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Producer Responsibility

United Kingdom Report

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Each year the UK uses 600 million tonnes of resources to produce only 60 million tonnes of goods. 6 months later only 6 million tonnes of these goods are still in use.

Source (2003) Taking Stock Org.

1. Overall context

National legislation relating expressly to producer responsibility has been implemented largely in response to EC Directives such as packaging, WEE, and end of life vehicles, and there has been little in the way of independent, innovative laws. The shift from 'end of pipe' environmental legislation governing waste towards producer responsibility has also caused some tensions in government departmental responsibilities, with the environmental department (DEFRA) taking lead responsibility for more traditional environmental laws, while the Department of Trade and Industry (DTI) has taken the lead for producer responsibility laws. DTI's main interest is seen to be to minimize costs on industry and the public sector, and the tendency has been to take a minimalist approach to the implementation of Directives.

Over the last year, however, the Government has launched strategy documents concerning sustainable consumption and production, largely as a follow up the Johannesburg World Summit where the UK Government amongst others committed itself to a 10 year strategy on the issue. These are beginning to raise more fundamental questions concerning the environmental impact of consumer consumption, and product policy represents a key element of this approach. As one of the recent discussion documents from a government advisory body notes, it is somewhat ironic that current legislation requires a detailed environmental assessment of a new factory concerning its impact on local surroundings, but nothing in the way of an assessment of the products it will manufacture. The identification of suitable policy and legal tools, however, is much more guarded at present, and producer responsibility as a legal concept is not yet playing a key role in discussion. In summary, the current state of play is that the Government is beginning to articulate the right messages but is uncertain as to the means to achieve these goals.

2. Producer Responsibility Liability (Questions 1-5)

2.1 General liability issues

Under both common law principles of liability and the Consumer Protection Act 1987 (which implemented the EC Directive on Product Liability) liability can be imposed on manufactures for damage caused by products, but claims are restricted to damage caused to persons or private property (which could include those parts of the physical environment subject to private ownership such as trees, land, rights to fishing in waters, etc.) rather than harm to the unowned environment. At common law the claimant must generally prove fault on the part of the manufacturer which will be difficult when his product meets the current statutory standard (in an unusual case involving environmental exposure to a damaging product, claimants in 1980 failed in a case in negligence against Shell and British Petroleum concerning lead in petrol because the companies were meeting the then statutory EC maximum levels). Claims under the Consumer Protection Act are based on the concept of a 'defective' product, and UK manufacturers may claim a 'state of the art' defence, though, giving the ECJ interpretation on this provision, this defence is very narrow in practice.

The effectiveness of private litigation based on civil liability is dogged in the product field by the familiar problems of uncertainty of causation and potential multiple defendants. Recent litigation concerning exposure to asbestos during employment and which reached the highest court, the House of Lords in 2002, indicated that the judiciary might take a more flexible approach. In that case, the court accepted that it was impossible for the claimant who had been employed over his lifetime by a number of companies negligently exposing him to asbestos to prove which was the fatal fibre causing his disease. The court accepted that the concept of 'causation' was a creature of law rather than one of autonomous expression, and held, essentially, that giving rise to *exposure* of risk was sufficient to impose liability jointly and severally on all the employees, even if one could not prove scientifically which employer actually caused the disease. Joint and several liability remains the basic principle of damage apportionment where multiple defendants are involved, but in the House of Lords case, the judges indicated that they found the US approach developed in pharmaceutical cases and based on liability apportioned according to market share was an attractive approach which could be developed in the UK. I have no idea whether market share apportionment has been developed in other European countries.

2.2 **Packaging Waste** The EC Directive on Packaging Waste was implemented in the UK under the **Producer Responsibility Obligations (packaging waste) Regulations 1997**. The Regulations were amended at the end of the last year to provide tougher interim targets over the coming years in order to provide a

better basis for meeting the anticipated amendments to the Directive, an unusual example of national law-making preparing ahead of finally agreed EC legislation.

The UK legislation does not apply to all producers or to household waste but is focussed on those who pass two threshold tests - a turnover of £2m (about 3.5 m EUROS) and handling 50 tonnes of packaging in a calendar year. A 'producer' is defined in the Regulations and includes manufacturers, converters, importers, pack-fillers or sellers who make a supply to another part of the chain or to the end user. About 5000 companies in England and Wales come within the system.

