

EXPLANATORY MEMORANDUM TO
THE PRODUCER RESPONSIBILITY OBLIGATIONS (PACKAGING WASTE)
(MISCELLANEOUS AMENDMENTS) REGULATIONS 2016

2016 No. 241

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to amend existing instruments establishing the system of packaging waste producer responsibility in Great Britain and Northern Ireland (SI 2007/891 and SR (NI) 2007/198).
- 2.2 Producer Responsibility was established in 1994 and implements Article 6(1) of Directive 94/62 on packaging waste when read together with Article 4 of Directive 2008/98 on waste.
- 2.3 This instrument will make Producer Responsibility more efficient by reducing regulatory burdens on producer businesses. By freeing producers to focus on core elements of the system, it will be more likely that environmental outcomes and EU-imposed targets will be achieved.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The instrument relies on a combination of enabling powers, including section 2(2) of the European Communities Act 1972, in relation to Scotland, Wales and Northern Ireland. See Annex.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument varies between provisions.

4. Legislative Context

- 4.1 SI 2007/891 and SR (NI) 2007/198 taken together implement the EU obligations referred to in paragraph 7.3, for the UK as a whole. Some of the provisions in the instrument will be mirrored in an instrument being made by the Department of the Environment in Northern Ireland SI (NI) 2007/198.

5. Extent and Territorial Application

- 5.1 The instrument contains provisions extending to Great Britain (Parts 2 and 4) and provisions extending to Northern Ireland (Part 3).

- 5.2 The territorial application of this instrument is set out in Section 3 under “Other matters of interest to the House of Commons”.
- 5.3 Ministers in Northern Ireland; Wales; and Scotland were consulted and agreed to these regulatory changes.

6. European Convention on Human Rights

- 6.1 Rory Stewart, Parliamentary Under Secretary of State for the Department for Environment, Food and Rural Affairs, has made the following statement regarding Human Rights:

“In my view the provisions of the Producer Responsibility Obligations (Packaging Waste) (Miscellaneous Amendments) Regulations 2015 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 The system of Producer Responsibility for Packaging requires every UK packaging producer (i.e. every manufacturer, convertor, packer/filler, importer, seller, secondary provider or service provider above a certain size that deals with packaging) to finance the reprocessing of an amount of packaging waste (“individual obligation”). Compliance schemes may be approved, which become responsible for producers’ obligations on their behalf.
- 7.2 Accredited reprocessors or exporters of waste for reprocessing can sell Packaging Waste Recovery Notes to producers of packaging and compliance schemes, which relate to the amounts of waste that they accept for reprocessing. These “notes” provide producers of packaging and compliance schemes with evidence of the quantity of packaging they have financed for recycling.
- 7.3 Producer Responsibility implements Article 6(1) of Directive 94/62 on packaging waste and Article 4 of Directive 2008/98 on waste. Article 6(1) requires the UK take the necessary measures to attain packaging waste reprocessing targets. The targets are absolute - for example a minimum of 60%¹ for UK-wide glass packaging waste. Under Producer Responsibility, the individual obligations are carefully calibrated to ensure that, when added together, each Article 6(1) target is met.
- 7.4 Article 4 of Directive 2008/98 on waste (a framework directive) requires the UK to apply a waste hierarchy as a priority order in waste prevention and management legislation and policy. Preventing waste is at the top of the hierarchy. Article 8(1) confers power on the UK to implement Producer Responsibility as this contributes towards the implementation of the waste hierarchy, because it links individual obligations to the amounts of packaging waste used by producers. In this way producers are incentivised to reduce volumes of packaging and volumes of packaging waste which would otherwise become waste at the end of their useful life.
- 7.5 Producer responsibility is an overarching principle that requires certain producers of products, such as packaging to take responsibility for the products they place on the market. By improving the reuse, recycling and recovery of these “end of life” materials, producer responsibility aims to achieve a more sustainable approach to

¹ See sub-paragraph (e)(i).

resource use; build viable economic enterprises and reduce the quantity of waste going to landfill.

