



## **Welsh Government Consultation on Landfill Disposals Tax**

### **Response from UKELA's Wales Working Party and Waste Working Party Working Party**

The UK Environmental Law Association (UKELA) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of environmental law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice on proposals of governments and regulators covering a range of environmental law topics, with the help of its specialist working parties. This response has been prepared with the help of the UKELA Waste Working Party and UKELA Wales Working Party.

### **RESPONSES TO CONSULTATION QUESTIONS**

#### **Tax Rates**

- 1. How important is it that the Welsh Government maintains consistency with the UK and Scottish Governments on Landfill tax rates and why?*

UKELA agrees with the analysis and arguments for maintaining consistency with rates in England set out in the consultation document. The factors which might impact on decisions to send waste generated in England to landfill sites in Wales are wide-ranging and complex, but there will inevitably be the possibility of waste generated in England being sent to landfill sites in Wales if Wales sets lower rates of tax than England. For that reason UKELA believes that the Welsh Government should maintain consistency with the UK and Scottish governments on tax rates.

2. *Are the current standard and lower rates set at an appropriate level for Wales. Please explain your response.*

The logic of the UK Government not increasing the lower Landfill tax rate in proportion with the standard rate is not evident from the consultation paper. However, UKELA considers that an analysis should be undertaken of the implications of raising the lower rate in Wales, in particular the likely impact on reducing, recycling or reusing waste; the likely effect on relevant businesses; and whether it would give rise to waste tourism and “backhauling”.

3. *Is there value in the Welsh Government having the ability to set different lower rates of tax and why?*

UKELA would support the Welsh Government having the ability to set different lower rates of tax for the reasons set out in the consultation paper. It is difficult to predict the future with any certainty and any Government could be disadvantaged by not having the power to make necessary changes in response to economic, political, social and environmental developments.

#### **Defining Taxable Material**

4. *Are there any changes to the list of materials qualifying for the lower tax rate that should be considered, and on what basis?*

Given the wide gap between the standard rate of tax and the lower rate of tax, there is a very real risk of waste tourism and backhauling if the Welsh Government adds additional materials to the list of materials qualifying for the lower rate of tax in Wales that are subject to the standard rate of tax in England. Again, UKELA believes that the Welsh Government should maintain consistency with the UK and Scottish Governments.

#### **Compliance with the Lower Tax Rate**

5. *What would be the practical implications of introducing a threshold to define ‘a small quantity’ of non qualifying waste?*

The absence of specific guidance as to what constitutes a small quantity is of concern as inevitably interpretations would vary considerably, leading to potential,

consequential loss of revenue. It seems sensible and reasonable to impose a threshold of 10%. The argument about fully enforcing EU Council Decision 2003/33/EC is valid, subject to consideration of the enforcement costs.

### **Introduction of the Loss of Ignition Test**

6. *Would you support the introduction of a Welsh Loss on Ignition (LoI) test when Landfill Tax is devolved. Please explain your reasons.*

The case for introducing this test appears to be well made and has the potential to contribute to the reduction of greenhouse gases. The Welsh Government has the opportunity to learn from the English and Scottish experiences of the test before taking a final decision.

### **Defining the Area in which a Taxable Disposal Takes Place**

7. *Are there any problems with the existing arrangements for defining the area in which a taxable disposal takes place, and if so, how might these be resolved?*

It is difficult to respond to this question without some factual information on the extent to which tax is paid on waste items that are stored or sorted for recycling within tipping areas. The practical implications of changing the tax point need to be fully explored and the costs/benefits of each approach considered before a decision is made.

### **Credit for Landfill Waste Removed**

8. *In your view, are there any issues with the current arrangements for credit for landfill material permanently removed from a landfill site and if so, how might these be addressed?*

Whilst UKELA supports the Welsh Government's desire to ensure the arrangements for credit are fair, simple and appropriate, it is difficult to comment without knowing the difficulties (if any) of the current arrangements. This relates to the previous question as to the appropriate tax point and so it is assumed that if the tax point is to be at the tipping area there would be no need for claiming credit.

## **Landfill Site Activities to be treated as Disposals**

9. *What would be the practical implications of legislating on the basis that all material entering a landfill site is subject to tax?*

It is evident that the existing legislation is fraught with difficulties in view of the litigation that has arisen and the fact that this puts at risk significant tax revenues. The case for legislating to ensure that all material entering a landfill site, apart from that which is exempt, should be taxed appears to be well made and should overcome current problems with interpretation of the legislation.

