

Net Zero, Energy and Transport Committee
Tuesday 3 September 2024
24th Meeting, 2024 (Session 6)

UK subordinate legislation: consideration of consent notification

Introduction

1. This paper supports the Committee’s consideration of a ‘type 1’ consent notification sent by the Scottish Government relating to the following proposed UK statutory instrument (SI):
 - Producer Responsibility Obligations (Packaging and Packaging Waste) Regulations 2024
2. The process for how the Scottish Parliament considers consent notifications is set out in the [SI Protocol](#). See **Annexe A** for further details.

Producer Responsibility Obligations (Packaging and Packaging Waste) Regulations 2024

3. On 5 June, the Minister for Climate Action wrote to the Committee to give notice that the Scottish Government proposed to consent to this SI. Her letter is in **Annexe B** with the formal SI notification is in **Annexe C**. She explained in her letter that the UK Government would lay the SI on 5 September. Given the subsequent change of UK Government, it is possible that this date may change. However the Scottish Government has not revised its request for the Committee to respond to the consent notification by 5 September.
4. Under the SI protocol, the Scottish Parliament is often asked to approve the principle of a proposed UK SI without sight of the proposed text. However, in this case, the draft SI text has been [notified](#) to the World Trade Organisation under the terms of the Technical Barriers to Trade Agreement and the EU Commission under the terms of the Technical Standards Directive. The [draft UK SI](#) is therefore available to view.
5. The Scottish Government says of the proposed SI:

“Packaging EPR will require producers of products to pay the full net cost of managing their packaging at end of life, providing a source of funding to local authorities to provide efficient and effective household packaging collection and disposal services, and placing financial responsibility on the producer in line with the “polluter pays” principle. Payments will be made to a scheme administrator appointed by the four governments of the UK acting jointly. The scheme administrator will then distribute these monies to local authorities.”
6. The key powers being used here to legislate in devolved areas can be used by UK Ministers only if the Scottish Ministers consent. These powers are available to

either the UK Ministers or Scottish Ministers (known as “concurrent”). The notification sets out that the Scottish Government considers that a UK SI is necessary in this case, rather than separate Scottish provision, partly because certain aspects are reserved (e.g. packaging labelling requirements) and partly so that a single UK scheme administrator could be set up rather than separate but parallel provision. The notification states that “A UK-wide scheme for packaging EPR continues with the current approach in the Producer Responsibility (Packaging Waste) regulations 2007 with which producers and regulators are familiar.”

Next steps

7. The Acting Cabinet Secretary for Net Zero and Energy (who as Minister for Climate Action notified the Committee about the UK SI) has been invited to give evidence on 3 September. In line with standard practice, the Comm has been provided with a private legal and policy briefing note for this session.
8. After the evidence session, the Committee must reach a view on whether or not to approve the proposal to consent to the SI. If it wishes to consent to the proposal it may, in doing so, set out in its letter to the Scottish Government any observations or concerns that it thinks are relevant.
9. If the Committee is not content with the proposal, it should include in its letter to the Scottish Government one of the following recommendations:
 - That the Scottish Government should not consent to the provision being made in a UK SI and that the Scottish Government should instead take forward an alternative Scottish legislative solution; or
 - That the provision should not be made at all (that is, that the Scottish Government should not consent to the provision being included in a UK SI, nor should the Scottish Government take forward an alternative Scottish legislative solution).

Clerks to the Committee
June 2024

Annexe A: Process for parliamentary scrutiny of consent notifications in relation to UK statutory instruments

1. The Protocol provides for the Scottish Parliament to scrutinise the Scottish Government's decisions to consent to certain subordinate legislation made by the UK Government: specifically, UK Government subordinate legislation on matters within devolved competence in areas formerly governed by EU law. It sets out a proportionate scrutiny approach and categorises SI notifications as 'type 1' or 'type 2'.
2. Type 2 applies where all aspects of the proposed instrument are clearly technical (e.g., they merely update references in legislation that are no longer appropriate following EU exit) or do not involve a policy decision. These are notified retrospectively, after the Scottish Government has given its consent.
3. All other proposals are type 1. In this case, the Scottish Parliament's agreement is sought before the Scottish Government gives consent to the UK Government making subordinate legislation in this way. Each type 1 notification must be considered by the relevant Committee.
4. **The Committee's role in relation to type 1 notifications is to decide whether it agrees with the Scottish Government's proposal to consent to the UK Government making Regulations within devolved competence, in the manner that the UK Government has indicated to the Scottish Government.**
5. If Members are content for consent to be given, the Committee will write to the Scottish Government accordingly. The Committee may also wish to note any issues in its response or request that it be kept up to date on any relevant developments.
6. If the Committee is not content with the proposal, however, it may recommend that the Scottish Government should not give its consent. In that event, the Scottish Ministers have 14 days under the Protocol to respond to the Committee's recommendation. They could—
 - Agree. If so, the Scottish Ministers would then withhold their consent.
 - Not agree. If so, the Parliament will debate the issue.
7. If the Parliament agrees to the Committee's recommendation that the Scottish Ministers should not consent, the Protocol provides that the Scottish Ministers should "normally not consent" to the UK SI. However, the Protocol also provides that if the Scottish Ministers consider that the Committee's proposed alternative cannot be achieved, they may consent to the UK SI. If so, they must explain why they are doing so to the Scottish Parliament.

