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CORPORATE GOVERNANCE REPORT

Annex to the RPS
Review of the Producer Responsibility Initiative Model in Ireland

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TABLE OF CONTENTS

1. Context to the Corporate Governance Report

This Report considers the legal relationship between the Schemes and the DECLG. It discusses the current framework of this relationship (including the contractual documentation in place between the DECLG and the Schemes) and outlines our recommendations for changes to this framework in order to develop the relationship between the two parties and to streamline it whilst optimising the desired environmental outcomes.

These recommendations call for the implementation of a coherent set of rules to (1) govern the legal relationship between the Schemes and the DECLG, (by way of a Service Level Agreement) and (2) implement rules according to which the Schemes should be governed internally (by way of one Corporate Governance Code which all Schemes would be obliged to sign up to pursuant to the provisions of their respective Service Level Agreement).

1.1 Overview of the Legislative Framework

The development of Irish producer responsibility initiatives (PRIs) has been influenced to a large degree by EU waste policy and legislation. EU waste policy has evolved over the last four decades through a series of environmental action plans, policy initiatives and legislation that aims to protect the environment and human health from the adverse impacts of waste generation and management. To this end EU waste policy, as embodied in the waste hierarchy, prioritises waste prevention followed by preparing for re-use, recycling and other forms of recovery, with disposal such as landfill as the option of last resort.

Current EU waste policy adopts a life-cycle approach to waste and the waste hierarchy is associated with the broader objective of reducing the environmental impacts arising from the consumption of natural resources.

The Waste Framework Directive (2008/98/EC), the corner stone of EU waste law, requires Member States to take appropriate measures to encourage firstly the prevention or reduction of waste production and secondly the recovery of waste by means of recycling, preparing for re-use, reclamation or any other process.

Article 8 of the Waste Framework Directive provides for Extended Producer Responsibility (EPR). Member States may adopt measures for producers to take responsibility for the acceptance of returned products, financing and making arrangements for the subsequent management of waste and making information in relation to such measures publicly available.

Article 11 of the Waste Framework Directive obliges Member States to take appropriate measures to promote the re-use of products by encouraging the establishment and support of re-use and repair networks, the use of economic instruments, procurement criteria, quantitative objectives or other measures. Producer responsibility is among the economic instruments employed by EU waste legislation with the ultimate aim of the EU becoming a recycling society, which seeks to avoid waste and uses waste as a resource.

Extended Producer Responsibility legislation has developed in line with the advancement of EU waste legislation and policy from initial waste stream recycling targets to an integrated life cycle approach to waste management. The concept of Extended Producer Responsibility is closely linked with the polluter pays principle and can be considered as an application of the principle to waste producers, in so far as the costs of waste management are borne by the producer of the waste. This in turn promotes eco-design of products, as producers are incentivised to redesign products to reduce waste management costs. As set out in Recital 27 of the Waste Framework Directive, Extended Producer Responsibility is: "*one of the means to support the design and production of goods which take into full account and facilitate the efficient use of resources during their whole life-cycle including their repair, re-use, disassembly and recycling without compromising the free circulation of goods on the internal market.*"

The overarching Extended Producer Responsibility requirements in the Waste Framework Directive are supplemented by other Directives for specific waste streams namely, packaging and packaging waste, batteries, end-of-life vehicles and waste electrical and electronic equipment. Each of these Directives sets out the legal framework for the operation of producer responsibility schemes for the waste stream in question, including targets/objectives to be achieved, control and reporting mechanisms. They emphasise the need for all producers of waste materials to accept responsibility for such waste and operate within a spirit of shared responsibility and close co-operation to achieve the objectives of the Directives.

The Waste Framework Directive provides that Member States may take legislative and non-legislative measures to ensure that product producers (which include those who manufacture, process, treat, sell or import products) have extended producer responsibility. This would include the development of national PRIs. However when applying producer responsibility Member States are obliged, pursuant to Article 8(3) of the Waste Framework Directive, to take into account the:

"technical feasibility and economic viability and the overall environmental, human health and social impacts, respecting the need to ensure the proper functioning of the internal market."

Furthermore, according to the Waste Framework Directive, extended producer responsibility must be applied without prejudice to waste stream specific legislation and product specific legislation.

