The Deposit and Return Scheme for Scotland Regulations 2020

Accompanying Statement

March 2020

Scottish Government
Riaghaltas na h-Alba
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INTRODUCTION

1. A first draft of The Deposit and Return Scheme for Scotland Regulations 2020 ("the Regulations") was laid before the Scottish Parliament on 10 September 2019 for a 91-day representation period ending on 10 December 2019.[1]

2. As part of that exercise, the Scottish Government delivered a public consultation seeking views on the Regulations. This exercise built on a wider public consultation on the design of Scotland's Deposit Return Scheme (DRS) which closed on 25 September 2018.[2] The most recent consultation was designed to elicit detailed feedback on the intent and legal effect of the Regulations to establish the scheme, with the questions structured accordingly.

3. Separately, the Scottish Parliament's Environment, Climate Change and Land Reform (ECCLR) Committee considered the Regulations, gathering evidence from a wide range of stakeholders and publishing a report detailing the Committee's conclusions.

4. This report analyses and responds to the representations and recommendations made through both these exercises and details those changes which Ministers have made to the Regulations as a result of the views expressed. It should be considered alongside the final Regulations.

5. The analysis is largely qualitative in order to ensure full account is taken of the breadth of views expressed on the Regulations and the often detailed reasons offered in support of positions adopted.

[1] https://www.gov.scot/publications/deposit-return-schemme-scotland-regulations-accompanying-statement-proposed-regulations/
[2] https://consult.gov.scot/environment-forestry/deposit-return-scheme/

OVERVIEW OF THE REGULATIONS

6. The Deposit and Return Scheme for Scotland Regulations 2020 are to be made in exercise of the powers conferred by sections 84, 89, 90 and 96(2) of the Climate Change (Scotland) Act 2009.

7. The main policy driver for the Regulations is to promote and secure an increase in recycling of materials, forming part of the Scottish Government's response to the global climate emergency.

8. The Scottish Government is committed to creating a more circular economy where products and materials are kept in a high-value state of use for as long as possible – maximising resources to benefit the economy and the environment. We recognise that fresh interventions are needed to bring about the systemic and behavioural change necessary to fulfil these aspirations.

9. It was against this backdrop that in the 2017-18 Programme for Government, the Scottish Government announced its intention to introduce a Deposit Return Scheme (DRS) for drinks containers for Scotland. Many other countries operate similar schemes, including:

- Croatia
- Denmark
- Estonia
- Finland
- Germany
- Iceland
- Lithuania
- Netherlands
- Norway
- Sweden

10. An extensive programme of consultation and stakeholder engagement followed the Scottish Government's announcement and on 8 May 2019 Scottish Ministers published "A Deposit Return Scheme for Scotland: Full Business Case Stage 1".[3] That document ("the FBC") identifies the Scottish Government's preferred scheme design for DRS. The Regulations take account of the scheme design set out in the FBC.

11. That design enables consumers to take single-use containers back and redeem a 20p deposit from any retailer selling drinks covered by the scheme. This is within the range of deposit levels adopted by successful international schemes, adjusted for inflation.

3 https://www.gov.scot/publications/deposit-return-scheme-scotland-full-business-case-stage-1/

12. The scheme will include plastic bottles made from polyethylene terephthalate ("PET plastic", which is the most common type of bottle for products such as fizzy drinks and bottled water), aluminium and steel cans and glass bottles.

13. Businesses that sell drinks exclusively to be opened and consumed on-site, such as pubs and restaurants, will have the choice whether to charge the deposit to the public and will only be required to return the containers they sell on their own premises.

14. Online retailers will be included in the scheme. This means that those customers who are dependent on online delivery, because for any reason they are unable to travel to shops, will be able to easily get back the deposits paid on containers.

15. Non-retail spaces will be able to act as return locations. These could include recycling centres, schools or other community hubs. While retailers will be required by legislation to provide a return service unless exempted, non-retail spaces will operate on an opt-in basis.

16. Retailers can choose to install reverse vending machines (RVMs) to collect the bottles and cans and return deposits. Alternatively, they will have the option to return deposits over the counter, collecting the containers manually.

17. Specifically, the Regulations:

- Prohibit the marketing or sale to consumers of **single-use drinks in containers made of polyethylene terephthalate (PET plastic), steel, aluminium or glass which are ultimately intended for retail sale in Scotland**, if the producer of those articles is not registered with the Scottish Environment Protection Agency (SEPA). The producer is either the brand owner (for products branded in the United Kingdom) or the importer (for products branded outside the United Kingdom).
- Require that a **20p deposit** is applied each time one of those single-use drinks containers is sold in Scotland. The seller must also make clear that the packaging can be returned in exchange for reimbursement of the deposit. These obligations do not apply to products sold in export (duty-free) shops, on hospitality premises where a closed loop exists, or for sale to a consumer outside Scotland.
- Require **producers to collect a target percentage of the scheme packaging** which they place on the market in a calendar year, by collecting their own scheme packaging from retailers and return points, and accepting the return of their scheme packaging from wholesalers. Producers will reimburse deposits for any packaging returned or collected.
- Provide for **targets** which will increase over the first three years of the scheme's operation (70% in year 1, 80% in year 2 and 90% in year 3). This approach builds on the experience in other countries which have successfully introduced similar schemes.
- Provide for producers to appoint a **scheme administrator** to meet the above obligations on their behalf. Anyone seeking to act as a scheme administrator must be approved by the Scottish Ministers.

- **Require retailers to operate a return point at premises from which sales of scheme products are made.** This involves accepting (subject to certain exceptions) packaging returned by consumers, reimbursing deposits for that packaging and retaining the packaging for collection by or on behalf of producers.
- Provide that, where specified criteria are met, the Scottish Ministers may **exempt** a retailer from acting as a return point and may approve any other person who wishes to act as a return point.
- Require retailers selling products by means of **distance sales** (e.g. through an online grocery sale and delivery service) to provide takeback services from the site of delivery to consumers who have purchased those items.

18. The Scottish Government is satisfied that the Regulations fall within the competence of the Scottish Ministers and are compliant with EU law. To the extent they have the potential to impact on free movement of goods, the Scottish Government considers that they are proportionate and justified on environmental grounds. Similarly, the Scottish Government is satisfied that the Regulations are fully compliant with the European Convention on Human Rights. The different treatment of actors in the scheme has a purpose and does not amount to discrimination under the ECHR.

OVERVIEW OF THE PUBLIC CONSULTATION ON THE REGULATIONS

19. The public consultation consisted of 7 open questions, each seeking views on a Part of the Regulations:

- Part 1 – General
- Part 2 – The deposit and return scheme
- Part 3 – Producers
- Part 4 – Scheme administrator
- Part 5 – Retailers and return points
- Part 6 – Appeals or reviews
- Part 7 – Enforcement and offences

20. 147 responses were received through the exercise, 113 of which were from organisations and 34 from individuals. Where consent has been given, responses will be published so they can be considered alongside this report.

21. The organisations which responded represented a range of sectors including:

Sector	**Responses**
Packaging manufacturers	5
Drinks producers	35
Wholesalers/distributors	3
Retailers	30
Commercial waste management/resources sector	9
Public sector	11
Third sector	8

* The above list is not exhaustive. Further, it is recognised that organisations will often overlap several sectors. The above summary should therefore only be considered indicative.

22. A number of respondents used the consultation as an opportunity to express general views and opinions on the merits of DRS, sometimes without specific reference to the structure or content of the Regulations. We have not analysed these views as part of this exercise on the basis that a separate public consultation seeking views on the detailed design for DRS has already been conducted, analysed and responded to. However, where it has been possible to link respondent comments to specific regulations, we have sought to do so.

23. The consultation was designed to facilitate detailed and specific comments on the Regulations. Accordingly, the analysis of views expressed is largely qualitative and focuses on themes identified through the consultation responses. As a guide, where reference is made in the report to ‘few’ respondents, this relates to three or less respondents. The term ‘several’ refers to more than three, but typically less than ten. The term ‘significant number’ refers to more than ten.