The regulations oblige companies to recover and recycle the packaging waste to meet national targets. Companies can choose to register directly, or alternatively they can register with a number of private *compliance schemes* who are themselves registered with the Agency and will ensure compliance with the prescribed targets. There are around 20 such schemes and about 80% of businesses register with them. Individually registered companies or registered schemes must demonstrate annually that they have achieved recovery and recycling targets by means of producing before the Agency a sufficient quantity of Packaging Recovery Notes (PRN). These certificates which state the tonnage of materials recycled, are issued by registered waste reprocessors such as paper mills, and plastics businesses and may be sold on the open market as a tradeable instrument.

Competition Law

In relation to *competition law*, the original regulations contained provisions concerning special scrutiny of compliance schemes under competition law, but the Government later decided that such schemes should in future be subject simply to normal Competition Law requirements. In its view the spread of schemes would mean that no single one would have an appreciable effect of the market, or that if it did it would gain an exemption on environmental grounds. There has been no case-law on this issue as yet. However, the Government's own Better Regulation Task Force has recently criticized the lack of transparency in the current scheme. It noted that one of the compliance schemes, Valpak, now represented members with an obligation of around 65% of the UK total with a strong market power over the major reprocessors with whom it had contracts. It could clearly influence the use made of PRN revenue, but under the current arrangements "this is an entirely opaque process."

Packaging Design and Essential Requirements

The Directive requires companies to ensure that packaging meets certain 'essential requirements' in its design. These requirements were transposed late in the day into UK law (packaging is presumed to comply if it meets European CEN standards), and are supposed to be enforced by local trading

standards officers. But local authorities complain they are insufficiently resourced for this task and the standards are too vague to be enforceable – since 1999 there have just been two prosecutions, with the Dept of Trade and Industry calling for a light touch in enforcement. However, a recent independent research report commissioned by DTI (ENDS Report Dec. 2003) suggests that in relation to larger companies, awareness of the requirements is reasonable high, and that their existence has had a positive impact on new design.

Data

According to Government figures, in 2000 the United Kingdom produced on average about 570 kilograms of municipal waste per person compared to the EU average of 535 kilograms per person. But the UK sent the second highest amount of waste of any country to landfill, over 460 kilograms per capita compared to an EU average of 290 kilograms, and was in the bottom three countries (Portugal and Greece being the others) when it came to recycling of household waste - only 60 kilograms of municipal waste per person was recycled in 2000 compared to a EU average of 140 kilograms per person.

In relation to packaging waste, figures based on returns to the Environment Agency and its sister organizations, indicate that overall recovery rates rose from 48% in 1999 to 53% in 2002. just about in keeping with the EC Directive's requirements. But there are concerns in certain specific materials, such as aluminium (15%) and plastics, the latter (at 12% on 1998 and around 20% in 2002) having the longest way to go. However there has been concern about the accuracy of some of the data which is largely based on reports from reprocessors and businesses handling packaging. In 2003, following investigation by the Government, the figures for wood recycling was revised down from 85% to 54%, and plastics have been revised down from 22.7% to 19%.

The market based system of Process Recovery Notes developed in the UK has attracted some interest in other countries and within the Commission as a cost-effective system for meeting the Directive's requirements. A number of other countries stipulates targets material by material, but the UK system largely relies upon the market in PRNs to determine the economic optimum mix for overall compliance, and allowing each material to find its own level. Over specification of sectors by individual is considered to ignore the competitive relationship between different materials and raise issues of anti-competitive practice. But equally it should be stressed that UK implementation of the original Directive appears to have been made with a minimalist view to meeting the targets and no more. The revised targets under the Directive as amended will pose substantial challenges, especially in the paper sectors where the regime will need to move beyond the commercial/industrial stream to pick up the households sector.

2.3 End of Life Vehicles The End of Life Vehicles (ELV) Regulations came into force in the UK on 3 November 2003, a late transposition of the Directive due to the complexity of the issue. The regulations do not yet deal with all aspects of the Directive.