The Waste Management Act 1996 and the Waste Management (Waste Directive) Regulations 2011 set out the legislative basis for EPRs under Irish law. There are presently Extended Producer Responsibility / Producer Responsibility Initiative (PRI) arrangements in six waste streams, waste electrical and electronic equipment (WEEE); batteries; packaging; farm plastics; end of life vehicles (ELV); and tyres. In all of these waste streams, except ELV, producers have the choice of meeting the required PRI environmental outcomes specified in the applicable legislation either through membership of a PRI Scheme which acts collectively on behalf of the producer-members, or self-complying on an individual basis.

1.2 Understanding of the Requirements of the Corporate Governance Framework

In drafting this Report we have sought to identify the key needs of the Corporate Governance Framework as set out in the DECLG terms of reference. Having considered these in some detail we believe that they can be summarised as follows:

- Meeting requirements of domestic and EU waste law and policy including the achievement of targets;
- Retaining a sufficient control and influence over the Schemes' activities without imposing an additional administrative burden on the DECLG ;

- Mandating that all Schemes adopt one common set of rules for Corporate Governance, which reflect current highest standards;
- Ensuring that the Schemes which contract with the DECLG offer a consistent and high quality service;
- Ensuring that reliable data can be collected and processed in respect of each Scheme;
- Enhancing the ability of DECLG to address/sanction poor or non-performance by any Scheme;
- Ensuring the availability of a Contingency Fund for continued delivery of each PRI in the event of failure of a Scheme;
- Increasing the opportunities for and actual transparency for members around all aspects of the Schemes' operations; and,
- Increasing the transparency around environmental outputs and conditions of approvals for the Schemes in line with the Aarhus Convention;

Overall we understand that the DECLG requires a simple, efficient, transparent and easily enforceable legal structure to govern its relationship with the Schemes to ensure the highest standards of internal Corporate Governance. Whilst we have endeavoured to frame our recommendations in a manner which will be efficient and low maintenance for the DECLG, we do wish to highlight that a successful relationship between the DECLG and the Schemes going forward will require on-going monitoring, management and engagement on the part of the DECLG with the Schemes. We would encourage this engagement as a means of minimising the risk of issues arising with the Schemes under the new structures we are recommending.

2. Current Governance Framework for Producer Responsibility: The Schemes

2.1 Introduction

Currently the contractual framework between the Schemes and the DECLG is based on an application process which, if successful, is followed by the grant of an approval to a given Scheme. The approval is set out in a letter from the Minister and is subject to a "schedule of conditions". These are not countersigned by the Scheme but take the form of an appendix to the Letter. The applicable conditions differ across the various Schemes and we set out below a sample of these approvals in order to demonstrate these differences.

2.2 Analysis of the Current Arrangements

We have been furnished with copies of the approval letters and schedules of conditions (collectively the Current Arrangements) in respect of the Schemes which are currently authorised by the DECLG. We have also been furnished with a summary document outlining the views of stakeholders in relation to the Corporate Governance Framework (attached at Annex 2 to this Report). These documents demonstrate that the DECLG has attempted to address both contractual obligations for the Schemes (by reference to the relevant statutory framework) and internal governance type obligations (by setting out obligations on audit, composition of the board etc.) in the same contractual document. However, the Current Arrangements, which date between December 2007 and November 2011 are each individual and as such address different matters. They are not consistent with each other. We briefly demonstrate this point below by referring to a sample of the Current Arrangements.

2.2.1 Sample of the Current Arrangements Reviewed

One approval letter schedule of conditions (which dates from 2007) outlines the data and reporting requirements, some limited stipulations in relation to the board of directors, provision for audits, and provisions on dissemination of information.

A further approval letter which we analysed, from 2010, has a slightly longer set of conditions appended to it, addressing membership, opening hours, provisions to be included in its annual environmental report, management of financial resources, cooperation with other compliance schemes, information dissemination and retailer registration.

Another approval made in September 2008 also comprises of an approval Letter (stating that the approval covers a period up to 30 September 2013) and a schedule of conditions. This schedule of conditions has a different focus to those considered immediately above in that it focuses on the internal governance of the company, mandates the furnishing of environmental and financial statements and contains mandatory statements regarding the making of amendments to the company's Memorandum and Articles of Association and the composition of the Board of Management. The contingency reserve, cooperation with other Schemes, targets, and information dissemination are also addressed.

Among the most recent Current Arrangements we have reviewed is an approval from October 2011. Its schedule of conditions addresses certain general provisions, reporting requirements, management of financial resources, cooperation with other Schemes, and achievement of targets.