OVERVIEW OF SCRUTINY UNDERTAKEN BY THE SCOTTISH PARLIAMENT'S ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE

24. The ECCLR Committee undertook an extensive programme of evidence-gathering and scrutiny of the Regulations during the pre-laying period.

25. The Committee issued a call for written evidence on 17 September 2019 with a deadline for response of 15 October 2019. The call for evidence invited views on ten areas and provided an opportunity for respondents to highlight additional issues. 69 written submissions were received.

26. The Committee supplemented those submissions with a series of oral evidence sessions involving:

- Cabinet Secretary for the Environment, Climate Change and Land Reform
- Scottish Government officials
- Bodies representing retailers
- Packaging manufacturers
- Drinks producers
- Waste management organisations
- Non-Governmental Organisations and the third sector
- Wholesale organisations
- Local authorities

27. The Committee published a report detailing this evidence and their conclusions on 10 December 2019. The report highlighted the broad support which exists for the principle of introducing a DRS in the context of the need to transition to a circular economy and respond to the global climate emergency. At the same time, it recommended a number of areas where the Regulations should be revisited and these points are addressed as part of this analysis. Finally, the Committee requested further information on a number of aspects of the scheme and its anticipated impacts. Those requests are being addressed separately and so are not covered by this report.

28. During the pre-laying period, the Regulations were also the subject of scrutiny by the Scottish Parliament's Delegated Powers and Law Reform Committee, with no substantive issues being raised.

REPRESENTATIONS ON THE DRAFT REGULATIONS: ANALYSIS AND GOVERNMENT RESPONSE

29. The following section sets out the Scottish Government's analysis of the comments received on the draft Regulations and our response to the representations which have been made.

30. To note, where a regulation has been omitted from this section it is because no themes or substantive issues have been identified through the analysis.

PART 1 – GENERAL

Regulation 1 – Citation and commencement

Background

31. Regulation 1 lays out when the Regulations come into effect. The first draft Regulations published in September 2019 indicate a commencement date of 1 April 2021 for key provisions concerning the scheme's operation. It is at this point that DRS would be considered fully operational. The timetable for implementation of the scheme has been the subject of ongoing discussion with stakeholders, supported through the Scottish Government's DRS Implementation Advisory Group. The various commencement dates included in the draft Regulations were caveated for this reason.

Summary of public consultation responses

32. A significant number of respondents indicated that the caveated timescale for full implementation is unachievable. The respondents indicating this were primarily retail and producer groups who argued more time was needed for implementation. A few respondents also called on the Scottish Government to align its plans with the timetable for implementing DRS and wider packaging producer responsibility reform across the UK.

Committee Recommendations

33. The Committee concluded that swift action to deliver DRS was necessary. However, it identified that the ambition to have the scheme operational within 12 months of passing the Regulations may be challenging in practice.

34. The Committee further highlighted that, in setting a date for the scheme's implementation, Scottish Ministers should consider the impact on business of introduction in the Christmas and holiday periods.

Response

35. The Regulations have been amended to include a commencement date of 1 July 2022 for key provisions concerning the scheme's operation. It is at this point that DRS would be considered fully operational. This timetable has been developed following extensive engagement with the Scottish Government's DRS Implementation Advisory Group (IAG). The timetable has been tested through established external assurance processes and validated by industry experts who have been involved in the establishment of other schemes.

36. The provisions concerning registration of producers with the Scottish Environment Protection Agency (SEPA) will now commence on 1 January 2022, providing sufficient time for producers to register prior to the scheme being fully implemented.

37. In line with the draft Regulations, the provisions concerning the approval and operation of scheme administrators will come into force on the day after the day on which these Regulations are made. The provisions concerning the exemption of return point operators and the approval of voluntary return point operators will now commence on 1 January 2021. Ministers consider that this will afford retailers sufficient time to seek any exemptions prior to the scheme becoming fully operational.

38. In line with conclusions drawn by the Committee, the Scottish Government is clear that our climate change obligations are such that implementation cannot be delayed until the rest of the UK is in a position to implement a DRS. The other UK administrations intend to undertake a further consultation on proposals for DRS later in 2020.

Regulation 2 – Interpretation

Background

39. Regulation 2 defines the terms used in the Regulations.

Summary of public consultation responses

40. There were requests for greater clarity around some of the definitions, in particular:

- What constitutes a drink, and within that what a concentrated drink is
- What is meant by the term 'first placed on the market'
- Precision over what constitutes a hospitality retailer
- What type of company constitutes the 'operator' for the purposes of a distance-selling website

41. A few respondents raised questions around whether gels and other concentrates, yogurt drinks and syrups would meet the definition of a drink. A suggested approach was to develop a viscosity standard to support identification of drinks.

42. A number of minor technical details were raised over the definition of ‘first placed on the market’ in relation to goods being held in excise duty suspension or goods ultimately intended to be sold in England.

43. Commenting on the definition of ‘operator’, a few respondents highlighted that an organisation with controlling access to a website will often be different to the body controlling the content (i.e. the products sold through that website). It was highlighted that some websites simply operate as a platform through which retailers facilitate the sale and delivery of often small quantities of products. In these circumstances, it was argued that the website operator should not be responsible for meeting any legal obligations placed on distance sellers through the Regulations.

Response

44. We feel that the Regulations are already sufficiently clear in the majority of the areas raised by stakeholders. The Regulations use simple, commonly understood phrases to describe a number of these issues – for instance, ‘drink’ means a beverage intended for human consumption, including concentrated soft drinks. This approach was taken to ensure the Regulations are not prescriptive to the point where they would potentially exclude product types that constitute a drink.

45. With regard to the definition of ‘first placed on the market’, the objective of the Regulations is to require that only products which are marketed by producers with the intention that they be made available for retail sale in Scotland fall within the scope of the scheme. Further technical amendments have been made to clarify this point.

46. We have also further clarified in the Regulations what a hospitality retailer is for the purposes of deposit return, specifically that it is a retailer selling a scheme article exclusively for consumption on the premises of sale.

47. Turning to the definition of the term ‘operator’, we continue to believe it is appropriate that the owner of the website should assume the legal obligations established through the Regulations. Such an approach is likely to be easier to communicate to consumers, many of whom will often associate a transaction with a website operator as opposed to a seller utilising an online platform. An approach which is focused on website owners is also likely to be more effective from a compliance monitoring and enforcement perspective. There is nothing in the Regulations to prevent a website operator from establishing commercial arrangements with sellers using their platform to support them in meeting their obligations linked to the scheme.

48. In preparation for the scheme’s introduction, it is the expectation that SEPA, working with any scheme administrator, will provide producers, wholesalers, retailers and the public with advice and guidance on how to interpret and comply with the requirements of the legislation.

Regulation 3 – Scheme articles and scheme packaging

Background

49. This regulation defines those single-use drinks and their packaging which fall within the scope of the scheme. It does so by identifying the materials from which containers are to be made as well as other key characteristics they hold.

Summary of public consultation responses

50. There was strong interest from a significant number of stakeholders in the exclusion of glass from the scheme, or for an approach which would involve the phasing-in of materials including glass at a later date once the scheme was fully established.

51. Linked to this, there was also a suggestion that a review period be established, at which point consideration would be given to the inclusion of additional materials. There was a suggestion that provision be made for other materials to be added through agreement between involved parties rather than through legislative change.

52. Finally, several respondents called for the exclusion of certain product types such as fresh dairy or other nutritional drinks.

Committee Recommendations

53. The Committee recognised the environmental benefits associated with improved recycling of glass and noted the high levels of public support for improved glass recycling. At the same time, it was acknowledged that the glass industry and related businesses had significant reservations around its inclusion.

54. The Committee concluded that the scheme should be as comprehensive as possible and should be designed to include cartons, pouches, HDPE plastic, and biodegradable and other emerging plastics in the future.

55. The Committee called on the Scottish Government to offer an indication of the likely timeframe for extending the scheme to include these other materials and sought clarity on the potential for other materials to be included without the need for further legislative change.

Response

56. Building on the content of the FBC, the Scottish Government has provided extensive evidence to the ECCLR Committee and to stakeholders on the case for including glass in the scheme.