Annexe B: Correspondence from the Minister for Climate Action

Dear Edward Mountain MSP,

EXTENDED PRODUCER RESPONSIBILITY FOR PACKAGING

EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing to you regarding extended producer responsibility (EPR) for packaging, which the Scottish Government is introducing, along with the other UK governments, from April 2025. Packaging EPR will require producers of products to pay the full net cost of managing their packaging at end of life, creating a source of funding to local authorities to provide efficient and effective household packaging collection and disposal services and placing financial responsibility on the producer in line with the “polluter pays” principle.

The Scottish Government has been working closely with the UK Government, the Welsh Government, and the Department of Agriculture, Environment, and Rural Affairs in Northern Ireland to implement packaging EPR and develop the necessary legislation in the form of a UK statutory instrument.

I am therefore writing to you in relation to the protocol on obtaining the approval of the Scottish Parliament to proposals by the Scottish Ministers to consent to the making of UK secondary legislation affecting devolved areas arising from EU Exit.

That protocol, as agreed between the Scottish Government and Parliament, accompanied the letter from the then Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, to the Conveners of the Finance & Constitution and Delegated Powers and Law Reform Committees on 4 November 2020 and replaced the previous protocol that was put in place in 2018.

I attach a Type 1 notification which sets out the details of the SI which the UK Government proposes to make and the reasons why I am content that Scottish devolved matters are to

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be included in this SI. Usually at this stage of a notification the SI is not in the public domain. However, in this case the draft SI has been notified to the WTO and the EU, and the draft is therefore in the public domain. The notification contains a link to the draft SI as notified. This draft may be subject to further minor changes and we will, in accordance with the protocol, advise you when the final SI is laid and advise you as to whether the final SI is in keeping with the terms of this notification (and the draft notified to the WTO/EU).

Lord Douglas-Miller's letter of 17 May 2024 requesting consent to this SI indicated the UK Government's intention of laying on 5 September. UKG has asked us to continue with the consent process for the SI; however, given the Prime Minister's recent announcement of a general election, the laying date is expected to slip beyond the intended date. I understand that the SI needs to be laid by late October to come into force by 1 January 2025.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you by 5 September 2024.

Yours sincerely

GILLIAN MARTIN

Annexe C: NOTIFICATION TO THE SCOTTISH PARLIAMENT

NOTIFICATION TO THE SCOTTISH PARLIAMENT

The Producer Responsibility Obligations (Packaging and Packaging Waste) Regulations 2024

Is the notification Type 1 or Type 2?

This is a Type 1 notification.

Brief overview of the SI (including reserved provision)

The SI is the Producer Responsibility Obligations (Packaging and Packaging Waste) Regulations 2024.

These regulations establish extended producer responsibility (EPR) for packaging.

Packaging EPR will require producers of products to pay the full net cost of managing their packaging at end of life, creating a source of funding to local authorities to provide efficient and effective household packaging collection and disposal services, and placing financial responsibility on the producer in line with the “polluter pays” principle.

The instrument aligns with European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste as last amended by Directive (EU) 2018/852 of the European Parliament and of the Council (the Packaging Waste Directive).

The instrument initially consequentially amends the Producer Responsibility Obligations (Packaging Waste) Regulations 2007, then revokes these regulations on 1 January 2026 (along with the equivalent legislation applicable to Northern Ireland). The 2007 Regulations are assimilated law as they implemented, in part, the Packaging Waste Directive in Scotland, England and Wales.

The instrument also makes minor consequential amendments to the Waste Batteries and Accumulators Regulations 2009 which are assimilated law (having partially implemented Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators) to update references to the 2007 Regulations to refer to the this instrument.