2.3 Conclusions from Review of the Current Arrangements

It is our view that the Current Arrangements have two principal weaknesses. Firstly they each contain differing contractual provisions, meaning that there are few consistent obligations which would apply to all the Schemes. This is a considerable weakness as some of the Current Arrangements do not touch on clauses which we would view as key. Secondly the current documentation lacks certain basic contractual provisions which are required to protect the DECLG.

For example, some schedules do not provide for the possibility for the DECLG to terminate them or state what would occur in the case of unsatisfactory performance or upon an insolvency event occurring in respect of a Scheme. We are aware that some of these powers may be contained in the underlying legislation but would state that it is advisable to see express powers provided for in the contractual documentation between the DECLG and the Scheme. In other approval letter schedules the main focus appears to be on Corporate Governance and many standard contractual provisions, such as, termination, dispute resolution mechanisms, confidentiality, force majeure, and governing law are missing.

The DECLG has a broad statutory power to grant or refuse an application for approval as a Scheme under the WEE, Batteries, Packaging and Waste Tyres legislation.[1] While the DECLG would appear to have a discretion to refuse an application following a careful consideration of that application, any such discretionary power must be exercised legitimately in accordance with the purposes and objectives of the legislation.

We would recommend that a very straightforward new system is implemented to ensure that the DECLG receives appropriate contractual protections from the Schemes and that the Corporate Governance Framework which reflects best practice is adopted by the Schemes. This recommendation can be achieved through a two-step approach:

Firstly we recommend that each Scheme enters into a Service Level Agreement (SLA) with the DECLG. The SLA will form the contract between the two parties and will replace the current system of approval letters combined with schedules. Each SLA can be tailored to each Scheme to ensure that the specifics of each approval are catered to, but at a minimum each SLA will contain consistent basic contractual provisions which will give the DECLG a greater level of certainty and protection. The basic contract law clauses will be the same in each Scheme's SLA and the 'bespoke' provisions to apply to different Schemes will be added into the SLA after the standard clauses. One of the objectives of this SLA system will be to

[1] SI No. 355 of 2011 (European Communities Waste Electrical and Electronic Equipment) Reg 33(1), SI No. 268 of 2008 (Waste Management Batteries and Accumulators) Reg 36(1), SI No. 798 of 2007 (Waste Management Packaging) Reg 19(1), SI No. 664 of 2007 (Waste Management Tyres and Waste Tyres) Reg 27(1). The legislation relating to Farm Plastics and ELVs is not robust, and there is no PRO for ELVs.

implement a system where the DECLG can manage the performance of the Scheme on a low resource basis. Although our aim is to ensure that the DECLG does not have to deploy very significant resources on an on-going basis to the Schemes, we would reiterate that a successful relationship between the DECLG and the Schemes (from the DECLG's perspective) will require on-going management and a monitoring role for the DECLG (or its agent).

In tandem with the implementation of individual SLAs for each Scheme, we recommend that one standard Code of Corporate Governance is drafted which will be adopted by each Scheme and which will apply across all the Schemes. It will be a term of each SLA that the Schemes are contractually required to comply with the Code of Corporate Governance, and a breach of the Corporate Governance Code will constitute a breach of the SLA. This document will enable the DECLG to impose high standards of Corporate Governance within each Scheme and will address many of the points which the DECLG had previously sought to address by way of the conditions to the approval letters. Schemes would be contractually bound (via their SLA) to implement the Code of Corporate Governance and the DECLG would reserve the right to amend the Code from time to time meaning that the Code of Corporate Governance could be updated to reflect changes to best practice without requiring the underlying contract to be renegotiated or re-executed.

3. Regulating the Relationship between the Schemes and the Department: The Service Level Agreements

As set out in Section 2.3 above, we recommend that the DECLG enters into an SLA with each Scheme. As these SLAs would replace the Current Arrangements in place between DECLG and the Schemes, consideration will have to be given to whether the DECLG is permitted to terminate the Current Arrangements on notice to the Schemes or whether it prefers to await their expiry before implementing the new system of SLAs.

There is an express statutory power to review, revoke, vary and replace approvals in all the relevant statutory instruments except those relating to Farm Plastics and End of Life Vehicles.[2] This power is subject to prescribed procedural requirements including the provision of notice of proposed changes and a period of no less than four weeks for the Scheme to make submissions and/ or apply for a new approval, as required.