For waste and recycling operators who currently deal with scrap vehicles, the regulations introduce a number of changes to current arrangements, including:

- * operators of sites that are currently registered as exempt from a specific waste management licensing need to obtain a waste management licence if they are to continue to treat ELVs that have not been fully depolluted; and
- * operators of all sites who want to continue to treat ELVs will have to comply with new minimum technical requirements.

The Government will require vehicle manufacturers and importers to meet the costs of take-back and treatment of vehicles sold after 1 July 2002, in accordance with the terms of the Directive, as soon as regulations to that effect can be introduced. Producers are also to pay for 'all or a significant part' of the costs of free take back and treatment of all ELVs from 1 Jan 2007.

Take-Back responsibility

The Directive gives flexibility to Member States in deciding how to fund take back and treatment between 2002 and 2007. The Government decided that until 2007 the "last owner" of the vehicle would continue to have responsibility for its disposal. This appears to be similar to the policy adopted in Germany and France, although the Environment Agency and other bodies have made strong representations that this will impose costs on those least able to afford it (the owners of the oldest cars) and is likely to lead to increased illegal dumping of old vehicles. On environmental grounds it would be much more preferable to give a small financial reward to the last owner who takes his vehicle to a registered operator. It appears that this policy position was a result of the Department of Trade and Industry (with strong concerns about the potential costs on the motor industry) taking a lead on this Directive. A recent Parliamentary Select Committee questioned the Environment Minister on this issue, and he denied there would be a problem. One method of deterring abandonment of vehicles will be to require the owner to continue to pay road tax until he can produce a certification of legal disposal for the vehicle.

At present the UK scrap industry is efficient in recovering metal components from used cars, but less so for glass, plastics and rubber - Plastics count for around 10% of body weight but in the UK currently only 01.1% is recycled. According to the Environment Agency, currently between 75 and 80% of parts and materials from scrapped cars are reused or recycled (compared to

the Directives targets of 85% by 2006 and 95% by 2015). Car manufactures considered there are higher percentages achieved, while shredders who carry out work considered rather less. However, given the continuing uncertainties as to exactly how the scheme will operate, it appears that shredders and recyclers are unwilling to make necessary investment decisions. The Environment Agency and the recycling industry believe that there needs to be a central fund to help create stable markets for recycle materials from vehicles and to off-set costs of de-polluting. It appears that this was agreed by Government and would have been funded out of a special tax on new vehicles, but this has now been dropped by Government who are currently politically extremely sensitive to charges of increasing the general tax burden by indirect means.

2.4 Waste Electrical and Electronic Equipment (WEEE). The Government is currently in the middle of a consultation exercise on its preferred policies for implementing the two EC Directives which must be transposed into UK law by 13 August 2004. Draft regulations are expected in Spring of this year.

The Government supports, as a preferred option, a national "clearing house" to coordinate collection of WEEE nationwide for treatment and recovery, rather similar to the approach being taken in Germany. The clearing house would be a central body, funded by producers on a non-profit basis, which would coordinate free collection of WEEE from civic amenity sites and other designated central facilities on demand, and then allocate separately collected WEEE to producers or producer compliance organizations, for them to arrange treatment and recovery. The Government expects the proponents of the clearing house to come forward with proposals for a fair allocation process. It would then be for producers or their compliance organizations to contract with treatment facilities and recyclers on a free market basis and to arrange reporting of data to the clearing house to confirm tonnages recovered and recycled against their obligations. The Government notes that if such a clearing house were established it could raise issues of competition law.

There are two other two main options being considered. A structure similar to the Dutch NVMP scheme run by manufacturers and importers, which arranges collection, treatment and recovery of WEEE from municipalities or retailers, with funding via a visible fee on a range of products. And finally, a system of tradable notes for the recycling of WEEE, and possibly also for treatment. This would be a more purely market-based approach, with producers having to meet their producer responsibility obligations by buying sufficient WEEE recycling notes from recyclers as evidence of having discharged their obligations. This would be similar to the system introduced for packaging regulations, but the Government now appears to have come out against this idea, in part because the proposal for a central clearing house came from a group of the key WEEE producers

themselves, anxious to keep down recycling costs.

