



Law Society
of Scotland

Consultation response

Plastic Packaging Tax: Policy Design

August 2020



Introduction

The Law Society of Scotland is the professional body for over 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 Tax Law and Environmental Law Sub-committees welcome the opportunity to respond to HMRC's consultation on *Plastic Packaging Tax: Policy Design*¹. We previously responded to the joint HMT and DEFRA consultation on Plastic Packaging Tax². We have the following comments to put forward for consideration.

General comments

We consider that the legislation implementing this tax needs to be consulted upon. The drafting, explanatory notes and guidance requires to be very clear to aid and encourage compliance by business both within the UK and overseas.

Ultimately, the effectiveness of any enforcement will be dependent on the clarity of the legislation which is brought in to implement the tax. The burden of compliance and related administration required to be fulfilled by business must be clear and allow business to readily comply with their terms.

The interaction of this tax with other regimes such as the deposit return scheme which may be introduced in Scotland ahead of England and Wales requires to be carefully crafted to ensure that the obligations are proportionate, clear and consistent.

We question whether consideration has been given to alternative packaging approaches and possible unintended consequences of such? For example, this may include emissions from increased transport weight, reduced efficiency from increased bulk and less units moved, increases in spoilt product whether due to poorer packing solutions or transit delays, and bio-security of alternative packing materials.

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

² <https://www.lawscot.org.uk/media/362630/19-05-12-env-consultation-plastic-packaging-tax.pdf>

Consultation questions

Question 1. Do you agree with the revised definition of plastic, which removes the ‘main structural component’ test and limits the exclusion to ‘cellulose-based’ polymers? Please outline your reasoning.

With the aim of the tax being to encourage the use of recycled plastic as opposed to new plastic, we agree that the removal of ‘main structural component’ from the definition makes sense given that non-recycled plastic may be present in packaging without forming the main structural component.

However, although the exclusion of cellulose-based polymers would appear to support the use of greener plastics, we recommend that the Government includes a fuller exemption to bio-based, biodegradable and compostable plastics more generally at this stage to stimulate their use as a packaging solution rather than deferring this to a later stage.

Question 2. Do you agree that packaging-type products that do not fulfil a packaging function until they are used by the end consumer should be included in the tax unless they are for longer term storage? Please outline your reasoning.

With the aim being to reduce environmental harm, we agree that the tax should include packaging products not yet used by the end consumer as a packaging function (for example, cling-film). We recognise that for health and safety reasons, such as in hospitals, there will no doubt need to be exceptions to this, but the approach of including packaging-type products prior to them actually fulfilling a packaging function would be both simpler and more consistent to monitor and would be more likely to bring about a behavioural change to production and use.

We agree that plastic used for longer term storage merits exclusion of the tax given the nature of it being re-used, albeit the definition of longer term storage needs to be clearly defined and guidance may be required on this.

Question 3. Do you have any observations on the government’s proposed approach to excluding plastic packaging used to facilitate the transport of imported goods?

It is noted that the importer may have little control or knowledge of the amount of packaging being used, but it is recommended that for consistency the Government encourages the use of plastics used in transporting imported goods being of a similar level of recycled content. Similarly, there is an inconsistency with the approach being taken on imported packaging where the proposal is to tax at the point of first commercial use, and therefore consideration needs to be given, in the context of the main aim of this policy/legislation, whether importers should be taxed on the freight plastic they receive at the point of it reaching the UK. Otherwise there is the risk that no country takes responsibility for the extent and nature of the plastic used in imports.

In relation to international trade movements, we recognise that it is desirable to businesses to minimise administrative processes, delay and expense at the border and therefore any action which is taken in relation

to imported goods should be as simple as possible. We note that there are likely to be practical issues in determining how much plastic is in a consignment without taking it apart.

Question 4. Do you think it is feasible to provide evidence that packaging has been commissioned for use as immediate packaging for licensed human medicines at the time the tax is chargeable? If not, please explain why.

We would expect this to be a question of having record-keeping processes by the likes of pharmaceutical companies in place and so should, in theory, be feasible.

Question 5. Would the proposed exemption cause any market distortion or other unintended consequences? If yes, please provide more details.

Not known.

Question 6. Do you agree the proposed charging conditions will ensure that the UK manufacturer of plastic packaging is liable for the tax? If not, please explain why.

The drafting of the legislation in relation to this requires to be very clear.

Question 7. Do you foresee any issues for specific packaging components due to the proposed approach of disregarding further ancillary processes for the purposes of the tax? Please explain what these issues are.

By excluding ancillary processes, it will no doubt help simplify what is otherwise a potentially complex regime. It may be that thresholds need to be considered in case ancillary processes materially change or extend the nature and extent of plastics being used. As above, legislation will need to be very clear.

Question 8. Do you have any observations on the proposed treatment of imports of plastic packaging, particularly linking the tax point to “first commercial exploitation” i.e. when it is controlled, moved, stored, is subject to an agreement to sell, or otherwise used in the UK in the course or furtherance of business?

There is a logic to the tax point being the point of first commercial use, however there is also the risk of a loophole being created for personal/non-commercial use and therefore it may be appropriate to set a threshold by way of volume for personal/non-commercial uses.

Question 9. Do you agree the “consignee” on import documentation is likely to be the taxable person for imports of plastic packaging? In what scenarios might someone else be the person on whose behalf the plastic packaging is commercially exploited?