Once the relevant notice requirements have been adhered to any necessary terminations have been effected, we recommend that each Scheme signs up to an individual SLA so that requirements specific to each Scheme can be accommodated. In addition to the 'bespoke' section of the Schemes' SLAs (which we would anticipate would be quite succinct) we recommend below a series of provisions which would be contained in each SLA. These provisions will enable the DECLG to gain key contractual protections which will assist it in managing the performance of the Schemes at arm's length and without requiring significant time/resources. The SLAs, once executed by the Schemes, have the advantage that responsibility for compliance with the obligations imposed on the Schemes rests with the Schemes. As such they are efficient from the DECLG's point of view because there is a low burden of administration but the obligations are quickly and easily enforceable. The DECLG will of course need to maintain a monitoring role in order to know if/when a breach of the SLA may occur or has occurred so that it can take appropriate measures.

3.1 Key Clauses

We set out below our recommendations with regard to the content of each SLA. As you will note these focus on implementing key protections for the DECLG and are divided into four categories as follows:

3.1.1 Obligations on the Schemes

The provisions of each SLA should clearly set out the following obligations on the Schemes:

Incorporation of the Corporate Governance Code

The SLA should provide that the provisions of the Code of Corporate Governance (as further discussed below) are accepted and shall immediately be adopted by the Scheme and that the Scheme recognises that the Code as executed by the Scheme is subject to modification

[2] SI No. 355 of 2011 (European Communities Waste Electrical and Electronic Equipment) Reg 34, SI No. 268 of 2008 (Waste Management Batteries and Accumulators) Reg 37, SI No. 798 of 2007 (Waste Management Packaging) Reg 20, SI No. 664 of 2007 (Waste Management Tyres and Waste Tyres) Reg 28

by the DECLG at its sole discretion from time to time and undertakes (1) to make any immediate amendments necessary to its Memorandum and Articles of Association; (2) to make such further amendments to its Memorandum and Articles of Association as may be necessary in the future if the Code is modified or updated by the DECLG; and (3) to submit the further amendments to its Memorandum and Articles of Association to the DECLG for its prior approval.

Requirements of approval by the DECLG as a Scheme

This clause in the SLA should operate as a system of pre-conditions so that the Scheme is only approved on condition that it abides by these requirements. These will include clauses imposing reporting requirements on the Schemes and regarding the collection of data necessary for the Environmental Protection Agency to report to the domestic and EU authorities on the meeting of targets. They will also provide for rights of verification and audit and can include a provision requiring the Scheme to commit that it has the capacity and technical expertise required to meet the targets set out later in the SLA. The provisions on the collection and reporting of data should be specific to each Scheme and should be detailed and expressed to be mandatory in nature.

Achievement of Targets

As the achievement of targets is of critical importance to the DECLG, it should clearly enumerate the individual Targets each Scheme is required to meet for its individual waste stream. We recommend that the DECLG structures the overall target by dividing it into a series of interim targets to be met by each Scheme. We recommend the interim and overall targets are set out in a schedule to the SLA. We further recommend that it is expressly stated in the SLA that a breach of the clause on achievement of targets (including interim as well as final targets) constitutes a contractual breach of the SLA. The Scheme reporting obligations should be designed so as to provide an early warning or 'red flag' system to highlight when a Scheme is off-target (and thereby in breach of its SLA with the DECLG). The advantage of this approach is that the DECLG gains early insight into the progress of the Scheme in terms of meeting its targets on an annual or more frequent basis.

We recommend that the steps necessary to remedy such a breach of contract (including non-financial and financial measures and penalties) should be set out in a schedule to the SLA. Such measures and penalties should be specifically devised to address the cause of the breach, including any issues leading to the failure to achieve the requisite targets. They might include, for example, increased spending on education and awareness, increased rates of collection, training for key personnel and directors, and assignment of additional resources. These measures may be specified by the DECLG following consultation with the Scheme, or proposed directly by the Scheme, as part of the Scheme approval process.

In addition to the adoption of appropriate levels of management and oversight by the DECLG, we also recommend the use of non-financial and financial contractual measures and penalties for the achievement of targets. Other options are discussed under the heading 'Encouraging PRO Performance' in Section 4.4 of the main report. In particular, it is clear that the DECLG currently has no statutory power to impose fines for breach of targets, and

that provision for such a measure would need to be introduced in primary legislation in order to have any legal effect. The practicality of enforcing statutory fines would need to be considered, given the likely uncertainty with regard to the cause of any failure to achieve targets.

