

Julie James MS
Minister for Climate Change

14 March 2023

Dear Julie

The Packaging Waste (Data Collection and Reporting) (Wales) Regulations 2023

At our meeting this week we considered your letter dated 10 March 2023; which follows your letter to us on 1 March 2023 and the withdrawal of The Packaging Waste (Data Collection and Reporting) (Wales) Regulations 2023 (the Regulations) on 8 March 2023.

Your letter of 1 March drew our attention to errors you have identified in the Regulations. Your most recent letter of 10 March acknowledges that the Welsh Government was sent our draft report on the Regulations before they were withdrawn.

The questions and matters raised in the draft report for the version of the Regulations withdrawn on 8 March are replicated in the Annex. We would not usually seek a government response to a draft report after the Regulations to which it relates have been withdrawn. However, in the current circumstances, it would assist our consideration of the replacement regulations if you would address these matters and respond as soon as possible. In particular I would be grateful if you could respond to the points in the draft report where further explanation is sought under Standing Order 21.2(v).

I would also be grateful for your views on whether any of the matters raised may have implications for the corresponding regulations for England, Northern Ireland and Scotland.



Yours sincerely,

Huw Irranca-Davies

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Chair



1. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In regulation 2(1), in the definition of “pub operating agreement”, there is a difference in meaning between the English and Welsh texts. In the Welsh text, the phrase “on or from the premises” has been translated as meaning “on or off the premises”.

The phrase “on and off the premises” is used later in regulation 9(2)(b)(i) and (ii), and both language texts are equivalent in that regulation.

Therefore, further explanation is required as to whether the English text in the definition of “pub operating agreement” in regulation 2(1) is correct in using the phrase “on or from the premises”, or whether the Welsh text has incorrectly translated the meaning of the phrase here.

(See section 3(2)(c) of the Public Health (Minimum Price for Alcohol) (Wales) Act 2018 (anaw 5), and paragraph 3(1)(b) of Schedule 2 to SI 2020/1149 (W. 261) for examples of where “on or from the premises” has been translated correctly in the Welsh text of legislation.)

2. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

In regulation 2(1), the definition of “recovery” (“adfer”) does not appear to be used anywhere in either the English or Welsh text of this SI with the meaning given by Article 3(15) of the Waste Directive, and is therefore defective drafting.

In addition, there is an example of “recovery” used in the English text of regulation 5(4) in the context of sports drinks. Therefore, “recovery” in the English text of regulation 5(4) will bear the meaning given by regulation 2(1) as currently drafted which appears to be incorrect. The Welsh text uses a different word to convey “recovery” in regulation 5(4) compared with regulation 2(1), so this additional issue does not occur in the translation.

3. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In regulation 2(1), should there be a definition of “supplies” explaining that it has the meaning given in regulation 10(1)? Other terms that are defined in later regulations have been signposted in this manner in regulation 2(1) such as “drink”, “packaging”, “licensor” and “pub operating business”.

4. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In regulation 3(5), in the English text, there is an obligation to notify the UK regulator in the “country” specified in a notice given under regulation 3(3). However, the term “nation” is used elsewhere in the English text throughout the SI including in regulation 3(3). Therefore, the English text is inconsistent as

regards terminology and differs from the rest of the SI. In the Welsh text, the same term “gwlad” has been used in regulation 3(3) and (5) for both “nation” and “country”, and throughout the rest of the SI for “nation”.

5. Standing Order 21.2(vii) - that there appear to be inconsistencies between the meaning of its English and Welsh texts

In regulation 6(1)(b), there is a difference between the English and Welsh texts. The English text includes the words “whether it is supplied as such to the final user or consumer”. However, the Welsh text has used “sold” (“ei werthu”) rather than “supplied” (“ei gyflenwi”) in the corresponding place in the translation. The meaning of “supply” is given by regulation 10 of these Regulations so it is a significant difference.