We agree that the “consignee” approach has a logic to it, and has the potential to help simplify a system that will be challenging to police.

Question 10. Do you agree that packaging that is damaged after the tax has become due should not be relieved? If not, please explain why you think this packaging should be relieved.

Yes, in the context that the overall aim is to reduce environmental impact.

Question 11. Do you foresee any difficulty or added costs with the proposal for the taxable person to incorporate the amount of Plastic Packaging Tax onto the sales invoice, and if so, could this information be provided to customers in any other way?

In addition to sellers providing customers with information, it is important that steps are taken to educate the market and public about the need for behavioural change in this area, so that there is a joined-up approach between commerce, Government and consumers.

Question 12. Are the proposals for joint and several liability reasonable? If not, please say why?

While these proposals appear reasonable, it is unclear how an online marketplace or fulfilment house would evidence when they knew or had reasonable grounds to suspect that the tax had not been accounted for.

Question 13. Do you envisage any problems with extending joint and several liability to online marketplaces and fulfilment house operators who knew, or had reasonable grounds to suspect that the tax had not been accounted for on sales made through their platform?

In practical terms, commercial parties are likely to seek warranties or representations in their contract terms to the effect that the overseas seller warrants and confirms that it has accounted for and shall account for the tax or confirm that it is small for the purposes of the legislation.

Clear guidance on how this might look and operate in practice will be required. In addition, what evidence will HMRC be looking for to demonstrate that they did not know or reasonably suspect that the overseas seller had not accounted for tax.

There is an element of HMRC attempting to burden the online marketplace and fulfilment houses with the obligation of ensuring overseas sellers are brought within the ambit of the legislation. In practice, this will be difficult for them to police.

Question 14. Will extending joint and several liability to third-party fulfilment house operators and online marketplaces be sufficient to deter overseas sellers from non-compliance with the tax? If not, what other steps should HMRC consider?

HMRC might introduce a check as part of the import process as part of the duty checks on entry to the UK. As referred to above, there would be benefit in keeping the system simple so as not to add further costs and delay at the borders.

Question 15. Do you agree with the proposed guidance and tools to help business determine if they are above or below the de minimis? What other help could the government provide?

Clear and consistent guidance for business is key here. An interactive platform that provides the opportunity for a business that is small to self-certify after using the online calculator would be ideal. This would then provide the requisite evidence in a manner that satisfies HMRC. This may also assist with overseas sellers trying to satisfy their obligations to online marketplaces and fulfilment houses. In addition, this could sit alongside making tax digital and allow HMRC and business to know when a review of their obligations is required and update the information at required intervals.

Question 16. Do you agree with the approach to record keeping for businesses below de minimis? If you disagree, please suggest what alternative approaches would be more appropriate and why.

Please see the answer to Question 15.

Question 17. Do you agree with the proposed forward and backward look test to apply the 10 tonne threshold? If you disagree, please suggest what would be more suitable and provide evidence to support your view.

The guidelines and regulations on how this operates in practice require to be drafted very clearly.

Question 18. Do you agree with the government's proposal to restrict calculations of recycled plastic content to approved methods? If not, please explain why. What methods other than the proposed mass balance approach should be considered?

Yes, otherwise there is the risk of lack of clarity and consistency.

Question 19. Where businesses are importing plastic packaging with at least 30% recycled content, will it be feasible for them to obtain the mass balance evidence from overseas manufacturers? What other ways could importers demonstrate the proportion of recycled plastic?

Not known.

Question 20. Do you agree with the government's proposed method for calculating the weight of the packaging? If not, please explain why and how you would calculate it.

The guidelines and regulations on how this operates in practice require to be drafted very clearly. The question of what would not be regarded as constituting reasonable care should be addressed so business is clear about what is expected by HMRC.

Question 21. Are the types of evidence within the government's list appropriate for proving recycled plastic content and the other information required by HMRC? Are there any additional sources of evidence which could be used? If so, please provide details.

In this area, it is very important that the Government issues clear guidance as to what types of evidence it will accept, as that will have a bearing on how businesses prepare to record and report on plastic content.

Question 22. What further due diligence could businesses reasonably conduct to ensure their products meet the relevant specifications for tonnage and recycled plastic?

The guidelines and regulations on how this operates in practice require to be drafted very clearly. The question of what would not be regarded as business taking reasonable care in their due diligence process should be addressed so business is clear about what is expected by HMRC.

Question 23. Are there any observations or issues you can see with the government's proposals to provide relief for exported plastic packaging through direct exports, REPs and tax credits? Please provide details of any alternative methods of relieving exports you would recommend.

As plastic pollution is a global environmental issue rather than simply a national one, it is important to keep that context in mind when approaching the question of exports and whether any tax should be levied. If part of the aim is to create behavioural change, then should manufacturers for export not similarly be encouraged/incentivised to produce plastic content with a greater recycled content? The UK has a greater ability than many countries to take a lead on this and set a standard, and while it is recognised that UK manufacturers need to be competitive, the UK could help set a benchmark on encouraging plastic packaging exports to have a lesser environmental footprint.

Question 24. Do you agree with the proposed information requirements to evidence the proposed export reliefs? If not, please explain how you could evidence the export.

Not known.

Question 25. Do you agree with the proposal not to relieve transport packaging used on exports? If not, do you have any suggestions on how transport packaging could be offered relief?

Yes. It is important that transport packaging is considered within this scheme if the aim is to encourage the use of recycled plastics.



For further information, please contact:

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