57. While we recognise that the inclusion of glass increases the cost and complexity of administering DRS, we remain convinced that the benefits outweigh these drawbacks. Currently we recycle around 64% of glass waste; international experience indicates that a glass capture rate of over 85% should be achievable

through DRS. This will significantly reduce CO2 equivalent emissions associated with glass drinks packaging. It will also reduce the amount of dangerous glass litter in our environment. Whilst some stakeholders have called for a decision on the inclusion of glass to be delayed, we believe the costs and complexity associated with incorporating glass at a later date would be prohibitive.

58. Some industry concerns have centred around a reduction in the availability of good-quality clear glass if return points crushed returned glass bottles. Section 34 of the Environmental Protection Act 1990 requires those handling waste to ensure that it is handled in a fashion that promotes high-value recycling, and will apply in relation to the handling of returned scheme packaging. The Scottish Government has published a Code of Practice to aid compliance with this obligation.

59. We have carefully considered the case for the exclusion of single-use drinks containers by product type. In reaching a view on this, we have been mindful that the Regulations in question are being brought forward for the purposes of environmental protection. There is no intention to use the Regulations to encourage a change in consumer purchasing habits, human life or health, or business interests. It therefore follows that any exclusions should be made on environmental grounds and we are satisfied that the operation of exclusions linked to material will be more closely connected to the environmental purposes of the Regulations than a product based exclusion would be.

60. In light of the above, we are not minded to adjust the Regulations with regard to the scope of materials at this stage. With regard to the Committee's questions regarding a potential timeframe for expanding the scope of materials to be included in the scheme, we are content to commit to such a review, the timing of which should take account of the anticipated timeframes for a fully established, high performing scheme. The currently proposed performance targets suggest this will be achieved at the end of the third full year of operation. We have therefore, at new regulation 32, included a provision requiring that the Scottish Ministers review the Regulations after sufficient time has passed to allow for an assessment of the performance against the targets, taking into account in particular deposit levels, the scope of materials included in the scheme and the targets themselves. Further information is set out in relation to Regulation 32 under the relevant heading below.

61. Technical amendments have been made to the definitions in this regulation for clarity.

62. Finally, The Cabinet Secretary for Environment, Climate Change and Land Reform wrote to the Committee on 10 December regarding the potential inclusion of materials within DRS on a non-statutory basis. A copy of that letter is included at **Annex A** of this report. The Scottish Government wants to establish a scheme that maximises consumer participation and represents the best possible opportunity to drive increases in recycling. We believe the adoption of legislation which applies equally across all in-scope materials will help us to achieve these objectives.

PART 2 – THE DEPOSIT AND RETURN SCHEME

Regulation 4 – Sale of articles

Background

63. Regulation 4 prohibits the marketing (including through online retail or vending-machine sales) or sale in Scotland of scheme articles, if the producer of those articles is not registered with SEPA.

Summary of public consultation responses

64. Comments on this Regulation focussed on the potential for wholesalers or retailers to be allowed to register as producers for the purpose of selling scheme articles from UK brand owners based outside Scotland. This, it was argued, would limit the impact DRS would have on those brand owners whilst maintaining product choice for wholesalers, retailers and consumers in Scotland.

Response

65. While we accept that such an arrangement could potentially be beneficial for smaller producers, allowing wholesalers and retailers to register as producers on behalf of a brand owner risks allowing large-scale producers to use their influence and market leverage to encourage wholesalers and retailers to take on their producer obligations. This would undermine one of the key purposes of the Regulations, that is to apply a producer responsibility measure. It is commonly accepted that producers have responsibility for decisions regarding packaging design. It therefore follows that those organisations should assume responsibility for managing the consequences of those design decisions once a product reaches end-of-life.

66. It is on this basis that we are not minded to adjust the Regulations to allow wholesalers to register as producers on behalf of brand owners based outside Scotland.

67. Some technical changes have been made to clarify the obligations concerning sale of scheme articles. In particular, amendments have been made to clarify that single-use drinks containers ultimately intended for retail sale outside of Scotland may be commercially sold in Scotland.

Regulation 5 – Obligations relating to charging deposits and marketing, offering for sale or selling articles

Background

68. Regulation 5 provides that when a scheme article is sold in Scotland a deposit of 20 pence must be included in the sale price. The seller must also make it clear by providing information to the purchaser that the product is a scheme article and its packaging can be returned in exchange for a deposit, and must inform the purchaser where the item is not a scheme article. These obligations do not apply in the case of

sales of articles in export shops, exclusively for consumption on the premises of sale, or for consumption outside Scotland.

Summary of Responses

69. A significant number of respondents indicated that they felt the deposit should not be set in the Regulations, or that only a minimum deposit should be set. This, it was argued, would give a scheme administrator or producers control of the necessary levers to achieve the scheme packaging collection targets set through the Regulations. Further, such an approach would allow for the deposit to be varied by container size (which is an issue of concern for manufacturers of items often contained in multipacks).

70. Several respondents also called for the Regulations to make clear that the deposit should not be considered part of the sale price of the product, and that it should be displayed separately. This was linked to an interest amongst several respondents in clarifying through the Regulations that the deposit is not subject to VAT.

Committee Recommendations

71. The Committee acknowledged that there are a number of factors which need to be taken into account when setting the deposit level. They concluded that there should be a minimum deposit level, were content with the proposed level of 20p and agreed that the minimum deposit level should be set out in the Regulations.

72. However, the Committee also acknowledged the concerns raised by some stakeholders about the impact that a flat-rate 20p deposit could have on consumer behaviour as well as the potential for such a deposit to impact on packaging design choices, with potential unintended consequences for plastics use and health impacts. The Committee noted the desire of industry to retain a level of flexibility in relation to the deposit and concluded that there should be scope for any scheme administrator to set a variable rate, for example based on product size.

Response

73. The Scottish Government continues to believe that a flat-rate statutory deposit of 20p is most likely to deliver the outcomes being sought through DRS. Based on international evidence, a deposit in the range being proposed is likely to incentivise public participation and so support the delivery of a high-performing scheme. The public consultation on DRS, undertaken in summer 2018, reinforced this point, with more than half of respondents calling for a deposit of 15p or more. Only a third of those who responded to that consultation supported the introduction of a variable deposit.

74. We have carefully considered the wider impacts associated with a 20p deposit. The Scottish Government's 'Deposit Return Scheme: Full Business

Regulatory Impact Assessment'[4] concluded that a DRS of the design being proposed in Scotland (i.e. one with a flat-rate deposit of 20p) could impact consumer choice, incentivising a shift, to some extent, towards purchasing larger-sized products compared to what they were purchasing before. However, the scale of this change is likely to be small and would not be expected to cause consumers to change their choice or preference for a certain brand. The decision to pursue a scheme design which maximises consumer convenience and targets a high capture rate should also help to mitigate this impact. We have not found any evidence to suggest a 20p deposit is likely to result in an increase in negative health outcomes.

75. Based on a flat deposit rate of 20p, modelling work undertaken by the Scottish Government suggests that DRS will result in an initial additional outlay of around £1.40 for those individuals falling within the lowest 10% household income group as defined by the Office for National Statistics. While this money can be reclaimed, it is anticipated that it will then be spent on servicing further deposits and so cannot be redirected to other priorities. The outlay rises to approximately £1.80 for the second-lowest household income decile.

76. We are concerned that the introduction of a variable deposit could increase these costs for consumers. We consider this to be an unnecessary additional cost on the basis that a 20p deposit should act as a sufficient incentive to encourage participation in the scheme, irrespective of the size of containers being purchased.

77. There are also practical challenges associated with affording any scheme administrator a degree of flexibility in the setting of the deposit level(s). The Regulations place responsibility for delivering DRS directly on producers and allow them to appoint a scheme administrator to act on their behalf to meet these obligations. Whilst we expect the majority of producers to appoint a single scheme administrator to act on their collective behalf, this may not always be the case. Where a producer chooses not to appoint a scheme administrator, their products would not necessarily be subject to the same variable deposit levels being operated by other producers. This has the potential to introduce significant complexity and confusion.

