of Scotland

DD: 0131 476 8109

[AlisonMcNab@lawscot.org.uk](mailto:AlisonMcNab@lawscot.org.uk)