The Government accepts that local authorities will need to improve reception facilities at public waste disposal sites but does not wish to impose extra financial burden on authorities. At present, the Government suggests that local authorities should be able to bid for upgrading funds out of new recycling fund funded through the take back scheme for retailers.

As to retailer take-back obligations, the Government is proposing a flexible approach.. It is currently considering asking all retailers who sell EEE products to choose either to offer in-store take-back on a new for old basis; or to join a take-back compliance scheme to fulfill collection obligations on their behalf. It is expected that many retailers will opt to join a compliance organization, in view of the strong concerns expressed by the sector about certain aspects of in-store take-back, including health and safety, staff training, administration and lack of storage space. The compliance scheme would offer either a local collection point in, say, a shopping centre or improved household door to door collection, and retailers would fulfil their obligation by advising consumers on current facilities in place. The Government is now inviting the retail sector to come forward with a detailed proposal for a take-back compliance organization.

There is currently considerable criticisms by both industry and environmental groups that Government, led by the Department of Trade and Industry, is yet again taking a over-minimalist approach towards implementation - one that will meet the current obligations in the Directives, but fails to provide a secure basis for future revisions of targets which are contemplated for 2008.

As with the Packaging Directive, the WEE Directive contains provisions requiring Member States to encourage eco-design but the Department of Trade and Industry is very reluctant to put this into legislation – instead it is proposing to convene a business forum on the issue.

3. New Policy Discussion Papers (Questions 6-10)

3.1 UK Government Framework Strategy for Sustainable Consumption. In Autumn 2003, the Government published a discussion paper. **Changing Patterns: UK Government Framework for Sustainable Consumption and Production**, signed jointly by the Environment and Trade & Industry Ministers. This was the first major statement from the UK Government since the World Summit on Sustainable Development in Johannesburg, where the Government committed themselves to "*encourage and promote the development of a ten year framework of programmes ...to accelerate the shift towards sustainable consumption and production*", and is its first major policy statement concerning sustainable product policy generally.

According to the Government, the paper is intended to *"provide a framework to take forward a very broad, ambitious and challenging agenda which affects us all at the local, national and global level."* Key proposals include:

- * Breaking the link between economic growth and environmental pollution.
- * Improving resource efficiency
- * Focusing on areas where environmental damage is greatest.
- * Examining the whole life-cycle of a product, through design, production, use and disposal, to help reduce its effect on the environment.
- * Enabling consumers to receive more information on products and services.
- * Government utilising a range of tools, including taxes, voluntary agreements, subsidies, regulation and information campaigns, to stimulate innovation and investment to provide cleaner technology.

Sustainable Consumption and Production is defined as *"Continuous economic and social progress that respects the limits of the Earth's ecosystems, and meets the needs and aspirations of everyone for a better quality of life, now and for future generations."* The document commits itself to focussing policy on areas where it is clearest that the impact on resource use *"is pressing up against environmental limits"* - examples giving include a goal of reducing CO2 emissions by 60% by 2050 and a commitment to keep water use within the limits of its replenishment.

The document considers environmental impacts and consumption patters in a rather wider context than simply product policy - including energy and water use, for example. But in relation to products and services, it states that a central feature of policy will be a *'holistic approach that considers whole life-cycles of products and services, intervening to deal with problems as early as practicable in the resource/waste flow.'* It also notes that the Government's own Advisory Committee on Consumer Products and the Environment was about to report (see below 3.2) and commits itself to an early response.

The paper was accompanied by another document, **Sustainable Consumption and Production Indicators**, which proposes a set of a set of "decoupling" indicators was published to assess the progress of breaking the link between economic growth and environmental damage.

In terms of policy instruments to achieve these long term and ambitious goals, the discussion paper is rather less committed, though it states clearly that it doubts whether a single policy instrument is appropriate in this area. The use of economic instruments is given strong support, and there appears to be no direct discussion of producer responsibility as a legal liability issue.