The Welsh Government should be aware of the First-Tier Tribunal's Tax Chamber's decision in the case of *Patersons of Greenoakhill Limited v The Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 334 (TC), which has clarified the status of biodegradable material that degrades to produce methane gas which is subsequently used for power generation.

10. *What activities would you expect to be exempt from tax and why?*

UKELA suggests that the Welsh Revenue Authority should adopt the same approach as HMRC to exempt activities, in order to avoid the risk of creating opportunities for waste tourism and backhauling.

11. *Do you have any suggestions for how we might clarify the taxable and non-taxable activities on a landfill site and what would be the practical implications of these?*

Please see response to question 10 above.

## **Exemptions and Reliefs**

12. *Do you think that any of the current exemptions should be removed or modified? Please explain your response.*

The case for retaining the current exemptions is not apparent. If it is proposed to retain any of them, the reasons should be clarified in terms of impact on the environment and business. Furthermore, there will need to be robust guidance to minimise abuse and inconsistent application.

13. *Is there a case for removing or modifying the water discount relief?  
Please explain your response?*

It does not appear that there is a sound case for retaining the water discount relief. However, the likely financial impact on businesses needs to be considered before a decision is made.

14. *Do you think there is a case for introducing any new exemptions or reliefs, and if so, what should they be and why?*

It is impossible to comment on this in a meaningful way without understanding the rationale and implications.

### **Improving Regulation**

15. *What would be the practical implications of placing an obligation on landfill site operators to use a weighbridge, where one is functional and available on the landfill site or within close proximity of the site, with a corresponding penalty for failure to do so?*

There appears to be no reason why an operator should not be obliged to use a weighbridge where one is available and functional. The practical implications relate to regulators satisfying themselves that weighbridges have been operational and that they have been used in every case. The guidance would need to be explicit on the circumstances in which a penalty will be charged and it would need to be sufficient to deter landfill operators and waste management companies from avoiding the requirement.

### **Extend the Definition of a Landfill Site**

16. *What would be the practical implications of extending the definition of landfill sites to include illegal deposits of waste within the scope of the tax?*

UKELA is concerned about waste crime and would support any measures aimed at reducing illegal waste deposits and fly-tipping. Cogent arguments have been presented in support of extending the definition of landfill sites to include illegal waste deposits within the ambit of the tax. However, the success of such a measure will be dependent to an extent on effective regulation and enforcement. The benefits

will need to outweigh the overall costs, which have already been identified as significant.

While UKELA agrees with the proposal that anyone caught illegally disposing of waste and anyone who knowingly permits such a disposal at a site other than a landfill site should be made liable to pay landfill tax, it is concerned that liability should not be imposed on innocent landowners who fall victim to illegal waste disposal activities, or on innocent landlords whose tenants engage in illegal waste disposal activities on their land or go insolvent leaving their landlord with large quantities of waste to dispose of. Such landowners and landlords will have to pay landfill tax on the disposal of waste removed from their property, which is arguably unfair in itself, and should not be penalised twice for the illegal activities of third parties. UKELA notes that Defra and Welsh Government have recently consulted on waste crime issues, including the position of landowners and landlords faced with illegal waste management activities on their land.

### **Criminal and Civil Penalties**

*17. Are there any issues with the current penalty regime and if so, how might they be addressed?*

UKELA believes that the current penalties are adequate. What matters, however, is that there is proper enforcement of the law by the enforcement bodies mentioned in paragraph 3.29 of the consultation document and that the courts impose appropriate penalties to remove any economic benefit derived from offending and to deter future offending.

### **Compliance Activity**

*18. Is there a need for increased compliance activity on the ground, rather than desk based? If yes, please explain your view and provide evidence/explain the benefits where possible.*

UKELA considers that on the ground regulation and enforcement is more likely to have the desired effect in reducing waste crime and tax evasion, than desk based assessment of information. Offenders need to know that there is a real possibility of

being caught in order to consider stopping re-offending and legitimate operators need to know that their businesses are not being undercut by illegal operators.

### **Minimising the Impact of Landfill Disposals Tax Evasion**

*19. Are there any further actions the Welsh Government might take to use its new tax powers to improve compliance and enforcement, and minimise the impact of Landfill Disposals Tax evasion? If yes, please describe what those actions could be?*

There is limited information about actions planned by Welsh Government to improve compliance and enforcement, and minimise the impact of Landfill Disposal Tax evasions. Achievement of these objectives will require action on a number of fronts including more effective enforcement and effective PR and communications activity. It will be important to establish the costs of such activity against the estimated costs of non-compliance and tax evasion on both financial and environmental grounds.