In addition, it revokes the Packaging Waste (Data Reporting) (Scotland) Regulations 2023 and its associated amendments, as well as the equivalent instruments in the rest of the UK. These were required as part of the implementation of packaging EPR, but will no longer be necessary in 2026 as a result of this instrument coming into force which imposes its own data collection and reporting requirements. Those regulations are not assimilated law.

In keeping with the 2007 Regulations this instrument is a UK-wide instrument, which allows for consistency in regulation across the whole of the UK, and also for a single scheme administrator which will enable the collection and distribution of disposal costs across the UK. It is intended to be laid in the UK Parliament on 5

September 2024 and come into force on 1 January 2025.¹ Development of the EPR scheme and these regulations which underpin it was a four-nation programme.

The draft instrument was notified to the WTO under the terms of the Technical Barriers to Trade Agreement,² and also to the EU Commission under the terms of the Technical Standards Directive, both on 1 May 2024.³ The draft instrument as notified is available on the WTO website.⁴

Details of the provisions that Scottish Ministers are being asked to consent to.

Summary of the proposals

The purpose of the provisions is to establish an extended producer responsibility (EPR) scheme for packaging and packaging waste. Packaging EPR will require producers of products to pay the full net cost of managing their household packaging at end of life. These payments will be made to a scheme administrator appointed by the four governments of the UK acting jointly. The scheme administrator will distribute these monies to local authorities to cover their full net costs of operating efficient and effective disposal services for household packaging waste. A summary of the effect of the provisions, broken down by Part, follows.

Part 1

This Part makes various general provisions, including definitions of different packaging categories (which align with those in the Packaging Waste Directive), household packaging, producers and other key terms.

Packaging that is a scheme article for the purposes of an operational Deposit Return Scheme (DRS) is exempt from the regulations. Until 1 January 2028, drinks containers (excluding those made of glass) are exempt from certain obligations under the regulations, including disposal costs, recyclability assessments, and the requirement to provide recycling information; they are subject to data collection and reporting obligations and recycling obligations. From that date, if there is no operational DRS in any part of the UK, the exclusions for drinks containers will fall away so that drinks containers will be subject to all of the obligations in the Regulations. Packaging which is reused or exported is also exempt.

Part 1 also provides that the Scottish Ministers are the appropriate authority in relation to Scotland, and the appropriate agency is the Scottish Environment Protection Agency (SEPA).

¹ Lord Douglas-Miller's letter of 17 May 2024 requesting consent to this SI indicated the UK Government's intention of laying on 5 September. UKG has asked us to continue with the consent process for the SI; however, given the Prime Minister's recent announcement of a general election, the laying date is expected to slip beyond the intended date. The SI needs to be laid by late October to come into force by 1 January 2025.

²

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBTN24/GBR87.pdf&Open=True>

³ <https://technical-regulation-information-system.ec.europa.eu/en/notification/25848>

⁴ https://members.wto.org/crnattachments/2024/TBT/GBR/24_02787_00_e.pdf

Part 2

This Part specifies the obligations on producers based upon type and size of producer. Producers with more than £2m turnover and 50 tonnes of packaging placed on market per annum are large producers, and those who are below one or both of those thresholds, but with more than £1m turnover and 25 tonnes of packaging placed on market per annum, are small producers and must collect and report data on the packaging that they place on the market.

Small producers, and large producers who are exclusively sellers, must register, collect data on the packaging they place on the market and report these data to the environmental regulator (SEPA for Scotland).

Large producers, with the exception of sellers, must, in addition, meet and confirm compliance with recycling obligations, and where applicable, must also pay local authorities' disposal costs (see part 6). Recycling obligations are met by the purchase of PRNs (packaging waste recycling notes) and PERNs (packaging waste export recycling notes) which represent a certain amount of waste that has been recycled.

Part 2 also requires producers to determine, and keep records in relation to, the recyclability of packaging that they produce, and mark this packaging with a recyclability label including the phrase "Recycle/Do Not Recycle" and the "swoosh" symbol with or without a strike through as appropriate, as well as recycling instructions. Producers must apply to the environmental regulator each year for registration. Registration may be cancelled where the producer or scheme fails to comply with its obligations under packaging EPR.

Parts 3-5

These Parts provide that producers may join a scheme to discharge the obligations referred to in Part 2; that is, their registration, reporting and recycling obligations. The scheme then carries out these obligations on behalf of its members.

Part 6

This Part addresses disposal costs; that is, the costs (subject to certain qualifications) incurred by local authorities in relation to the collection and disposal of household packaging waste. It provides for large producers who supply household packaging to pay their share, by tonnage of each packaging material, of local authorities' cost of operating an efficient and effective collection service. Producers must also pay their share of the scheme administrator's operating costs. From 2026 onwards, the scheme administrator must modulate these fees to incentivise producers to make more-sustainable packaging choices.