78. It is for these reasons that we do not intend to provide for a variable deposit through the Regulations. We are, however, content to commit to a review of the deposit level, the timing of which should take account of the anticipated timeframes for a fully established, high performing scheme. The currently proposed performance targets suggest this will be achieved at the end of the third full year of operation. This would be consistent with the timescales for reviewing the scope of materials to be included in the scheme. We have therefore, at new regulation 32, included a provision requiring that the Scottish Ministers review the Regulations after sufficient time has passed to allow for an assessment of the performance against the targets, taking into account in particular deposit levels, the scope of materials included in the scheme and the targets themselves. Further information is set out in relation to Regulation 32 under the relevant heading below.

[4] https://www.gov.scot/publications/deposit-return-scheme-scotland-full-business-regulatory-impact-assessment/

79. We also accept the argument that the Regulations should be clarified to ensure that the deposit is considered separate to the sale price of the product. Regulation 5 is already robust in requiring that the deposit be displayed separately. We have strengthened this further by clarifying that the deposit is a separate payment.

80. We have consistently indicated our view that the deposit should not attract VAT and we continue to make representations to the UK Government on this basis. However, it should be noted that any decision to recognise the deposit as being VAT exempt is not something that would be effected through these Regulations but rather through agreement with and guidance from HMRC. We will continue to pursue this issue as a matter of priority.

PART 3 – PRODUCERS

Regulation 6 – Producers

Background

81. Regulation 6 defines producers as either the brand owner (for scheme articles branded in the United Kingdom) or the importer (for scheme articles branded outside the United Kingdom).

Summary of responses

82. In line with feedback offered in relation to Regulation 4, several respondents expressed an interest in allowing wholesalers or retailers to act as producers on behalf of brand owners based elsewhere in the UK. Linked to this, there was a suggestion that the definition of 'importer' should be adjusted so as to cover any person bringing a scheme article into Scotland, rather than bringing it into the UK (as is currently the case).

83. A few respondents also suggested the introduction of a *de minimis* to exempt small producers from the requirements of the Regulations.

Committee recommendations

84. The Committee noted the potential for some impacts on small producers to be mitigated through the approach taken to the scheme's implementation. However, it acknowledged the significant concerns which exist amongst small businesses about DRS and urged the Scottish Government to engage directly with smaller producers in advance of finalising the Regulations, considering what support can be provided to these bodies.

Response

85. It is felt that the Regulations are sufficiently clear about who is intended to assume the obligations of producers and Ministers are satisfied that the legislation delivers the Government's policy intention as currently drafted. As previously outlined, it is not considered appropriate for producers to be given the option of

passing their producer obligation onto wholesalers or retailers buying their goods and bringing them into Scotland.

86. Whilst we are keen to ensure that DRS does not represent a disproportionate burden for any producer, we believe it is important for all businesses (including small producers) to meet their responsibilities when it comes to the management of drinks packaging at end of life. It is for this reason that we do not intend to introduce a *de minimis* threshold for overall participation in the scheme. Other amendments are, however, being made to the Regulations in order to support the effective participation of small producers in DRS.

Regulation 7 – Application for registration of a producer

Background

87. This regulation sets out the process to be followed by a producer who is seeking registration with SEPA.

Summary of responses

88. A significant number of respondents commented that the producer registration fee payable to SEPA may be too high (particularly for smaller producers), with several respondents questioning whether a flat-rate registration fee for both large and small producers was fair and/or appropriate.

89. Concern was also raised over the nature of the reporting obligations being placed on producers in the first year of the scheme's operation, at which point businesses may not be able to robustly disaggregate data in order to accurately report the number of containers they are placing on the Scottish market.

Committee Recommendations

90. The Committee heard evidence from a range of stakeholders arguing that the producer registration fee should be tiered so small producers pay less. The Committee concluded that such an approach had some merit.

Response

91. The Scottish Government is receptive to the arguments which have been put forward regarding the introduction of a tiered producer registration fee and will amend the Regulations to introduce a *de minimis* threshold, meaning those producers with a taxable turnover of £85,000 or less will not be required to pay a fee for registration. This threshold is consistent with that adopted for the purposes of VAT registration.

92. It is our intention that SEPA will work with all affected producers, providing advice to support compliance with reporting obligations established through the Regulations.

93. Some further technical amendments have been made to this regulation and regulation 8 to clarify the registration process in cases where a producer has had their registration cancelled following persistent failure to comply with obligations.

Regulation 9 – Cancellation of registration of producers

Background

94. This regulation governs the process for cancelling the registration of a producer.

Summary of responses

95. It was noted that SEPA is required to take note of any representations made by a scheme administrator but not a producer when considering whether to cancel that producer's registration.

Response

96. The Regulations are being amended to require SEPA to take note of representations made by the producer in question as well as those of a scheme administrator, and to ensure that the producer and scheme administrator are made aware of the opportunity to make such representations.

Regulation 10 – Producer obligations: general

Background

97. This regulation lays out the general obligations of registered producers in complying with their duties.

Summary of responses

98. A few respondents called for this regulation to be amended to exempt producers from wider packaging producer responsibility arrangements for the purposes of any scheme articles they have placed on the market. Those arrangements are provided for under The Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (as amended).

Committee Recommendations

99. The Committee concluded that producers should not be required to participate in the existing packaging producer responsibility scheme given that their environmental obligations will in future be addressed through DRS. The Committee therefore asked the Scottish Government to confirm that packaging falling within the scope of DRS would be excluded from the existing scheme.

Response

100. The Scottish Government is clear that deposit return is a form of extended producer responsibility, and therefore packaging that is being dealt with through DRS should be exempt from alternative packaging producer responsibility arrangements. We have set this position out to the other UK administrations in a letter issued by the Cabinet Secretary for the Environment, Climate Change and Land Reform on 7 October 2019, and will continue to explore how this policy can best be given effect. The delivery of this objective would require an amendment to the above noted UK statutory instrument and could not be achieved through these Regulations. Accordingly, no amendments are planned in respect of regulation 10 with respect to producer responsibility.

101. Minor consequential amendments have been made to this regulation.

Regulation 11 – Producer obligations: directly registered producers

Background

102. This regulation sets out the responsibilities of those producers who register directly with SEPA, rather than through a scheme administrator. These include:

- collection of a target percentage of the scheme packaging which they place on the market in a calendar year
- collection of their own scheme packaging from return points
- payment of any reasonable handling fee charged by a return point for each item of scheme packaging collected
- accepting the return of their unsold scheme packaging from wholesalers and retailers
- reimbursing deposits for any packaging returned or collected

103. It should be noted that regulation 13 provides for a scheme administrator to assume these obligations on behalf of a producer.

Summary of responses

104. A significant number of respondents commented on the provisions concerning the charging of a reasonable handling fee by return points. Some support was expressed for a flat-rate handling fee payable to manual return points, those operating reverse vending machines and hospitality retailers. Respondents also sought clarity over the ‘infrastructure’ costs to be covered as part of any handling fee and argued that the fee should take account of the value of lost sales space as opposed to the rental value of lost floorspace incurred by retailers. There was a suggestion that the costs associated with vehicles used for the provision of a distance sales takeback service should be covered even in instances where the vehicle in question is not used *solely* for that purpose (the draft Regulations did not recognise these costs).

105. Several respondents also queried the requirement for producers to accept the return of ‘unsold and unemptied’ drinks products directly from retailers and wholesalers.

106. Finally, a significant number of respondents raised concerns regarding the suitability of the collection targets contained in schedule 3. It was noted that the proposed DRS was ambitious in its scope and would require a significant shift in consumer behaviour. Accordingly, it was suggested that the collection targets should be relaxed, either by extending the ‘ramp-up’ period or by reducing the targets themselves.

Committee Recommendations

107. The Committee specifically considered the arrangements for payment of a handling fee to return points and concluded that DRS should be cost-neutral for retailers. Accordingly, they felt the handling fee should represent the complete cost of participating in the scheme. The Committee requested further detail from the Scottish Government on the arrangements for the setting of the handling fee as well as details of any appeal/dispute mechanism.

108. Finally, the Committee considered that, similar to retailers, the introduction of the scheme should be cost-neutral for wholesalers and sought clarity from Ministers on how this would be achieved.