6. Standing Order 21.2(vii) - that there appear to be inconsistencies between the meaning of its English and Welsh texts

In the Welsh text of regulation 2(1), “Packaging” has been defined and translated as “Pecynwaith” which is used throughout these Regulations. However, in regulation 6(3), “Deunydd Pacio” has been used in the title of “the Packaging (Essential Requirements) Regulations 2015”. It's the only place where “Deunydd Pacio” has been used as a translation in these Regulations for “Packaging” and it is inconsistent with the terminology used elsewhere. This suggests to the reader of the Welsh text that it has a different meaning from “Packaging”.

In both language texts, it refers to “the rules set out in paragraph (2)” but if you turn to paragraph (2) of regulation 6 it describes them as “the criteria”. Therefore, the terminology of paragraphs (2) and (3) is inconsistent within regulation 6 of these Regulations. In addition, regulation 3(3)(a) of, and Schedule 5 to the Packaging (Essential Requirements) Regulations 2015 refer to them as criteria.

7. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

Regulation 7(1) provides the meaning of “household packaging”. We do not consider that the drafting provides a clear definition of what is meant by household packaging in this context.

8. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In regulation 8(2), the terms “brand owner” and “branded packaging” are defined and given a meaning. “Brand owner” is also listed in regulation 2(1) where it is explained that it has the meaning given in regulation 8(2). However, this isn't done for “branded packaging” and in regulation 10(3) “branded packaging” is explained as having the meaning within regulation 8(2). It is true to say that regulation 10(3) is the only other place where “branded packaging” is used in these Regulations, but should it have been signposted in regulation 2(1) to aid the reader like the term “brand owner” ? In which case, the phrase “within the meaning of regulation 8(2)” could then have been omitted from regulation 10(3).

9. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In regulation 16(2)(b)(iii) and (3)(b)(iii), there are references to “relevant packaging waste” having the same meaning as in paragraph 23(5) of Schedule 1. However, the term that appears in paragraph 23(5) of that Schedule is defined as having that meaning “In this paragraph” because it is used in paragraph 23(1) of Schedule 1. This is misleading to the reader as “relevant packaging waste” does bear the same meaning in regulation 16 as well as paragraph 23 of Schedule 1. Therefore, should that term have been defined in regulation 2(1) as having that meaning in these Regulations rather than defined in paragraph 23(5) of Schedule 1? Alternatively, should the term have been defined in regulation 2(1) as having the same meaning as in regulation 16(7), the definition added to regulation 16(7) and omitted from paragraph 23(5) of Schedule 1?

10. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

In regulation 17(2)(b), it appears that the specific year is missing in the date “1 January” in both places where it occurs. If you turn to Schedule 1, paragraph 1(b)(ii) it refers to regulation 17(2)(b) and a period beginning on 1 January 2023 and ending on 30 June 2023. Regulation 17(2)(b) is therefore defectively drafted.

11. Standing Order 21.2(vii) - that there appear to be inconsistencies between the meaning of its English and Welsh texts

In regulation 23(5), there is a slight difference between the English and Welsh texts. The English phrase “corrected information” has been translated as meaning “correct information”. Therefore, it could be argued that the Welsh text doesn’t fully convey the meaning of the English text.

12. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements

In paragraph 1(a) of Schedule 1, the term “commencement date” is defined as having a meaning “In this Schedule”. But, the definition doesn’t appear to be used in the Schedule, so this is defective drafting.

13. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In Schedule 1, in paragraph 13(2)(e), in the Welsh text, the term “conceived” has been translated as “llunio”. Elsewhere in the SI, a form of “creu” rather than “llunio” has been used in the Welsh text for “conceived”. Therefore, the translation of the term is inconsistent in this paragraph compared with the rest of the SI and it suggests to the reader that it has a different meaning from “conceived”.

14.Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

In Schedule 1, in paragraph 15, in the opening words before sub-paragraph (a), the phrase “unfilled household packaging and other unfilled packaging” occurs where it is clear that “unfilled” applies to both the household packaging and other packaging.

Later in sub-paragraph (c), there is a duty to keep records of the weight of “unfilled packaging and of household packaging”. The construction of the sentence in English suggests that “unfilled” only applies to “packaging” in this sub-paragraph rather than to both “packaging” and “household packaging”.