As discussed below at section 3.1.4, the SLA should incorporate an alternative dispute resolution (ADR) mechanism to address any legal and commercial disputes arising under the SLA. We recommend that the ADR clause is referred to in the clause on achievement of targets. In this way, if a dispute arises with regard to the non-financial and financial measures and penalties to be adopted, the matter might quickly be referred to an expert/ arbitrator appointed to assist the DECLG and the Scheme to resolve the issue quickly and efficiently, ensuring that the Scheme is required to take such steps as are necessary and appropriate to remedy the breach of contract in the event that an interim target is missed.

Contingency fund

The purpose of the Contingency Fund (Fund) is to ensure the availability to the DECLG of sufficient resources for the continued delivery of each PRI in the event of failure of a Scheme. The SLA should include a clause outlining this rationale for the retaining of a Fund.

We understand that there is currently a risk that a Scheme may access the Fund to fund day to day operations. In order to avoid the Fund being depleted in this way, the SLA should require the Fund to be ring-fenced from the day-to-day financial requirements of the Scheme, and the Fund should be held either by the DECLG (subject to conditions), or by the Scheme in trust for the DECLG.

The SLA should carefully outline the circumstances in which DECLG is permitted by the SLA to access the Fund, where it might have "step–in rights" and when (if at all) the Scheme or its members would be permitted to access it. We are aware that a key requirement for the DECLG is that the Fund must be available in the event of a Scheme collapsing in order that continuity of service can be guaranteed. We therefore recommend that the DECLG retains full control over and is proprietor of the Fund, subject to the provisions of the SLA.

However, in the event that it is not feasible or practical to have the Fund directly under the control of the DECLG, an alternative recommendation would be that title to the Fund remains with the Scheme but that specific contractual provisions are inserted into this clause of the SLA specifying an exhaustive list of circumstances in which a Scheme would be permitted to access the Fund or providing for the Fund to be held in a separate bank account and providing that it would constitute a breach of the SLA for a Scheme to withdraw monies from the Fund in circumstances other than those listed.

The question also arises as to whether the producer members of the Scheme who contribute to the Fund should be able to recoup the monies contributed to the Fund if they decide to transfer to another Scheme (where applicable) or exit the Scheme in favour of self-compliance. Clearly, the SLA conditions should not have the effect of restricting freedom to switch between Schemes (where applicable) and it is possible to address these

issues under both of the proposals above (i.e. Fund becoming the property of DECLG or Fund remaining in the ownership of the Scheme held in trust for the DECLG). In both circumstances the question of a producer's contribution following that producer if it switches Scheme can be addressed by mandating specific accounting requirements so that it is at all times clear who has contributed monies to a given Fund, and the relevant amounts. The primary objective of the DECLG must be to ensure that the Fund, or Funds, are sufficient to meet the potential costs of continuing the PRI in the event of a failure of the Scheme.

The SLA (or if the DECLG prefers a specific side agreement drafted solely for regulating the Fund) can enumerate the circumstances in which the contributions of a producer will be transferred to the Scheme the producer has switched to. It is recommended that the DECLG should restrict to a proportionate extend (either in quantum or in time) the ability of producers to fully recoup financial contributions to the Fund in circumstances where a producer is exiting a Scheme in order to self-comply. The rationale for this is to avoid a floodgate scenario where many producers exiting simultaneously may result in an unsustainable depletion of the Fund. It may be possible to structure the SLA provisions such that a producer in these circumstances may be able to recover a proportion of its contribution, subject to the condition that the recoupment of monies contributed to a Fund should not have a detrimental effect on the overall capacity of the Fund to continue the service in question in the event of a Scheme collapse. The DECLG should be satisfied that there is a sufficient factor of safety such that the details it decides upon will not call into question the capacity of the Fund in the event of collapse of a Scheme.

In terms of the length of time it would take for a Fund to amass we note that at present certain Schemes have no specified length of time whilst others have a period of five years. We recommend that a Fund is established immediately or as soon as possible upon the creation of any new Scheme.

Historic WEEE

The fund for Historic WEEE differs from the Contingency Fund as the Historic WEEE fund's function is to discharge the historic WEEE liability. It is paid by consumers and has been allocated to the Schemes. In light of the fact that we understand that the Historic WEEE fund is being depleted we recommend that the WEEE Schemes should be required, by virtue of a clause in their SLA to provide evidence of the quantities of historic WEEE collected and treated in order to access this fund.