Response

109. We are clear that participation in DRS should be cost-neutral for return points and are broadly satisfied that regulation 11 achieves this. We continue to believe it is appropriate to vary handling fees to reflect different return-point operating models and their associated costs. In particular, it remains our view that the handling fee payable to hospitality retailers should only account for the value of materials used for the collection and storage of scheme packaging. Hospitality businesses already manage the collection of packaging sold on their premises, although we appreciate modest adjustments may be necessary. We anticipate that those businesses will, however, benefit financially from DRS, with producers in the future covering the costs associated with the collection of scheme packaging which currently fall on hospitality retailers.

110. We have amended the Regulations to clarify that ‘infrastructure’ is intended to refer specifically to reverse vending machines and we have also revisited the current drafting so as to allow for *all* vehicle costs associated with the operation of takeback services to be covered through the handling fee. SEPA will have powers to carry out investigation and enforcement action against a person that is not complying with their obligations under the regulations – including failure to pay a handling fee – and beyond that, any dispute regarding the payment of a reasonable handling fee would ultimately be a matter for the courts.

111. Turning to the Committee's calls for the introduction of a mechanism through which to compensate wholesalers for the wider impact DRS will have on their operating costs, the Scottish Government does not intend to establish such a mechanism through the Regulations.

112. It is acknowledged that businesses throughout the supply chain will incur costs as a result of the introduction of DRS in Scotland. The costs to be incurred by wholesalers will relate largely to stock-management arrangements, including stock monitoring, storage and distribution. Similar costs will also be incurred by producers and also by large retailers. It is important to note that the handling fee paid to retailers who are acting as a return point is to meet costs associated with the delivery of an additional service to the public following the scheme's introduction, i.e. to accept the return of scheme packaging and reimburse deposits. The handling fee is *not* designed to meet the wider costs associated with supplying the Scottish drinks market. On a similar basis, the Scottish Government does not consider that wholesalers should be entitled through the Regulations to recover such costs from producers. We also note the Committee's view that many of the wider operating costs highlighted by wholesalers could be mitigated should industry choose to proceed with the introduction of a complementary DRS elsewhere in the UK on the same or similar timetable as is being proposed in Scotland.

113. With regards to the concerns expressed regarding the potential for the scheme to result in unopened products being returned to producers by wholesalers or retailers, the Regulations currently require that producers only accept returned scheme packaging rather than returned scheme articles. It is therefore clear that wholesalers and retailers should not expect producers or a scheme administrator to take back scheme articles which are full. Accordingly, we do not believe there is a need to change the Regulations in this area.

114. Finally, the Scottish Government has noted the concerns expressed regarding the proposed collection targets. We are clear that our climate change obligations dictate the need for swift and decisive action to improve our use of resources and so, whilst we recognise the ambitious nature of the targets being set, we are nevertheless satisfied as to their appropriateness.

115. In setting the targets, we have noted the experience of other European schemes where a progressive increase in performance over a three-to four-year period from scheme introduction has been evident. This suggests that a three-to four-year ramp-up period to achieve the 'steady-state' collection target is feasible. We have also based our approach on the fact that a number of successful schemes have secured a capture rate of 90% or more once fully established. Beyond this, we have, at new regulation 32, included a provision requiring that the Scottish Ministers review the Regulations after sufficient time has passed to allow for an assessment of the performance against the targets, taking into account in particular deposit levels, the scope of materials included in the scheme and the targets themselves. Further information is set out in relation to Regulation 32 under the relevant heading below.

116. Minor consequential amendments have also been made to this regulation.

Regulation 12: Producers registered through a scheme administrator

Background

117. This regulation makes provision about obligations on producers whose registration and obligations under regulation 11 are discharged by a scheme administrator.

Response

118. Whilst no thematic issues were highlighted in relation to these provisions, the Scottish Government has used the opportunity offered by the pre-laying period to further consider the appropriateness of the requirements set out through this regulation.

119. It is the intention that Scotland's DRS be owned by industry with targeted regulatory oversight. This approach will allow Scottish Ministers to ensure that operation of the scheme has a minimal impact on public resources, consistent with the concept of producer responsibility. The question of National Accounts sector classification is relevant in this regard and is described further in relation to regulations 13, 14 and 16.

120. In order to achieve this outcome, it is important to ensure that Ministers do not exert excessive control over operational aspects of the scheme, either directly or via regulations. This includes any relationships established between producers and scheme administrators. It is for this reason that Ministers have removed the requirement previously included at regulation 12 which requires a producer to pay their scheme administrator a sum equal to the deposit for each scheme article they place on the market. Similarly, Ministers do not intend to use the Regulations as a mechanism through which to structure any other fees paid by producers to a scheme administrator. We instead believe that any such transactions should form part of a commercial agreement between these parties rather than a legal obligation.

121. Minor consequential amendments have also been made to this regulation.

PART 4: SCHEME ADMINISTRATOR

Regulation 13: Scheme administrator

Background

122. Regulation 13 provides for a scheme administrator, defines what a scheme administrator is and provides for their approval by Scottish Ministers.

Summary of public consultation responses

123. The majority of respondents who expressed an opinion regarding the governance of the scheme administrator signalled support for a privately owned and operated administrator. A significant number of respondents, the majority of whom

were drinks producers or trade bodies representing such organisations, signalled that the Regulations should provide for a single scheme administrator to be designated to manage the scheme. There were, however, differing views about the level of control that Government should reasonably exercise over any body approved to operate as a scheme administrator.

124. Some support was expressed for control to be exerted by Government and/or Parliament over, for example, the composition of any Board of a scheme administrator. In particular, there were a number of calls to ensure that the wholesale and distribution sector was sufficiently well represented in the organisation's management structures, and views were also expressed about the importance of ensuring that retailers and small producers were adequately accounted for. There was a suggestion that a reference forum be established to provide a mechanism through which stakeholders could feed into the management of any scheme administrator.

125. Finally, there were a number of respondents who called for the scheme administrator to assume responsibility for aspects of the scheme which currently rest with Scottish Ministers, such as the scope of materials covered and the deposit level.

Committee Recommendations

126. While the Committee signalled a preference for the establishment of a single scheme administrator to operate DRS, they accepted that flexibility may be required.

127. The Committee was also content that the Regulations allowed for an industry-led scheme administrator to be appointed but expressed a view that all parts of the supply chain (including small business, local authorities, wholesalers, producers, retailers and the waste management sector), the environmental Non-Governmental Organisation sector and Trades Unions should be represented in its governance.

Response

128. As a form of extended producer responsibility, DRS requires producers to bear financial and organisational responsibility for the management of the waste stage of their product's life cycle. It follows that it should be for industry to assume responsibility for the management of the scheme on an ongoing basis.

129. In reaching this view, Ministers have taken account of the experience of other countries which have already successfully introduced deposit return schemes, many of which have industry-owned and operated scheme administrators.

130. The Climate Change (Scotland) Act 2009 allows for Scottish Ministers to designate one or more scheme administrators, and provides Ministers with a power of direction over that scheme administrator. However, it is the view of Ministers that the scheme should be owned and operated by producers. Therefore, the scheme administrator should have sufficient flexibility to run the scheme in a way which best suits its members and which allows it to be commercially successful. Furthermore, the exercise of such powers of control by Ministers would risk any scheme administrator attracting a public-sector accounts classification. This would carry

potentially significant policy and budgetary implications and, in particular, could result in a situation whereby a scheme administrator would undertake spending that would count towards Scottish Government budgetary limits.

131. Any steps taken by Ministers or Parliament to exert control over, for example, the composition of a scheme administrator's Board could also affect decisions about accounts classification, which in turn could undermine the producer-responsibility principle which has guided our approach.

132. It is for this reason that the Regulations:

- do not designate a single scheme administrator to operate the scheme
- afford any scheme administrator significant autonomy in relation to operational decision-making

133. Based on the above, there are no plans to adjust regulation 13 beyond the minor correction at paragraph (1).

Regulation 14: Application for approval of a scheme administrator

Background

134. Regulation 14 sets out the application process for any person wishing to be approved as a scheme administrator.

Summary of public consultation responses

135. Several representations were made in relation to regulation 14. The main comment concerned the nature of the information to be included in any application by a prospective scheme administrator. Specifically, the response in question suggested that additional information be sought on the applicant's wider proposed operating practices, including:

- payment of the living wage
- procurement of services from suppliers who are third sector operators or social enterprises
- plans to support domestic material reprocessing
- plans to facilitate charitable giving

Committee Recommendations

136. The Committee indicated that Ministers should direct the scheme administrator to facilitate the charitable giving of deposits.