3.2 Report of Advisory Committee on Consumer Products and the Environment (ACCPE) ACCPE was established in 1999 as an independent body composed of representatives of industry, ngos, and academia to

produce advise to Government on the development and coordination of policies to reduce the environmental impacts associated with the production and consumption of goods and services. In September 2003 it published an important report "**Towards Sustainable Products**" which is intended to be a contribution to the Government's own strategy on Sustainable Consumption. The report notes that to date Government has not routinely considered the environmental and social impacts associated with products - to quote, "*Why is there an environmental impact assessment for a new retail outlet, but not for the millions of tonnes of goods the store will be selling?*"

The report identifies three core principles :

(a) There should be a consistent focus on the environmental performance of products and the services they deliver since they are an integral part of the UK strategy on sustainable consumption and production. The reports calls for the Government to establish an executive body with responsibility for delivery and impetration (rather than simply advice to Government) in this area.

(b) Use what is described as a 'tool box approach' - i.e. making a link between key sustainable development issues and the products which have the most significant environmental impacts - and then choosing the most effective policy instrument to secure improvement. The report identifies 8 key product-related policy tools grouped under two headings, one relating to consumer choice and one relating to decisions higher up the supply chain.

The report goes on to recommend a number of policies relating to product marketing including building product-related issues into the policy agenda for business transparency and disclosure - as it notes, while more effort has been devoted in recent years to improve corporate reporting on environmental impacts of operations, very little has been done on reporting on products and their impacts.

(c) A policy of 'leading by example' - the Government needs to put sustainable consumption at the heart of its own public procurement policies, and to reduce the environmental 'footprint' of its own activities.

PRODUCT RELATED TOOLS IDENTIFIED IN ACCPE Report

1. Consumer choice

1.1 Consumer awareness (education, information campaigns, advice centres etc.)

- 1.2 Voluntary information instruments (eco-label, Energy Star etc.)
- 1.3 Compulsory information instruments (egg energy rating labels)
- 1.4 Economic instruments (taxes, subsidies, Research and Development support, public procurement)

2. Choices higher up the Supply Chain

- 2.1 Policy decisions within supply chain (retailer procurement policies)
- 2.2 Design (e.g. eco-design, life cycle assessment, voluntary agreements)
- 2.3 Regulatory Instruments (product bans, minimum performance standards, producer responsibility, take-back schemes, etc.)
- 2.4 Response to the legal and implied rights of others (responding to property rights, access to information, etc.)

3.3 Royal Commission on Environmental Pollution (RCEP) - Report on Chemicals in Products (2003).

The EU Chemicals reform agenda under REACH is strictly outside the terms of reference of this meeting, but it is worth mentioning the Royal Commission's most recent report on Chemicals, published in June 2003. The RCEP is a distinguished independent advisory body which chooses its own subjects for detailed investigation and has considerable influence in agenda-setting.

The Commission's report was very much focussed on the human and environmental impacts of chemicals in products. It was struck by the degree of lack of knowledge about chemicals and their impacts and the extent to which chemical product policy is fragmented and uncoordinated. Although it supported the overall goals of REACH (this was the 2002/ early 2003 version), it doubted whether the testing approaches for existing chemicals could deliver, and were over dependent on unreliable, old fashioned toxicological testing methods. The Commission proposed a much more rapid scanning methods using genomics and other modern knowledge based systems (as used in the pharmaceutical industry). This would categorize chemicals into various categories of hazard.

More significantly - and of relevance to the current meeting - the Commission supported a general policy of substitution (not simply less hazardous chemicals but sometimes less hazardous processes) and wanted the information derived from the rapid testing procedures to inform a range of policy instruments to push substitution. This would include, for example, economic instruments, extended producer liability, and enhanced labelling and information. Much greater monitoring was also needed to help balance the deficiencies of testing regimes (most of the environmental cause celebres over the past 30 years have been discovered by monitoring rather than testing). The Commission doubted whether formal regulatory approval systems on substitution could be made to work efficiently. The RCEP's link

between the chemicals testing regime and later substitution policies distinguishes it from the Commission's proposals.

3.4 Mass balance/ecological footprint studies

Serious work on conducting mass balance exercises for the UK have to date been conducted by the academics and think-tanks - a core element of the current programme being funded by the waste industry out of landfill tax credits which must be spent on environmental projects. For web-sites on current key projects see www.massbalance.org or www.takingstock.org

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