### **Tackling Tax Avoidance**

*20. In your view, is there evidence of tax avoidance within the existing Landfill Tax, and what is the nature of this?*

UKELA has no information on this issue.

### **The Invoice Period**

*21. Would you support aligning the tax return period with the financial year? Please explain your reasons.*

There does not appear to be any substantive reason for not aligning the tax return period with the financial year. The dominant criteria for such a decision should be convenience to the site operator's business cycle and the regulator's administrative processes, rather than work flow considerations of the Welsh Revenue Authority, the new body to be set up to collect the taxes.

### **European Waste Catalogue Codes**

*22. What would be the practical implications of making it a requirement that European Waste Catalogue codes are used in completion of returns?*

On the understanding that site operators are familiar with and competent in the use of EWC codes, and that their use does not impose an undue burden, UKELA would support implementation of the requirement to use the codes in the NRW waste returns. However, it would be helpful to have some indication of the costs involved for site operators and whether this is likely to lead to efficiency savings.

### **Filing Tax Returns**

23. *How might the Welsh Government simplify and modernise the filing of tax returns including improving electronic and online support?*

Whilst the costs and proportionality argument is valid to an extent, in today's technological environment, it would be a backward step to continue with a paper based system. Furthermore, apart from the medium term efficiency savings and improvements in records and compliance, there are also savings for the environment through the use of less paper.

### **Bad Debt Relief**

24. *Should bad debt relief be offered and if so, in what circumstances is it appropriate?*

All businesses face the risks of bad debt and this should be factored into their business modelling. It is not clear why the waste disposal sector has been awarded this relief. However, there may be a case for awarding relief in particular circumstances on a discretionary basis.

### **Resolving Tax Disputes**

25. *Have you comments on the operation of the current internal reviews and appeals provisions in a Landfill Tax context, including in particular the people eligible to see a review or appeal?*

UKELA supports the proposals as set out in the consultation paper.

### **The Timing of Payment when a Dispute Arises**

26. *In your view, are there any exceptional circumstances in which tax payers might be able to postpone payment of Landfill Disposals Tax until the conclusion of their appeal?*

The current HRMC arrangements appear fair and reasonable. In situations where the landfill operator has secured agreement to withholding payment until the appeal has been heard, the fact that there is a requirement to pay the full amount with interest if the appeal is lost presents a risk to the operator and should act as a deterrent to bringing forward appeal cases with a weak evidence base. There may well be exceptional circumstances in which the landfill operator may not have been able to secure the payment in question from the waste disposal company, so it appears reasonable to continue with the current arrangements.

### **Community Well-being**

27. *Should Welsh Government allocate a proportion of Landfill Disposals Tax Revenue to enhance the well-being of communities?*

In a situation of reduced public funding, the Welsh Government's block grant being reduced in line with the amount of landfill tax being collected and anticipated reductions in the level of tax collected, it is difficult to decide whether all the tax should accrue to the Welsh Government for distribution amongst various budgets or whether some should be allocated specifically for the well-being of communities affected by landfill sites. Those communities living nearby are likely to be affected by traffic and other impacts from the site. It is further noted that a number of sites are close to communities in deprived areas of Wales. In the light of this and proposed implementation of the goals of the Well-being of Future Generations Act, UKELA concludes that a proportion of the tax revenues should be retained to enhance the well-being of those communities affected by landfill operations.

28. *If the Welsh Government allocates a proportion of the Landfill Disposals Tax revenue to enhance community well-being, which of the following activities should benefit from funding, and why?*

- *Supporting compliance and enforcement, and minimising the impact of waste crime.*
- *Supporting waste minimisation and the diversion of waste from landfill*
- *Bio-diversity initiatives and wider environmental improvements*
- *Tackling poverty and deprivation in communities*
- *Other*

It is suggested that the funding should be flexible and enable projects that cover all four of the above, although there are concerns about supporting compliance and enforcement as the money should be used for the communities rather than to supplement the work of public bodies in terms of these activities. There should be a strategy for the funding such as aimed at improving the living conditions of those residing near a landfill site and clear criteria for award of financial support.

UKELA believes that research in areas such as biodiversity and waste management should be restored as legitimate purposes for the LCF (which used to be the case). This would mean relaxing the 10 mile rule, but the rule would arguably be unnecessary, as the funds raised could only be used in Wales.

*29. Do you have any thoughts on the possible administrative models?*

It is noted that there are about 50 active environmental bodies in Wales, a number of which could handle the process. It is important that care is chosen to select a body that provides value for money and ensures that the funds are well spent in the interests of the communities affected by landfill activity. Lessons need to be learnt from the experience of using the existing distributive environmental and environmental bodies.

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