Response

137. As outlined in relation to regulation 13, in order to avoid any scheme administrator attracting a public sector accounts classification, it has been important to ensure that Parliament and/or Ministers do not assume the ability to determine the general policy or programme of that organisation.

138. Whilst it is legitimate for Scottish Ministers to satisfy themselves through the scheme administrator approval process that a prospective scheme administrator will be able to fulfil its legal obligations, we do not consider it would be possible or appropriate to approve or otherwise an application based on a prospective scheme administrator's wider proposed operating practices.

139. Accordingly, there are no plans to adjust regulation 14. However, it should be noted that any application for scheme administrator approval must include *any* information requested by Scottish Ministers. We will explore how this provision can be utilised to ensure appropriate transparency around the wider operating practices of any scheme administrator.

140. Minor amendments have been made to this regulation in response to comments from the Delegated Powers and Law Reform Committee.

Regulation 16: Obligations of a scheme administrator

Background

141. Regulation 16 sets out the legal obligations that a person will assume once they are approved to act as a scheme administrator.

Summary of public consultation responses

142. Limited feedback was offered on regulation 16, with respondents mainly focusing on the amount of control that Scottish Ministers should reasonably exercise over operational aspects of the scheme once a scheme administrator is appointed. There was a suggestion that the scheme administrator should assume responsibility for aspects of the scheme which currently rest with Scottish Ministers, such as the scope of materials covered and the deposit level.

Committee Recommendations

143. The Committee concluded that sufficient autonomy should be afforded to any scheme administrator when performing their functions, with the body having flexibility in relation to:

- setting of a variable deposit level (covered elsewhere in this report)
- management of return point exemptions (covered elsewhere in this report)
- outsourcing of activities

144. The Committee further recommended that any scheme administrator be required to produce a strategic environmental assessment on a yearly basis in order to demonstrate its approach to delivery of DRS is achieving environmental benefits.

Response

145. The application process requires that a prospective scheme administrator clearly demonstrates to Scottish Ministers its ability to deliver a viable operation which will be able to discharge its obligations under the Regulations. Beyond this,

the Regulations afford a scheme administrator significant flexibility when determining *how* best to satisfy those legal obligations, including decisions about whether to outsource aspects of its operations.

146. Ministers believe this arrangement strikes the correct balance and are confident that, with appropriate regulatory oversight, it will deliver the improvements in recycling they wish to see.

147. We note the Committee's suggestion that the scheme administrator demonstrates its activities are achieving environmental benefits through the publication of an annual strategic environmental assessment.

148. International experience suggests that a scheme administrator will be proactive in demonstrating how their activity is delivering environmental benefits in the form of a more circular economy. We therefore do not see an immediate need to legislate for this. Nevertheless, Regulation 16(b) currently requires the scheme administrator to provide such additional information as the Scottish Ministers may request to assist in monitoring compliance with its obligations. This can include information about the environmental impact of its operations and Ministers could use the provision to request evidence not routinely published by a scheme administrator.

149. Accordingly, there are no plans to adjust regulation 16 beyond minor technical amendments. Minor amendments have also been made to regulation 17 in response to comments from Delegated Powers and Law Reform Committee, and to place the requirement to notify producers in the event a scheme administrator has its approval withdrawn on SEPA rather than that former scheme administrator.

PART 5: RETAILERS AND RETURN POINTS

Regulation 19: Retailer obligations

Background

150. Regulation 19 sets out the obligation of retailers to operate a return point and display certain relevant information, except for specific classes of retailers (such as export shops) or retailers which have been exempted by Scottish Ministers.

Summary of public consultation responses

151. There were calls from a few respondents for an exemption from the obligations set out under regulation 19 for retailers operating an entirely on-trade hospitality business.

152. Some respondents also expressed the view that small and/or temporary premises should be exempted from the obligation to operate a return point. Other respondents sought exemptions for other types of retailer, for example pharmacies or mostly on-trade hospitality retailers which completed only a small number of sales for consumption off the premises.

153. There was a suggestion that a dispensation be afforded to return-point operators who, on religious or ethical grounds, did not wish to accept the return of containers which had held alcoholic drinks.

154. Finally, there was a request that retailers only be required to accept the return of scheme packaging made from a material sold by that retailer, or ought to be able to seek an exemption from accepting items of scheme packaging made of other materials.

Committee Recommendations

155. The Committee concluded that universal accessibility will be fundamental to the successful operation of DRS. Whilst noting the calls for automatic exemptions, it believed such an approach risked leaving areas without adequate provision, carrying significant consequences for some communities and for the effective operation of the scheme.

Response

156. An exemption from operating a return point for entirely on-trade hospitality retailers is consistent with the intention of the Regulations and such an exemption has been included in the final Instrument.

157. We note the representations regarding the need to afford a dispensation for return point operators who, on religious or ethical grounds, do not wish to accept the return of containers which had held alcoholic drinks. We have amended the Regulations to include a ‘reasonable excuse’ defence in relation to the acceptance of scheme articles by a return-point operator in order to account for situations such as this.

158. Automatic exemptions for retailers of a specific type, beyond closed-loop hospitality businesses and those already mentioned in the draft Regulations, would risk violating the principle that it should be as easy to return a container as it was to buy one. It is on this basis that we do not intend to introduce further automatic exemptions; we note the Committee’s support for this approach.

159. We do not intend to limit return-point operator obligations to only those scheme packaging materials sold by the business in question. We are concerned that this could result in retailers adjusting product lines in order to avoid collecting certain materials falling within the scope of the scheme. We have consistently stated that Scotland’s DRS should favour no particular material and we believe the Regulations as currently drafted achieve this objective.

Regulation 20: Return points

Background

160. Regulation 20 requires return-point operators to accept and retain scheme packaging for collection by producers, subject to specific exceptions.

Summary of public consultation responses

161. Several respondents welcomed the provision for return-point operators to refuse to accept packaging under certain circumstances. However, a few respondents asked for greater clarity on, or additions to, the reasons for which packaging could be refused. Specifically, there was a suggestion that return-point operators be allowed to refuse packaging that is not intact. Several respondents also commented that the Regulations should set a reasonable limit on the number of containers a return point is required to accept.

162. Finally, there was a request that the Regulations prescribe a means through which scheme packaging could be easily identified by return points.

Response

163. We agree that return-point operators should be allowed to refuse to accept packaging that is not intact. While we consider that regulation 20(4)(a) already largely accounts for this scenario, we are happy to make this explicit in the final Regulations.

164. We also accept the view that return points should not have to take back a manifestly unreasonable number of containers and have amended the Regulations to allow return points to refuse to accept items if the return comprises a number of items disproportionately greater than the number of scheme articles that retailer sells on average in a single transaction.

165. Subject to these changes, we consider that the Regulations adequately account for the range of situations in which it would be reasonable for a return-point operator to refuse the return of scheme packaging.

166. We acknowledge the need to support return points in effectively identifying packaging falling within the scope of the scheme. We have therefore amended Schedule 1 of the Regulations to require that, as part of the producer-registration process, producers provide details of all scheme articles being marketed in Scotland. These details (for example, the product name and European Article Number barcode or similar identifier) may then be published by SEPA and used by return-point operators to support the identification of deposit-bearing containers. In practice, we believe publication will be managed by a single scheme administrator with the agreement of their member producers. We also anticipate that some producers will themselves take additional steps to ensure their products are easily identifiable as scheme packaging.

Regulation 21: Takeback services

Background

167. Regulation 21 places obligations on retailers selling via distance sales to provide a takeback service to consumers who have purchased such items.

Summary of public consultation responses

168. A significant number of respondents offered views on Regulation 21, with several participants seeking clarification on the intention and effect of the takeback requirements. A few respondents suggested the introduction of a *de minimis* threshold beyond which the requirements should take effect.