Cooperation with other Schemes / self-compliers

Depending on the Scheme, the DECLG should specify provisions and obligations in respect of cooperation with another Scheme operating in the same waste stream (if there is more than one Scheme in the stream) and with producers who have chosen to self-comply. We would recommend that the DECLG also mandates that Schemes in different waste streams should cooperate where this would be of benefit (for example in the co-funding of a public awareness programme which could apply to a number of streams). In this regard it should be specified that cooperation between Schemes should at all times occur within the

parameters of applicable competition law and in compliance with competition law and all other applicable regulations.

Notice

One of the key requirements for DECLG is that of certainty in relation to the provision of services by the Schemes. We therefore recommend that a significant period of notice be required of the Scheme before it would cease to provide the Services, and that such period might be linked to the expiration of the members' annual membership fees. The relevant notice period would be provided for in the SLA under the termination provisions (further outlined at 3.1.3 below). It is up to the DECLG to decide what period it would view as sufficient but it would be very helpful if this were expressed in the SLA as this would enable the DECLG to take measures against a Scheme which threatened or indicated that they no longer wished to provide services without providing sufficient notice.

3.1.2 Services to be Provided by the Schemes

Depending on the complexities of the given waste stream this clause may vary from SLA to SLA. At its core the clause should set out in a significant amount of detail the exact scope of services (which can be defined as the "Services") which the DECLG requires the Scheme to carry out. We understand that these will include (but are not necessarily limited to) membership services, collection services, sales services, marketing services and support services. The clause should be extensive and exhaustive and should include each individual service and role which DECLG requires the given Scheme to carry out. The rationale behind an extensive enumeration of the Services is that the DECLG can, if necessary, easily refer the Scheme to the service in question in the event that there is unsatisfactory service delivery and raise this as a potential breach of the SLA.

3.1.3 Ability of the DECLG to Terminate the SLA

We recommend that the DECLG should have the ability to cease or terminate its SLA with a given Scheme in the event that the Scheme breaches a key provision of the SLA or ceases carrying out the Services. The lack of an express provision in this regard under the Current Arrangements is a cause for concern and could certainly be easily remedied by adopting our recommendation to include a clause outlining events which would result in the DECLG being able to terminate the SLA. We recommend that the following events should trigger an ability for DECLG to terminate the SLA:

- if an order is made or an effective resolution is passed or a petition is presented for the dissolution (in the case of a partnership) or winding up (in the case of a company) of the Scheme;
- if a receiver, examiner, administrator or liquidator is appointed over any of the property or assets of the Scheme;
- if the Scheme commits any breach of the SLA (including but not limited to defaults in provision of the Services) which, if capable of remedy, shall not have been remedied within thirty days after written notification thereof has been served on the Scheme;
- if a distress or execution order is levied or served upon any of the property or assets of the Scheme and is not paid off within thirty days;
- if the Scheme shall cease or threaten to cease to carry on all or a substantial part of the Services;
- if the Scheme is in breach of any of the provisions of the SLA (including but not limited to the Warranties set out in the SLA);
- if the Scheme is in breach of any provision of the Companies Acts or other applicable legislative provisions; and
- if any other event occurs which the DECLG in its absolute discretion considers might or does adversely affect the ability of the Scheme to carry out the Services or carry out and and/or to comply with its obligations hereunder.

The DECLG also needs to give careful consideration to whether the threatening of cessation of the SLA will be a sufficient motivator for the Schemes to remedy any issues which the DECLG may raise with them. The termination clause in the SLA can be set out so as to provide that certain of the scenarios above (such as the winding up events) will trigger an

automatic termination of the SLA. This means that the SLA would come to an end automatically upon the occurrence of one of these events. For other scenarios above the DECLG may elect to give the Scheme a period of time (30 business days) to remedy or rectify the occurrence to the satisfaction of the DECLG. If the occurrence has not been rectified by the Scheme within the period of time set out in the SLA the DECLG would then be able to serve a notice on the Scheme terminating the SLA. If the threatening of cessation of the SLA may not be a sufficient motivator for the Schemes to remedy any issues which the DECLG may raise with them, the DECLG may also wish to consider other contractual measures and penalties (financial or non-financial), in addition to termination of the SLA.

In addition, the termination provisions of the SLA should also address the ability of the Scheme to terminate the SLA. As stated above this should provide for a significant notice period before termination in order to enable the DECLG to make the necessary alternative arrangements before a Scheme exited a particular market.