Part 6 also provides for a scheme administrator to calculate, collect and distribute disposal costs under the Regulations. The scheme administrator is to be appointed jointly by the four UK administrations. The four administrations, also acting jointly, may cancel the appointment. The four administrations may, in certain

circumstances, give directions to the scheme administrator with which it must comply, subject to certain conditions—these may be given by an individual administration where they concern only one nation of the UK, or by the four administrations acting jointly.

Part 6 further provides for what is meant by “efficient and effective” disposal costs. The scheme administrator will calculate the cost of each local authority providing an “efficient” collection service (i.e. keeping its costs as low as reasonably possible). It must then deduct the expected income to the local authority from the sale of the recyclate collected, giving the “net efficient disposal cost” for the authority. It may then deduct up to 20% of the net efficient disposal cost where it considers that the local authority is not providing an “effective” collection service for packaging waste. In determining what is efficient and effective the scheme administrator is to take into account factors including population density, accessibility, and levels of deprivation in the LA area.

Part 7

This Part requires reprocessors and exporters of packaging waste to apply to the environmental regulators for registration and allows the application to be refused if they are not a “fit and proper person” to operate such a facility, e.g. because they have previously been convicted of a relevant offence. It imposes record-keeping and reporting obligations on registered reprocessors and exporters. Reprocessors and exporters of packaging waste provide producers with evidence of having met their recycling obligations through the sale of PRNs (packaging waste recycling notes) and PERNs (packaging waste export recycling notes).

Remaining Parts

- Part 8 sets out how the regulations are to be applied to corporate groups, licensors, and pub operating businesses.
- Part 9 provides for an appeal route for:
 - Producers unhappy with a regulatory decision taken by SEPA (they may appeal to the Scottish Ministers);
 - Local authorities or producers unhappy with their estimated disposal costs or, in the case of producers, annual administration fees (they may appeal to the sheriff).
- Parts 10-12 outline SEPA’s enforcement obligations as the appropriate agency for Scotland, and those of the scheme administrator and those of the labelling authority in relation to recyclability assessments and labelling. It also creates a range of offences for failing to comply with the regulations and provide for a range of enforcement powers (those of SEPA largely align to those in the Environment Act 1995). It creates a range of civil sanctions, although this is mostly not applicable to SEPA, who have civil sanction powers by way of the Environmental Regulation (Enforcement Measures) Order 2015. Offences under these Regulations will be added later to the 2015 Order.

The SI does not confer powers to legislate on either UK or Scottish Ministers.

EU alignment

The Packaging Waste Directive (94/62/EC) aims to improve the quality of the environment by preventing and reducing the impact of packaging and packaging waste on the environment. It covers all packaging placed on the European market and all packaging waste. To meet these objectives, it requires member states to take measures, such as extended producer responsibility schemes, targets, or deposit return schemes to prevent the generation of packaging waste and to incentivise the development of less environmentally harmful packaging based on the "polluter pays" principle. Additionally, it sets overall and material-specific recycling and recovery targets for packaging waste.

The Packaging Waste Directive was originally implemented by the Producer Responsibility (Packaging Waste) Regulations 1997 and the Packaging (Essential Requirements) Regulations 2003. The 1997 Regulations were subsequently replaced by the Producer Responsibility (Packaging Waste) Regulations 2007 (the "2007 regulations") which continued to implement the Packaging Waste Directive. The 2007 regulations provide for a UK-wide producer responsibility scheme for packaging and annual targets, which has over time, become unfit for purpose.

This SI will replace the 2007 regulations and provide for extended producer responsibility for packaging as described above. In so doing it will continue to align with the Packaging Waste Directive by providing for an extended producer responsibility scheme which not only sets recycling targets (which meet or exceed those in the Packaging Directive), but also makes producers responsible for the costs associated with the disposal of their packaging waste with funds being dispersed to local authorities. Additionally, it incentivises the use of refillable packaging and more recyclable packaging, and ensures consistency of labelling. In sum, this instrument continues to align fully with the Packaging Directive.

Does the SI relate to a common framework or other scheme?

The Scottish Government has been working closely with the UK Government, Welsh Government, and Department of Agriculture, Environment, and Rural Affairs in Northern Ireland on design and delivery of packaging EPR. There is a dedicated programme structure with decision-making representation from all four governments. This structure sits within the Resources and Waste Common Framework and any issues may be escalated to this Common Framework for resolution.

