

Compliance and enforcement

Introduction

12.1 This section sets out who Government proposes will regulate the packaging Extended Producer Responsibility system, their powers, regulated stakeholders and how regulators will monitor and enforce the Extended Producer Responsibility regulations.

12.2 Delivery of the outcomes expected of the proposed system mean effective compliance monitoring and enforcement will be essential. The monitoring and enforcement regime will seek to ensure a level playing field for legitimate businesses, bring non-compliant businesses into compliance, stop illegal activity and punish those undermining the system. Sanctions and penalties will be sufficiently punitive to motivate compliance throughout the packaging value chain.

Summary of previous consultation

12.3 The 2019 consultation considered how a packaging Extended Producer Responsibility system could be monitored and enforced based on lessons learned from the regulation of the current packaging regime. It established that monitoring compliance and enforcing the Extended Producer Responsibility regulations are key to the system functioning as it should and that to achieve the ambitious outcomes of the proposed system, compliance and enforcement must be fit for purpose.

12.4 A majority of respondents to the 2019 consultation indicated that other enforcement mechanisms to those used in the current packaging producer responsibility regime should be considered to bring producers into compliance. It further provided that higher penalties should be proposed for non-compliance along with backdating the payment of compliance costs, increasing penalties over time and higher enforcement costs than the cost of compliance.

12.5 There was strong support (89%) for broadening of legally enforceable notices to obtain required information and acknowledgement that Civil Sanctions and Enforcement Undertakings have proven to be an effective mechanism and should be continued.

Enforcement authorities

12.6 Government proposes that most of the provisions in the Extended Producer Responsibility regulations would be enforced by the environmental regulators (the Environment Agency (EA), Natural Resources Wales (NRW), the Scottish Environment Protection Agency (SEPA) and the Northern Ireland Environment Agency (NIEA)).

12.7 It is important that the compliance and enforcement framework satisfies the requirements of the UK Government and the Devolved Administrations, working within devolved powers and has regard to accountability to Ministers of each administration.

12.8 Government is considering the appropriate regulator for the mandatory labelling obligations and packaging product requirements on producers and is doing this alongside the post implementation review of the Packaging (Essential Requirements Regulations) 2015.

12.9 Government is also considering the appropriate regulator for the enforcement of a mandatory cup takeback scheme if taken introduced.

12.10 The environmental regulators will not be responsible for the monitoring of and enforcement against local authorities under the Extended Producer Responsibility system except where local authorities have obligations as collectors or operators of material facilities.

Regulation of the system

12.11 Government proposes to draw on compliance monitoring and enforcement powers provided in the Environment Bill and set these out in the Extended Producer Responsibility regulations to enable regulators to exercise their functions. This includes the possibility of introducing charges so that regulators can recover the cost of their compliance monitoring and enforcement activity considered necessary by Government for them to carry out their functions under the Extended Producer Responsibility regulations. This might include supervising those that are subject to the Extended Producer Responsibility regulations placed on them, engagement and sharing of data with other enforcement bodies, and relevant market surveillance activity. This list is not exhaustive.

12.12 Regulator fees and charges will be paid by the producer, most likely directly to the appropriate regulator, but some fees may be payable via the Scheme Administrator or compliance schemes depending on registration requirements. Regulator fees and charges from other packaging Extended Producer Responsibility system participants with registration and/or accreditation obligations will be paid directly to the regulator. When setting charges regulators will need to factor in the resource and challenges that regulation of certain producers or stakeholders might pose, e.g. the regulator charges for Online Marketplaces may need to be higher than for a different type but equivalent sized producer. This is because of the unique challenge that Online Marketplaces could pose to the regulators given the amount of packaging data being submitted by one Online Marketplace is likely to be more than that being submitted by another type of, but similar sized, producer because it will comprise of data from many smaller businesses.

12.13 There are three regulatory elements of the system:

- Regulation of the Scheme Administrator (or compliance schemes)
- Regulation of all the sectors in the value chain based in England, Northern Ireland, Scotland and Wales

- Other organisations that cross boundaries

12.14 It is proposed that oversight of the Scheme Administrator will be through a combination of regulatory activity undertaken by the regulators as described in this section, along with the contractual arrangements underpinning the appointment of the Scheme Administrator by Government.

12.15 The Scheme Administrator will be responsible for the operation of all, or part of, the system (depending on final governance arrangements) and have obligations to report performance data and meet statutory recycling targets across all parts of the UK. These obligations will be monitored and enforced by the relevant environmental regulator.

12.16 The regulation would operate as it does under the current regime with each regulator responsible for enforcing the regulations for the obligated parties based within each of their areas. Regulators currently carry out their regulatory activity without undertaking monitoring and enforcement in another part of the UK, this will continue.