- 7.6 Directive 94/62 on packaging waste came into force in 1994. It aims to harmonise national measures for the management of packaging waste and prevent or reduce the impact of packaging and packaging waste on the environment, by encouraging minimisation and reuse and by setting recovery and recycling targets.
- 7.7 In addition the Directive aims to avoid obstacles to trade and the distortion and restriction of competition within the EU.
- 7.8 In 2013, 10.38 million tonnes of packaging was placed onto the UK market.
- 7.9 Discussions with businesses, administrators and regulators, provided a sought after opportunity by these groups to review how the regulations were working in practice and for Government to make appropriate proposals via consultation.
- 7.10 Broadly these regulations enact the following changes:
- a) removal of the requirement to provide operational plans;
 - b) transfer of the approvals process from the appropriate authority to the appropriate agency;
 - c) allows an “approved person” to delegate the responsibility for signing off reports; and
 - d) provides operators of schemes based in both Great Britain and Northern Ireland with the right to apply for approval from one approving body rather than two.
- 7.11 In respect of **Part 2 – Great Britain** these regulations make the following key changes:
- i) Removes requirements for obligated producers of packaging to provide an operational plan upon registration and introduces new conditions of approval of a scheme.
 - ii) Transfers the approval for a scheme application process from the appropriate authority (the Secretary of State in relation to England; the National Assembly for Wales in relation to Wales; and Scottish Ministers in relation to Scotland) to the appropriate GB Agency (which upon coming into force would be one of the three agencies, which currently operate in England (the Environment Agency), Wales (Natural Resources Wales) and Scotland (the Scottish Environment Protection Agency). In Northern Ireland the Department of Environment NI (DOENI) will make approvals on behalf of the Northern Ireland Environment Agency. In addition the regulation allows an operator of a scheme to elect to make an application for scheme approval with the DOENI, providing the operator’s registered office or principal place of business is in NI; and the operator proposes to apply to DOENI in relation to the same year for approval of the scheme under the regulations set out in the

Producer Responsibility Obligations (Packaging Waste) Regulations (Northern Ireland) 2007.

- iii) Allows an operator under certain circumstances to elect to make an application for scheme registration with the DOENI and enables the DOENI to perform the functions of the appropriate Agency on behalf of GB agencies.
- iv) Allows the operator of a scheme that has been refused approval and or registration by an Agency, leave to appeal against such a decision to the appropriate authority.
- v) Allows the appropriate Agency to approve delegation by an approved person to any other person (allowing delegation for signing-off reports).

7.12 In respect of **Part 3 – Northern Ireland** these regulations make the following amendments:

- i) Allows an operator to elect to make an application for scheme **approval** with a GB Agency and for that Agency to carry out approval for a scheme as if approval was undertaken by the DOENI, providing the operator's registered office or principal place of business is in Great Britain; and the operator proposes to apply in relation to the same year for approval of the scheme under the regulations set out in the Producer Responsibility Obligations (Packaging Waste) Regulations 2007.
- ii) Allows an operator to elect to make an application for scheme **registration** with a GB Agency and for that Agency to carry out approval for a scheme as if approval was undertaken by the DOENI, providing the operator's registered office or principal place of business is in Great Britain; and the operator proposes to apply in relation to the same year for approval of the scheme under the regulations set out in the Producer Responsibility Obligations (Packaging Waste) Regulations 2007.

7.13 In respect of **Part 4 – Great Britain** these regulations make the following amendment:

- i) Introduces transitional arrangements for applications made before 1st January 2016 but not determined by that date.

Consolidation

7.14 Subject to appropriate clearances we intend to consolidate the relevant legislation in April 2016.

8. Consultation outcome

8.1 A public consultation ran from 27th March to 22nd May 2015 and a summary of responses was published on 13th October 2015². The Government received responses

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467454/producer-responsibility-consult-sum-resp.pdf

from 53 organisations, which broadly included producers of packaging and batteries; compliance scheme operators, waste management companies; disposal authorities; reprocessors; trade associations; and Non-Government Organisations (NGOs). Informal consultation with the Advisory Committee on Packaging (ACP), other government departments and regulators also took place in developing the proposals contained within the associated Impact Assessment and consultation document.

8.2 Overall consultees responded positively to the Government's proposed regulatory changes in respect of packaging as follows:

- i) The proposal to replace operational plans and conditions of scheme registration with conditions for scheme approval, received 41 responses with 85% agreeing with the proposal or not providing a firm response either way.
- ii) The proposal to transfer the approval process from the appropriate authority to the appropriate agency, received 37 responses with 100% agreeing with the proposal or not providing a firm response either way.
- iii) The proposal that the "approved person", should be allowed to delegate responsibility for signing off reports, received 42 responses with 95% agreeing with the proposal or not providing a firm response either way.

9. Guidance

9.1 It is not anticipated that guidance will be required in respect of these regulations.

10. Impact

10.1 The impact on business, charities or voluntary bodies is to make significant regulatory savings as detailed in the associated Impact Assessment.

10.2 The impact on the public sector is expected to be minimal.

10.3 An Impact Assessment is submitted with this memorandum and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses; however existing de-minimis provisions are already in place.

11.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is that the packaging obligations apply to companies with a turnover of over £2 million and handling over 50 tonnes of packaging.

12. Monitoring & review

12.1 The Department and its agencies will continue to monitor and review the impact of the regulations as part of its standard business as usual policy-making and will ensure that the provisions are implemented, adhered to and that significant savings are realised by business.

13. Contact

- 13.1 **Clive Woods** at the Department for Environment, Food and Rural Affairs Tel: 020 7238 5739; email: clive.woods@defra.gsi.gov.uk, can answer any queries regarding the instrument.