In addition, the syntax of the Welsh translation of “unfilled packaging and of household packaging” in sub-paragraph (c) limits the application of “unfilled” to “packaging”. The grammatical construction of the translation doesn’t allow any possible application of “unfilled” to “household packaging”.

Therefore, the drafting and translation of paragraph 15(c) requires further explanation as to whether the intention is to place a duty to keep records of “unfilled packaging” and “unfilled household packaging”, or “unfilled packaging” and “household packaging”.

15.Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy to be of interest to the Senedd

Regulation 4 modifies the Waste Directive¹, and in particular the modification relates to the Waste Directive’s definition of “waste”, which is key to the understanding of these Regulations. We note that the Waste Directive is available to the general public on legislation.gov.uk.

However, we wonder whether there is a more accessible way of legislating in this regard to enable a reader to see the provisions on the face of these Regulations.

16.Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy to be of interest to the Senedd

Regulation 6(3) provides that Schedule 5 to the Packaging (Essential Requirements) Regulations 2015 contains illustrative examples of packaging.

It is unclear why these examples have not been included in a schedule to the Regulations. This would have improved accessibility, for what are already complex regulations.

¹ Directive 2008/98/EC of the European Parliament and of the Council on waste, as last amended by Directive (EU) 2018/851

17.Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy to be of interest to the Senedd

Regulation 14 provides for situations where a producer dies, becomes bankrupt or incapacitated (the “first producer”). A person who carries on the activities of the first producer is required by Regulation 14(3) to inform NRW within 28 days of commencing those activities. Given that this is a specific request, with a relatively short timescale depending on the circumstances, it is unclear how this requirement will be highlighted/publicised, so as to enable those obliged to inform NRW to do so in good time.

18.Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy to be of interest to the Senedd

In general terms, the Regulations can be difficult to navigate through. In our view, regulation 15 is not easily accessible and this may cause difficulty for a producer to work out what their obligations are. There are essentially four steps in regulation 15. Firstly, a producer must identify which provision of regulation 15 is relevant to their business. This directs them to specific provisions of regulations 16 and 17. Secondly, the relevant provision in regulation 16/17 then directs them to specific paragraphs to the Schedule. Thirdly, those paragraphs of the Schedule direct them to further separate paragraphs of the Schedule. Finally, only then can the producer see the information they are required to collect/report, although they may have to jump between separate paragraphs to ascertain the complete list.

It would appear more appropriate if the Schedule were simplified so that it contains a separate list for each type of producer, which clearly sets out all the information required of that producer.

We do not believe that this is the most accessible means of drafting the regulations.

19.Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy to be of interest to the Senedd

Regulation 19(2)(a) provides that paragraph 19(1) applies if a producer provides information the operator of a scheme requests within a “reasonable period of receiving such a request”. However, there is no detail as to what such a reasonable period might be.

20.Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy to be of interest to the Senedd

Regulation 22 requires NRW to publish lists of items collected for recycling. However, there is no specific requirement on the face of the Regulations to keep these lists up to date. It is therefore unclear if the intention is for the lists in Regulation 22 to be kept updated.

21.Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy to be of interest to the Senedd

Regulation 25(1) enables NRW to supply a form for an approved person to apply for approval to delegate their functions to another person under regulation 24(3).

Regulation 25(2) provides for a 28 day period during which NRW may grant or refuse the application for approval.

We wonder whether a provision granting deemed consent, in circumstances where NRW does not grant or refuse the application within the specified timescale, was considered and whether it would assist applicants.

22.Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy to be of interest to the Senedd

The Explanatory Memorandum at paragraph 27 explains that the approach to include an exemption for smaller business to minimise the impact on them:

To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to include a threshold within the regulations to exempt producers that do not handle more than 25 tonnes of packaging a year and have an annual turnover of more than £1 million. Producers that do not handle more than 50 tonnes of packaging a year and have an annual turnover of more than £2 million will be exempt from the reporting obligations but will still need to collect and retain data.

However, there is no clear explanation as to the value of smaller businesses collecting and retaining this data, if it is not to be reported to NRW. A Welsh Government response is requested to outline what benefit the collection and retention of this data will provide.