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Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Eich cyf/Your ref
Ein cyf/Our ref SF/JD/ 0073/11

Lord Dafydd Elis Thomas AM
Presiding Officer
National Assembly for Wales

28 March 2011

Dear Dafydd

THE WASTE (MISCELLANEOUS PROVISIONS) (WALES) REGULATIONS 2011

I am writing to inform you that in order to bring the Waste (Miscellaneous Provisions) (Wales) Regulations 2011 into force, it has become necessary to breach the 21 day rule. The Regulations will be made on 28 March 2011 and will come into force on 29 March 2011. I have set out below the background to the Regulations and the reasons why it has been necessary to breach the 21 day rule

The new EU Waste Framework Directive (Directive 2008/98/EC) ("the Directive") must be transposed by the UK into its domestic law. In Wales, the Welsh Ministers are responsible for transposition, having been designated to make legislation for this purpose using the powers at section 2(2) of the European Communities Act 1972. In addition, the powers at section 2 of the Pollution, Prevention and Control Act (to make regulations to for the purpose of regulating pollution) have been transferred to the Welsh Ministers: these powers also enable subordinate legislation to be made to transpose the Directive.

As there are no substantive issues of fact which would justify a transposition for Wales which would be different to that required for England, the Welsh Ministers have worked with the Secretary of State for Environment, Food and Rural Affairs to develop joint consultations and composite legislation which would transpose the Directive for both England and Wales: the Waste (England and Wales) Regulations 2011 ("the England and Wales Regulations").

The Directive's deadline for transposition expired on 12 December 2010. Following two comprehensive consultations, it is now intended that the transposing legislation will come into force early in March. It is essential that this is not further delayed, as the UK is now liable to immediate infraction proceedings with the consequent risk of very serious fines.

The Directive consolidates and replaces previous Directives on waste (it repeals Directives 75/439/EEC, 91/689/EEC and 2006/12/EC) and it also strengthens the EU's policy on waste in key areas such as waste prevention and the reduction of the environmental impacts of waste generation.

Transposition of the Directive's requirements therefore necessitates revision to a wide range of existing legislation in England and Wales. Much of this has been made using powers transferred to or conferred on the National Assembly for Wales and subsequently the Welsh Ministers, and in many cases the legislation has been made separately by them for Wales (although its content is essentially identical to equivalent legislation made by the Secretary of State for England).

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In order to amend Welsh subordinate legislation (i.e. made by the Assembly or the Welsh Ministers) it is of course necessary to amend both the Welsh and English versions. However, the England and Wales Regulations, being a composite instrument, will be made in English only. It would nevertheless have been possible for the Regulations to contain amendments to the Welsh versions of our legislation, but the UK Government were not willing for them to do so for administrative reasons in the context of the transposition timetable..

In order to deal with this issue, it was necessary for the relevant amendments to be contained in a separate instrument to be made by the Welsh Ministers – this is the purpose of the Waste (Miscellaneous Provisions) (Wales) Regulations 2011 (“the Wales Regulations”). It should be noted that all of the amendments in the Wales Regulations to Welsh legislation are equivalent to corresponding amendments to English legislation in the England and Wales Regulations: there are no differences in policy or practical effect. It follows that the Wales Regulations are in nature supplementary to the England and Wales Regulations. The latter are effective to transpose the Directive in relation to England, but there is a gap in relation to Wales which the Wales Regulations have effect to fill.

Given the role of the Wales Regulations in relation to the England and Wales regulations, a draft of the Wales Regulations was appended for information to the Explanatory Memorandum accompanying the draft England and Wales Regulations when these were laid before the Assembly.

The Wales Regulations contain two provisions which refer to and depend on provisions in the England and Wales Regulations.