Summary of stakeholder engagement/consultation

Along with the other UK governments, we have carried out two consultations on the proposals for packaging EPR. The first ran from February-May 2019 and received 679 responses.⁵ The second ran from March-June 2021 and received 1,241 responses.⁶ The four governments published our response to the second

⁵ <https://consult.defra.gov.uk/extended-producer-responsibility/consultation-on-reforming-the-uk-packaging-produce/>

⁶ <https://consult.defra.gov.uk/extended-producer-responsibility/extended-producer-responsibility-for-packaging/>

consultation on 26 March 2022, setting out our policy intentions for packaging EPR.⁷

As part of the development of this SI, the four governments jointly consulted on the text of an earlier draft of the SI. This consultation ran from July-October 2023.⁸

A note of other impact assessments

The Scottish Government has published the following impact assessments:

- A partial Equality Impact Assessment;⁹
- A partial Fairer Scotland Duty Assessment;¹⁰
- A partial Island Communities Impact Assessment;¹¹
- A partial Business and Regulatory Impact Assessment;¹²
- An updated BRIA (for a piece of supporting legislation).¹³

We have produced a final EQIA, FSDA, and ICIA, and are in the process of publishing these. Copies are attached. Given the four-nations nature of the policy, updating the BRIA is dependent on the UK Government publishing its final impact assessment. We are confident that the assessment will not materially change from that set out in the updated BRIA linked to above, but as and when Defra's analysis is available, we will consider whether there is any material change requiring us to revisit the consent process and will inform Parliament if so.

Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation

The benefits of packaging EPR are significant and support delivery of our net-zero and circular-economy objectives. In particular, it will rightly place on producers the financial responsibility for managing their packaging waste at end-of-life, creating a funding stream to local authorities estimated at £1.2bn per annum UK-wide.

Packaging EPR will also incentivise businesses to reduce excess packaging, to design and use packaging that is easily recyclable, and encourage the use of reusable and refillable packaging. The adoption of a clear "Recycle/Do not recycle" label will make it easier for people to know how to recycle their packaging.

The Scottish Government considers that a UK SI is necessary in this case. This is

⁷ <https://www.gov.uk/government/consultations/packaging-and-packaging-waste-introducing-extended-producer-responsibility>

⁸ <https://consult.defra.gov.uk/extended-producer-responsibility-team/consultation-on-the-draft-producer-responsibility/>

⁹ <https://www.gov.scot/publications/reforming-uk-packaging-producer-responsibility-system-partial-eqia/>

¹⁰ <https://www.gov.scot/publications/reforming-uk-packaging-producer-responsibility-system-fairer-scotland-duty-assessment/>

¹¹ <https://www.gov.scot/publications/reforming-uk-packaging-producer-responsibility-system-partial-island-communities-screening-assessment/>

¹² <https://www.gov.scot/publications/reforming-uk-packaging-producer-responsibility-system-bria/>

¹³ <https://www.gov.scot/publications/reforming-uk-packaging-producer-responsibility-system-partial-business-regulatory-impact-assessment-bria/>

partly because certain specific aspects are reserved (in particular, packaging labelling requirements) and partly because a single UK scheme administrator would not have been possible within the limits of the regulation-making powers in the Environment Act 2021 if each of the UK nations had made separate but parallel sets of regulations. A UK-wide scheme for packaging EPR continues with the current approach in the Producer Responsibility (Packaging Waste) regulations 2007 with which producers and regulators are familiar.

Intended laying date (if known) of instruments likely to arise

Lord Douglas-Miller's letter of 17 May 2024 requesting consent to this SI indicated the UK Government's intention of laying on 5 September. UKG has asked us to continue with the consent process for the SI; however, given the Prime Minister's recent announcement of a general election, the laying date is expected to slip beyond the intended date. The SI needs to be laid by late October to come into force by 1 January 2025.

If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?

Not applicable; the Scottish Parliament has 28 days to scrutinise this proposal..

Information about any time dependency associated with the proposal

The instrument must come into force by 1 January 2025 to enable delivery of packaging EPR by April 2025.

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

As set out above, the four governments have established a programme structure to oversee delivery of packaging EPR, with any issues escalated to the Resources and Waste Common Framework for resolution.

Any significant financial implications?

No major financial implications for the Scottish Government. SEPA will face certain costs associated with its duties as regulator. These will be largely recoverable via a fee chargeable to producers (as set out in schedule 1 of the SI). Where SEPA faces any non-recoverable costs these will be considered with SEPA through its normal budget-setting process.

Local authorities will receive from producers the full net costs of operating an efficient and effective disposal service for household packaging waste. This is estimated at £1.2bn per annum UK-wide.

Costs to business are set out in the BRIA; see above.