3.1.4 Other Standard Contractual Protections

In addition to the key provisions above we recommend that the DECLG ensures that the following clauses are also inserted into each SLA:

Term

Each SLA should have a start date and an express fixed duration. It should also specify the date by which the Scheme must apply for renewal or compete for the approval. Failure to meet the deadline for renewal may result in the approval lapsing. These provisions will enable the Agreement to terminate by effluxion of time and also provides the framework for the remainder of the obligations of the Agreement. It has been suggested that the duration of the SLA be linked to the deadlines for the meeting of environmental Targets and that failure to meet targets could result in non-renewal of the SLA.[3]

Disputes

The DECLG is effectively the regulator of the Schemes, and its decisions pursuant to the relevant Statutory Instrument will be binding, subject to the limited right of the Scheme to challenge decisions by way of Judicial Review proceedings in the High Court.

Other issues may arise between the DECLG and the Scheme which amount to a legal or commercial dispute under the SLA. In the ordinary course, legal and commercial disputes under a contract will be resolved by the Courts. However, this can be a costly, lengthy and adversarial process. We therefore recommend that the DECLG inserts a clause into the SLA which would invite both parties to submit disputes under the SLA to an expert agreed by them both, or to mediation or arbitration before having recourse to the courts. This option (in particular opting for a binding determination of an expert) has the advantage of speed and maintaining relationships, and is usually more cost effective than going to Court. Mediation is also a good option but the parties must both agree to the outcome, (failing

[3] In the Competition report section entitled " A single v Multiple PROs: Holding the PRO to account"

which the parties normally submit the dispute to binding arbitration). This option would not need to be immediately invoked and could be stated to apply only if informal correspondence/ interaction between the scheme and the Department (within fixed time parameters) has failed to achieve agreement.

Warranties in favour of the DECLG

The DECLG should also consider introducing a series of warranties for the individual Scheme. Warranties are contractual undertakings or promises which, if not respected, trigger an action by the party in whose favour they are drafted, for breach of warranty. These typically include warrants that:

- The Scheme is in compliance with all applicable laws, and regulations including but limited to waste management, planning and environmental legislation;
- The Scheme is in compliance with the Code of Corporate Governance which it signed up to on [insert date] and which may be amended by the DECLG from time to time;
- The Scheme has obtained and maintains all necessary consents, approvals, authorisations, licences and permissions which are required to enable it to comply with its obligations under the SLA and to enable it to procure completion of the Services and shall not commit any act or omission which might invalidate, breach or otherwise impair the effect of such consents, approvals, authorisations, licences or permissions;
- The Scheme is in full compliance with all necessary filings with all applicable registries including but not limited to the Companies Registration Office and the Revenue Commissioners;
- The Scheme maintains all insurances necessary to ensure compliance with the SLA;
- All information, reports and documents provided by the Scheme, its employees or agents pursuant to the provisions of the SLA and during the application process are and shall be at all times true and accurate; and,
- The Scheme has full power and authority to enter into and perform the SLA which constitutes or when executed will constitute binding obligations on the Scheme in accordance with its terms.

Other General (boilerplate) Clauses

In addition we recommend that the SLA contains an obligation on the Scheme to effect all insurances necessary for the carrying out of its business. The SLA should also expressly restrict novation or assignment to the prior written consent of the DECLG. It should provide that the Minister and the DECLG are indemnified from and against all actions, proceedings and costs, claims, demands and liabilities, arising directly or indirectly, from any act or omission of the Scheme, its employees, servants or agents in connection with the SLA or any breach of the SLA. It should provide that the SLA is governed by the laws of Ireland, and include a Force Majeure clause and a confidentiality clause.

Please see further the sample table of contents for an SLA contained at Annex 1 to this Report.

4. Regulating Governance within the Schemes: The Corporate Governance Code

Introduction

Corporate Governance refers to the system by which companies are directed and controlled. The board of directors are responsible for the governance within a company. Corporate Governance concerns what the directors do and how they set the values of a company. A Code of Corporate Governance regulates the key components of the practice and procedure of the company and its board of directors. The key underlying principles should be probity, accountability and transparency. A Code of Governance must also be capable of adaptation and revision to take account of changing economic and commercial environments.

We are acutely aware that in seeking a Corporate Governance Code that can be adopted by the Schemes, the DECLG's needs centre on practicality, reliability and control. With these in mind we set out our recommendations on the adoption of a Code of Corporate Governance which each Scheme would be contractually obliged to adopt (pursuant to the provisions of their SLA) in order to be authorised by the DECLG.

4.1 Desk Review into other Codes of Governance

There are a number of well-developed Codes of Governance which have been considered for the purposes of this review. The most relevant Codes are discussed below.