Regulator responsibilities

12.17 The environmental regulators are to become the primary scheme regulators for the system and would monitor compliance and enforce the obligations of the following:

- Obligated Producers
- Scheme Administrator
- Compliance schemes, if they are part of the governance arrangements (as described in Section 10)
- Reprocessors and exporters
- First Points of Consolidation which may be materials facilities and transfer stations, or reprocessing facilities.
- Waste collectors

12.18 Obligations required by the Extended Producer Responsibility regulations will be scrutinised through a robust system of monitoring and inspection, ranging from data analysis to on site auditing and inspection. Obligations monitored and enforced will include:

- Meeting of statutory targets
- Registration by producers
- Reporting of accurate and complete data
- Accreditation or registration of packaging Extended Producer Responsibility system participants to perform functions or issue evidence within the system

12.19 Given the critical importance of compliance monitoring and enforcement of the reformed system, transparency by regulators will be key. Government proposes enhancing the existing duty on environmental regulators to prepare and publish monitoring and inspection plans for producer responsibility schemes. This would include requiring the regulators to engage stakeholders in the development of these plans and report annually on the implementation of these plans, including how fees/charges received from those

being regulated have been spent in the delivery of the activities set out in these plans. However, Government recognises that regulators will need to have sufficient flexibility to enable them to adapt swiftly when enforcement priorities change during the course of a compliance year.

12.20 This requirement may extend to any other regulators with a role in compliance monitoring aspects of the packaging Extended Producer Responsibility scheme.

Enforcement response options

12.21 Civil sanctions, as described in the 2019 consultation, have proven successful as an enforcement measure since they were introduced through the Regulatory Enforcement Sanctions Act 2008 (RESA) in England and Wales and through the Regulatory Reform (Scotland) Act 2014. Northern Ireland does not have powers currently to use civil sanctions.

12.22 In England and Wales, a RESA civil sanction can be applied in relation to an offence as an alternative to criminal proceedings, where allowed under specific legislation. RESA civil sanctions have been used under the current packaging regime, however, to date only for offences committed by producers and have not yet been required for compliance schemes.

12.23 Extended Producer Responsibility regulations can make provision for civil sanctions of a kind found in RESA in relation to a failure to comply with requirements in the Extended Producer Responsibility regulations or for obstruction etc. Provision will only be made for criminal offences where there is a failure to comply with a civil sanction or obstruction etc.

12.24 The civil sanctions that can be imposed under the Extended Producer Responsibility regulations are discretionary requirements. This could take a form similar to a variable monetary penalty (VMP) under RESA. The maximum amount of an Extended Producer Responsibility VMP for a particular breach would be set out in the Extended Producer Responsibility regulations. Regulators would determine what an appropriate Extended Producer Responsibility VMP should be based on their enforcement policy, which is itself based on the Environmental Sentencing Guidelines. The regulators can calculate Extended Producer Responsibility civil penalties, and the equivalent in Scotland, by adjusting the maximum penalty according to the size and culpability of the organisation in breach, followed by consideration of specified aggravating and mitigating factors.

12.25 Government proposes the use of civil sanctions in England and Wales and equivalent civil sanctions in Scotland by regulators under the Extended Producer Responsibility system in conjunction with offences for breach of those sanctions. For Northern Ireland, and in line with the requirements of the Northern Ireland Protocol, transposition of the EU Packaging and Packaging Waste Directive under the powers granted by the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020) will also include the laying of appropriate

legislation to allow for civil sanctions to be imposed under Extended Producer Responsibility. Failure of the Scheme Administrator, or a compliance scheme if they have a role in the new Extended Producer Responsibility system, to meet statutory targets would be regarded as a significant breach under packaging Extended Producer Responsibility and therefore the penalty imposed would be appropriate and proportionate. A civil sanction could be applied for this breach and calculated using a prescribed formula considering the extent to which targets have been missed.

12.26 Government proposes that civil sanctions will be used in the first instance for breaches under packaging Extended Producer Responsibility, however regulators will be able to choose from the response options available to them for each breach. Regulators could have a combination of the following enforcement response options available to manage non-compliance. Offences will be available for breaches of those sanctions.

- Advice and guidance – lowest level of intervention usually used with the objective of bringing an operator or producer into compliance and remaining compliant.
- Warning – either via a letter or a site warning.
- Notices, powers and orders – the service of specific enforcement or information notices require actions to get back into compliance, or supply information, or take any actions deemed necessary to secure compliance, or investigate as necessary.
- Civil sanctions can be imposed to achieve the outcomes desired including:
 - Fixed monetary penalty - a low-level fixed penalty for minor offences.
 - Discretionary requirements (variable monetary penalty) - a notice requiring an offender to pay a proportionate monetary penalty to the regulator of such amount as the regulator may determine up to a limit set in the Extended Producer Responsibility regulations.
 - Enforcement Undertakings - a voluntary offer from an offender containing actions dealing with the cause and effect of their offending. The regulator can accept or reject the offer following a full criminal investigation.
- Formal Caution – where an offender admits the offence and consents to a caution, a caution may deter future offending.
- Prosecution under criminal law.