169. Several respondents asked for exemptions from the takeback provisions for:

- all online-only retailers
- retailers selling through a third-party marketplace
- 'online hospitality' retailers such as takeaway providers

170. Other respondents asked that the Regulations identify a maximum number of containers which an online retailer would have to accept as part of any takeback service offered.

Committee Recommendations

171. The Committee considered the inclusion of online sales to be critical to the effective implementation of the scheme and to meeting the recycling targets. It recognised that the practicalities of operating the scheme for online retailers is primarily a matter for industry and/or any scheme administrator.

Response

172. Whilst it is accepted that the majority of single-use drinks containers sold in Scotland will be purchased from physical retail sites, a significant and increasing proportion of sales now take place online. We believe it is vital that consumers who purchase items online have the same opportunity to return these as those who habitually buy from physical stores. This is particularly important to ensure fair access to the scheme for those who may be less mobile. It also ensures a level playing field between physical and online retailers.

173. In light of representations made, we have considered adjusting the Regulations in order to ensure that takeback services are operated on a proportionate and efficient basis. However, any approach that could be taken would risk compromising the vital provision of takeback services for those reliant on distance sales. Furthermore, we believe that many of the concerns raised by distance sellers are unlikely to be realised in practice as, for the most part, physical return points will represent the most convenient and efficient way for customers to recover deposits. Consequently, the demand for takeback services is likely to be largely driven by those who rely on online grocery deliveries. Distance sellers operating such services should have the necessary infrastructure to meet this demand.

Regulations 22-24: Exemptions for return points

Background

174. Regulations 22-24 set out the process by which Scottish Ministers may exempt a retailer from operating a return point.

Summary of public consultation responses

175. A significant number of respondents offered views on regulation 22, with fewer comments being received on regulations 23 and 24.

176. Respondents asked for greater clarity on the criteria to be adopted by Scottish Ministers when assessing an application for exemption. Some also called for the inclusion of additional criteria in the Regulations, with a suggestion that Ministers be obligated to take account of, for example, whether any retailer seeking an exemption was selling food to go. Some suggested the establishment of a regular review process in order to ensure that any exemptions continued to be appropriate.

177. Health and safety implications for small retailers which prepare fresh products on site, for instance bakeries, were also raised. Particular concerns were raised about the inclusion of glass and the potential food-safety risks this could carry.

178. A significant number of respondents suggested that applications for exemptions should be assessed by any scheme administrator, rather than by Scottish Ministers. Finally, on the basis that Scottish Ministers continue to hold responsibility for the exemptions process, it was suggested that the Regulations obligate any scheme administrator to make exemption applications, not retailers.

Committee Recommendations

179. The Committee noted a desire amongst stakeholders for the Regulations to provide greater clarity on exemptions and the associated application process.

180. The Committee went on to conclude that the details of any such process should be delegated to any scheme administrator, guided by an objective, fair and transparent policy framework agreed by the Scottish Government. The Committee encouraged proactive engagement with retailers at an early stage in developing the exemptions process.

Response

181. The draft Regulations allow for a scenario in which producers choose to discharge their DRS obligations individually rather than through a scheme administrator. It is therefore theoretically possible that DRS could operate without a single scheme administrator being in place. Accordingly, it has been necessary to obligate the Scottish Ministers rather than a scheme administrator to oversee the approval and refusal of exemptions in order to guarantee the existence of a functioning process. We would expect to work collaboratively with any scheme

administrator to ensure that there is an efficient and effective process that is aligned with their proposed operating model. Nevertheless, ultimate responsibility would rest with Ministers.

182. Regulation 22(1) gives Scottish Ministers the power to grant an exemption irrespective of whether an application has been made by a retailer. Any scheme administrator would therefore be free to make an application to Ministers which would be considered in the same way as an application directly from a retailer.

183. We consider that the reference to the local authority area in 22(1)(b) is unnecessary and introduces potential confusion so we have removed it. Subject to this change, we are satisfied that the Regulations as drafted establish a clear and proportionate process to facilitate exemptions.

184. With regard to premises where fresh food is being prepared, we do not think a sectoral exemption from having to act as a return point would be proportionate as it could lead to significant gaps in coverage of return points. However, we have amended the Regulations to allow an exemption to be granted where it is not possible or reasonable to operate a return point on a retail premises without significant risk that the retailer would in consequence be in breach of legal requirements relating to:

- food safety
- health and safety
- fire safety
- environmental protection
- public health

185. The final Regulations include a requirement for exempted retailers to notify Scottish Ministers of any material change in the circumstances which led to the exemption being granted; failure to do so will be an offence. Accordingly we do not believe that it would be necessary or proportionate to review individual exemptions as was suggested by some respondents. The Regulations will however be subject to a review process under new Regulation 32, which will provide an opportunity for any problems with the process to come to the attention of the Scottish Ministers, and to be reported to the Scottish Parliament, were this not possible at any other time.

Regulation 25: Voluntary return point operators

Background

186. Regulation 25 makes provision for a person to apply to register with Scottish Ministers to operate a voluntary return point from premises other than retail premises.

Summary of public consultation responses

187. Several representations were made on regulation 25, the majority of which indicated that applications to operate a voluntary return point should be assessed by any scheme administrator, rather than by Scottish Ministers.

Committee Recommendations

188. The Committee considered that the operation of voluntary community-based return point solutions would be vital to the scheme's success. Accordingly, they welcomed the steps being taken through the Regulations to make provision for such an approach.

189. The Committee went on to identify that any scheme administrator should play a role in assessing the need for additional voluntary return-point provision in consultation with communities across Scotland.

Response

190. As stated in relation to regulations 22-24, the draft Regulations allow for a scenario in which producers choose to discharge their DRS obligations individually rather than through a scheme administrator. It is therefore theoretically possible that DRS could operate without a single scheme administrator being in place. Accordingly, it has been necessary to obligate the Scottish Ministers rather than a scheme administrator to oversee the approval of voluntary return points in order to guarantee the existence of a functioning process. While we expect to work closely with any scheme administrator on such matters, the final decision to approve an application will be for Ministers to take.

191. We expect a scheme administrator will be proactive in identifying those parts of the country which require additional return-point infrastructure, with the establishment of that infrastructure being necessary to support the scheme administrator in meeting its statutory collection targets. However, we do not believe it would be appropriate for Ministers to direct the efforts of a scheme administrator in this regard as to do so could raise questions about the extent of Ministers' influence over a privately owned and operated entity.

192. We also believe there is significant scope for community-based organisations to proactively establish and operate return points. The operation of such a return point could help drive footfall into community facilities and create additional opportunities for charitable giving. Ministers are keen to facilitate such efforts, as long as their operation would not cause a significant additional burden to producers or a scheme administrator disproportionate to the benefits they bring to the scheme.

193. In light of the above, there are no plans to substantively adjust Regulation 25 other than to include a requirement for voluntary return point operators to notify Scottish Ministers of any material change in the circumstances which led to their approval; failure to do so will be an offence. Other minor technical amendments have also been made.

PART 6: APPEALS OR REVIEWS

Regulations 26-29: Right of appeal or review and procedure

Background

194. Regulations 26-29 establish a process for appeals and reviews against decisions of SEPA or the Scottish Ministers in relation to registration of producers and approval of scheme administrators.

Summary of public consultation responses

195. Several representations were received on regulation 26, with fewer views expressed in relation to regulation 27. Most respondents focused on the need to include a review mechanism where Scottish Ministers had chosen not to grant an exemption to a return point operator and/or approve the establishment of a voluntary return point.

196. There were some calls for greater clarity and transparency in relation to the process. For example, one respondent stated that it was inappropriate for Scottish Ministers to be able to appoint the person deciding any appeal or review.

Response

197. We continue to work closely with stakeholders on the development of a robust and transparent process for the consideration of applications concerning return-point exemptions and the establishment of voluntary return points, with recognisable guidelines being developed to support decision-making. Consequently, we are confident that applicants will have sufficient clarity about the circumstances in which such requests will be approved and should prepare applications accordingly. Nevertheless, we acknowledge there may be limited instances where an applicant wishes to dispute a decision of Ministers, and the Regulations as currently drafted envisage such appeals being pursued through the courts. We see no reason to deviate from this.