Explanation of reliance on section 2(2) of the European Communities Act 1972

1. The Department for Environment, Food & Rural Affairs (Defra) relies on a combination of enabling powers, which include section 2(2) of the European Communities Act 1972. The amendments to SI 2007/891 in Part 2 are made under sections 93 and 94 of the Environment Act 1995 in relation to England and section 2(2) of the European Communities Act 1972 in relation to Scotland and Wales. Part 3 – which extends to Northern Ireland only – relies on section 2(2) alone.

Existing reliance on section 2(2)

2. It might be helpful to explain, first, Defra's reliance on section 2(2) in the main SI being amended: SI 2007/891. That SI establishes Producer Responsibility in Great Britain. Parliament enacted specific powers to do so (see sections 93 to 94 of the Environment Act 1995), but in relation to Scotland and Wales they were transferred in 1998/9³. SI 2007/891 therefore relied on section 2(2) to establish the system in Scotland and Wales. As the governments in England, Scotland and Wales wished to establish a common system, a single SI was made. This was consistent with the Government's policy that specific powers should generally be used in preference to section 2(2), but that section was used because there was no specific power available following the transfer.

Section 2(2) and case-law

3. Section 2(2)(a) enables subordinate legislation to be made for the purpose of implementing any EU obligation, or enabling any such obligation to be implemented. Defra relied almost entirely on section 2(2)(a) to make the provisions in SI 2007/891⁴. Defra submits this was lawful and cites Oakley Inc vs Animal Limited [2005] EWCA Civ 1191 as authority (see Waller LJ at paragraphs 19-20 and Jacob LJ at paragraphs 52-55). Producer Responsibility guarantees a minimum amount of reprocessing of packaging waste each year. The purpose is to ensure the corresponding targets in Article 6(1) of Directive 94/62 are met. There is a very clear link between the system and the EU obligation. Producer responsibility also implements an overarching EU obligation to prioritise the prevention of waste (see paragraph 7.4 of the Memorandum).
4. Defra does not accept that it could not use section 2(2) only because of the fact that Article 6(1) does not specify the form and methods of implementation or because the imposition of obligations on members of the public is seen to be too tenuously connected to an obligation directed at the UK as a whole. The structure of Article 6(1) is a form common to many directives. It is consistent with the Treaty on the Functioning of the EU, which states that directives are addressed to Member States (not citizens) and that they shall leave to the national authorities the choice of form

³ See section 53 of the Scotland Act 1998 and article 2 of and Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999.

⁴ In some cases, the obligations set out in the SI, such as those for plastic and metal packaging, are calibrated to ensure that the relevant Article 6(1) minimum target is exceeded. This is so-called gold-plating and there is reliance on section 2(2)(b) which enables this because it is considered to be a "matter arising out of or related to any such obligation".

and methods⁵. Article 6(1) sets targets which the UK must meet. It is lawful to use section 2(2)(a) to establish a system which ensures they are attained.

Use of Section 2(2) in the draft instrument

5. The amendments in the draft SI to SI 2007/891 make Producer Responsibility more efficient (see paragraph 2.3 of the Memorandum). Defra submits that, just as it was lawful to rely in part on section 2(2) to make SI 2007/891, it is now lawful to use section 2(2) to amend that SI. The amendments relate to the details of Producer Responsibility. Defra notes the second limb of section 2(2)(a) which refers to subordinate legislation “enabling” any EU obligation to be implemented. Details such as schemes and the conditions under which they are approved ultimately enable the Article 6(1) targets to be attained. Defra also notes that a conferral of legislative power to make subordinate legislation includes a power to amend it.

Use of section 2(2) to amend SR (NI) 2007/198

6. Defra relies on section 2(2) to amend SR (NI) 2007/198 in Part 3 of the instrument. The provisions within Part 3 are within the scope of section 2(2) because they also deal with the details of Producer Responsibility. The Department for the Environment in Northern Ireland is making an instrument containing provisions mirroring some of those in Part 2 of the draft SI (see paragraph 4.1 of the Memorandum). In the case of those provisions, the policy was jointly devised by the Department and Defra. The provisions in Part 3 of the draft SI are different because they are a Defra-only initiative. It was agreed with the Department that it would be expedient for Defra to make these provisions. This is consistent with the Government’s general position that specific powers should generally be used in preference to section 2(2): sections 93 to 94 of the Environment Act do not extend to Northern Ireland⁶.

Conclusions

7. Defra submits that:
 - a. the draft SI makes the system of Producer Responsibility more efficient;
 - b. there is a direct link to the obligation in Article 6(1) of Directive 94/62 to reprocess minimum amounts of waste;
 - c. the system also implements Article 4 of Directive 2008/98 because its effect is to deter the proliferation of waste;
 - d. the EU legislation does not express the form or method of implementation but this is common and section 2(2) may still be used in such circumstances (Oakley Inc vs Animal Limited); and
 - e. it is expedient for Defra to legislate on behalf of the devolved governments (who have agreed to this) and Defra cannot rely on any more specific power.

⁵ See Article 288.

⁶ See section 125(7) of the Act.