The first provision is Regulation 5, which amends the definition of “Waste Strategy or Wales” at Regulation 2 of the Town and Country Planning (Local Development Plan) (Wales) Regulations 2005 (“the LDP Regulations”). The significance of this is that Regulation 13 of the LDP Regulations requires Local Planning Authorities to have regard to the Waste Strategy for Wales in preparing their Local Development Plans. That requirement is essential because appropriate LDP content is a key contributor to the effectiveness of the Waste Strategy for Wales in delivering the Directive’s requirement for there to be national waste plans.

The reference in Regulation 5 to the England and Wales Regulations (and therefore to the transposition of the Directive’s revised requirements for national waste plans) guarantees, straightforwardly and clearly, that the document which LPAs take into account in preparing their LDPs will be a national waste plan which complies with the Directive.

The second provision is paragraph 30 of Part 1 to the Schedule, which provides for Schedule 4 of the Hazardous Waste (Wales) Regulations 2005 to be substituted by the Schedule set out in Part 3 of the Schedule to the Wales Regulations. Part D of the new Schedule requires consignors of waste to confirm that they have applied the duty to apply the waste hierarchy as required by regulation 12 of the England and Wales Regulations.

Regulation 35 of the Hazardous Waste (Wales) Regulations 2005 requires that anyone removing hazardous waste from premises must complete a consignment note in the form set out in Schedule 4 (or a form requiring the same information in substantially the same format)

A key reason for the substitution of the new Schedule 4 is the Directive’s requirement that persons undertaking waste activities must take all reasonable measures to apply the Directive’s hierarchy of priorities for waste: i.e. prevention, preparing for re-use, recycling, other recovery, and disposal. This requirement is transposed by Regulation 12 of the England and Wales Regulations. The waste hierarchy duty will be particularly relevant where a person is considering the disposal of hazardous waste. Thus it is necessary, in transposition, to provide for the consignment note to demonstrate that the duty has been complied with.

It is considered that there was no satisfactory alternative to making these references. Firstly, it follows from the fact that the England and Wales Regulations are required to transpose the Directive that there were no equivalent existing statutory provisions to which reference could instead have been made.

Secondly, whilst it would in theory have been possible to provide free-standing provisions with the Wales Regulations, these would have been complex, referred directly to or repeated provisions of the Directive rather domestic legislation, and the direct link to the England and Wales Regulations would have been lost: this is considered undesirable as the England and Wales Regulations provide and explain the overall context for the transposition.

As there were no satisfactory drafting alternatives to the references to the England and Wales Regulations, it follows that it is necessary for the Wales Regulations to be made no earlier than the England and Wales Regulations.

However, it is also considered essential to bring the two instruments into force at the same time. Not doing so would result in a staggered and temporarily inconsistent implementation of the Directive in Wales, which would cause significant inconvenience and detriment to all those affected.

Finally, regard was had to the fact that instruments made under the enabling power for the Wales Regulations (section 2(2) of the European Communities Act 1972) may be made using the negative or affirmative procedure. This is at the discretion of the maker of the instrument and no criteria are laid down (see section 59(3) of the Government of Wales Act 2006). It follows that it would in theory have been possible for the Wales Regulations to have been made on an affirmative basis and to have followed a timetable parallel to that of the England and Wales Regulations.

However, in practice the choice of procedure has depended on the nature of the provision being made rather than procedural considerations. The Wales Regulations do not substantially affect the provisions of an Act of Parliament or Assembly Measure, they do not amend any provision of an Act or Measure, and provide only for consequential updatings of subordinate legislation to reflect changes in Directive terminology and objectives. It was concluded, therefore, that it would not be appropriate to make the Wales Regulations under the affirmative procedure.

Therefore, taking into account all above the matters, it was concluded that the detriment caused by the breach of the 21 day Rule, whilst regrettable, would have been outweighed by the detriment and disadvantages arising from the other available options.

A copy of this letter goes to Janet Ryder AM, Chair of the Constitutional Affairs Committee, and to Stephen George, Clerk to the Committee.

Jane Hutt