198. The position with regards to the operation of appeals and reviews concerning producer registration and scheme administrator approval decisions is somewhat different. Such decisions will take account of a wider range of factors, have the potential to be more complex in nature and will carry greater consequences. They are also likely to be more subjective in nature. These factors mean we see clear merit in including an appropriate process for appealing producer-registration decisions and reviewing scheme administrator approval decisions. The process for operating appeals and reviews which is set out in the draft Regulations is in line with standard practice for appeals against decisions by a public body and reviews of decisions of Scottish Ministers. Whilst we have sought to improve technical aspects of the process through some minor changes to these regulations, we do not intend to make substantive changes to this aspect of the legislation.

PART 7: ENFORCEMENT AND OFFENCES

Regulation 30: Enforcement authority

Background

199. Regulation 30 provides powers for SEPA to enforce the requirements arising under the Regulations.

Summary of public consultation responses

200. A significant number of representations were made in relation to regulation 30, with a range of sectors including drinks producers and retailers offering views.

201. Questions were raised about the scope of enforcement powers available to SEPA as the enforcement authority, with calls to expand these so as to facilitate the seizure of vehicles involved in unlawful activities linked to DRS. It was also suggested that SEPA should be able to perform spot-checks on producers, wholesalers, and retailers, and demand proof that a given drinks container is a 'scheme article' that has had deposits paid on it.

202. In relation to the enforcement of statutory performance targets, there were calls for SEPA to take a flexible and supportive role to compliance monitoring in the early years of the scheme's operation.

203. Finally, clarity was sought on SEPA's ability to undertake enforcement action in respect of an organisation based in another jurisdiction.

Committee Recommendations

204. The Committee recognised the need for a robust enforcement framework to be established in advance of DRS becoming operational. They sought assurance that the necessary compliance monitoring and enforcement powers required by SEPA would be in place in advance of the scheme commencing.

Response

205. As currently drafted, the Regulations provide for wide-ranging criminal penalties (on summary conviction a fine not exceeding the statutory maximum of £10,000, or on indictment and conviction an unlimited fine).

206. They also provide SEPA with extensive examination and investigative powers, the ability to access premises and to require the provision of documents and records to support enforcement activity. These tools have been used effectively by SEPA in other contexts. We have, however, built on the powers available to SEPA by including provision for the issuing of notices seeking the provision of specified information to support enforcement activity.

207. It is the intention that a separate Instrument be brought forward to include specified offences in relation to DRS in the Environmental Regulation (Enforcement

Measures) (Scotland) Order 2015. The Order, to be laid alongside the final Regulations, will provide SEPA with the power to impose fixed monetary penalties (FMPs) and variable monetary penalties (VMPs), and to accept enforcement undertakings to better tackle non-compliance. These enforcement measures are designed to offer SEPA a proportionate set of tools for dealing with relevant offences.

208. SEPA will be able to undertake enforcement action against any person with a legal presence in Scotland. They will be able to withdraw the registration of any producer supplying scheme articles to the Scottish market. Ministers are satisfied that the above suite of enforcement powers are sufficient to support compliance with and enforcement of the Regulations.

Regulation 31: Offences

Background

209. Regulation 31 provides for offences, and for penalties on conviction of an offence.

Summary of public consultation responses

210. Again, a significant number of representations were made in respect of this regulation, the majority coming from drinks producers (or trade bodies acting on their behalf).

211. Respondents called for the introduction of a new offence to apply where a wholesaler or retailer fails to keep appropriate records evidencing that a deposit has been paid in respect of any scheme articles being marketed for retail sale in Scotland. There were also calls for the introduction of more stringent penalties for any individual who chooses to market a product as a scheme article where the producer of the product has made clear that it is not intended for retail sale in Scotland.

Response

212. Where a person commits an offence under Regulation 4 by selling an article which is either (i) marketed by a producer who is not registered with SEPA or (ii) not intended for retail sale in Scotland, the Regulations already provide for wide-ranging criminal penalties (on summary conviction a fine not exceeding the statutory maximum of £10,000, or on indictment and conviction an unlimited fine). We believe this represents a sufficient deterrent to anyone who may wish to falsely present a product as a scheme article intended for retail sale in Scotland. SEPA guidance will inform retailers and wholesalers of their obligations to charge the deposit and how they can evidence discharging this obligation, which could involve the keeping of records.

213. Beyond this, consequential amendments have been made to this regulation to reflect amendments made throughout the regulations, and to ensure there are appropriate associated enforcement mechanisms, including the addition of an

offence of knowingly or recklessly supplying false information in connection with an application or notification under the regulations. Further minor amendments have been made to support the operation of the enforcement Order detailed above.

PART 8 – REVIEW OF THESE REGULATIONS

Regulation 32 – Duty to review these Regulations

Background

214. This is a provision that was not included in the draft Regulations.

Summary of public consultation responses and Committee recommendations

215. This provision was not included in the draft Regulations that were consulted on, and therefore was not specifically commented on.

216. However, comments were made under a number of other provisions suggesting a review after a set period to ensure the Regulations remain fit for purpose, including for the materials in scope, the deposit level and the collection targets.

Response

217. As indicated under those provisions where a review was called for, we agree that a review should be committed to in order to provide reassurance that the effectiveness of the Regulations is being kept under consideration. As the introduction of deposit return is a significant shift in our waste and resources policy, it is appropriate that the requirement for a review exists in the Regulations.

218. This provision therefore requires Scottish Ministers to undertake a review of the operation and effect of the Regulations by 1 October 2026. This would give sufficient time for the scheme to achieve ‘steady state’ and a review to be undertaken once all producers/scheme administrators have reported on their work to achieve the 90% target.

219. The regulation stipulates that Scottish Ministers should in particular consider the deposit level, the materials in scope and the targets. However, it does not limit the review to these issues only.

220. Furthermore, Scottish Ministers will be required to take note of the views of SEPA, any scheme administrators and any other persons they consider appropriate.

221. Following the review it will be for the Scottish Ministers to consider whether to leave the Regulations as they are or to amend them. A further instrument would be needed to amend the Regulations.

ANNEX A

Cabinet Secretary for Environment, Climate Change and Land Reform
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Gillian Martin MSP
Convener
Environment, Climate Change and Land Reform Committee
Room T3.40
The Scottish Parliament
Edinburgh
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Your ref:
Our ref:

5 December 2019

Dear Gillian

Thank you for the opportunity to appear before the Environment, Climate Change and Land Reform Committee on 19 November to give evidence on the Scottish Government's draft Deposit and Return Scheme for Scotland Regulations.

In the course of that session I agreed to write to the committee providing further information on the potential for additional materials to be included in our proposed scheme and, specifically, whether this would require an amendment to the above Regulations.

We have undertaken a further analysis of this point and concluded that it would be possible for industry to voluntarily extend the scope of materials to be included in the scheme, but that there are clear advantages to legislating for any such change. More specifically, a legislative approach would ensure that the legal obligations placed on producers and retailers in relation to the scheme will apply consistently across all materials.

A decision by industry to voluntarily add materials to the scheme without corresponding legislation would, for example, result in a situation whereby some materials attracted statutory collection targets whilst others would not. There would also be no statutory obligation on any parties to participate in the scheme with respect to the 'new' materials. Such an arrangement could result in a situation whereby individual retailers choose not to accept the return of certain materials

because they are not legally obligated to. As the enforcement authority for the scheme, the Scottish Environment Protection Agency would have no powers to intervene in such a scenario.

The Scottish Government wants to establish a scheme that maximises consumer participation and represents the best possible opportunity to drive the increases in recycling we wish to see. We believe the adoption of legislation which applies equally across all in-scope materials will help us to achieve these objectives.

As I outlined in my evidence to the Committee, we are open to expanding the scope of materials to be included in the scheme at a later date and welcome the interest being shown by packaging producers who wish to participate. Any expansion would involve an amendment to the above Regulations which would be subject to the Scottish Parliament's affirmative procedure.

I hope this reply is helpful.

ROSEANNA CUNNINGHAM

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