UK Code of Governance (2010)

The UK Corporate Governance Code was first developed in 1992 and has subsequently been revised, with the most recent issue in June 2010 by the Financial Reporting Council. It is primarily intended for companies and financial institutions operating in the financial and commercial sector, but it has been applied by a number of corporate entities and organisations both in the UK and further afield. It is considered to be an example of best practice in the area of Corporate Governance in its field.

Although this code has proven helpful in our research we do not consider that it should be adopted wholesale by DECLG as we would rather recommend a bespoke code specifically designed for producer responsibility in Ireland and the particular requirements of the DECLG in terms of governance of the Schemes.

Code of Practice for the Governance of State Bodies (2009)

The Irish Code of Practice for the Governance of State Bodies was published by the Department of Finance in 2009 and is applicable to all State companies (and State organisations and companies which are sponsored by the State who receive significant funding by the State or interact closely with government departments or other State agencies). It is considered that certain aspects of this Code are relevant to the governance

of the Schemes, despite the fact that the funding for those companies comes not from the State but from the relevant industry sectors. This is because it is necessary for the attainment of the environmental objective and recycling target that the DECLG maintains a degree of oversight and control over the Schemes and that the boards of such Schemes are responsible directly to the Minister. Overall, however, the Schemes must operate as semi-independent companies within the commercial sector, and therefore the Irish Code of Practice for the Governance of State Bodies is not entirely applicable. For that reason we would not recommend adoption of this Code.

OECD Principles of Corporate Governance (2002)

In 2002 the Organisation for Economic Cooperation and Development (OECD) prepared a document called Principles of Corporate Governance which sets out at a very high level the key principles of Corporate Governance applicable to any framework of any of the Member States within the OECD. This focuses in particular on the rights of shareholders, the equal treatment of shareholders, the role of stakeholders, disclosure and transparency obligations and the responsibilities of the board. While it does not represent an appropriate model in and of itself, it provides an appropriate benchmark for assessing the relevance and appropriateness of particular governance principles contained in other Codes.

The Governance Code (2012)

The Governance Code is a Code of Practice for good governance of community, voluntary and charitable organisations in Ireland. [4] These entities are principally established as companies limited by guarantee and not having a share capital. Directors of such companies are typically not remunerated for their work. One of the main concerns of entities in the community and voluntary sector is to seek to re-assure their State and EU funders that funds are being dispersed to various beneficiaries in the community in a cost efficient and transparent manner. The Governance Code is designed specifically with this imperative in mind and has been drafted very broadly to encompass a wide variety of entities. Whilst we would not recommend that it is adopted wholesale, we have drawn on certain of its provisions in our bespoke Code of Governance set out below.

4.2 A bespoke Corporate Governance Code to apply to all Schemes

Further to our desk review, and given our understanding of the functioning of the Schemes, our recommendation is that a bespoke Code of Governance is drafted which will meet the needs of the DECLG. Each Scheme would be required, when signing up to its SLA, to adopt the Code of Governance, at board level, so that it applies to each Scheme.

The advantage of a bespoke Code is that the DECLG can address the exact points which are currently of concern and account for these in the Code. This is a low maintenance solution for the DECLG as, once adopted, the positive obligation is on the Scheme to abide by its terms. The clause in the SLA requiring the Scheme to adopt the Code will also be worded so as to enable the DECLG to revise and update the terms of the Code. Schemes will be

[4] See www.governancecode.ie. The Governance Code was developed by a Working Group comprising representatives of organisations from the Community, Voluntary and Charitable Sector.

required to make such amendments as are required to their corporate constitutional documentation (normally Memorandum and Articles of Association) to ensure that these comply with the provisions of the Code.

We set out below our recommendations as to the key provisions of the bespoke Code, which are designed to remedy the DECLG's current apprehensions in relation to lack of transparency at board level by the Schemes.

4.3 Content of the Code of Governance

4.3.1 The Board of Directors

4.3.1.1 Membership and Representation on the Board

We would recommend that the DECLG continues to carefully address the issue of who should sit on the board of each Scheme. The Code can mandate that the board of directors involves representatives of significant economic operators and other stakeholders. A key issue will be bringing the correct mix of skills to the boards of directors of the Schemes. It is possible to specify in some detail that, of the board of directors at any given time, a specified percentage should be made up of customers of the Scheme, industry and other specified stakeholders etc. We are aware that various stakeholders hold the view that careful consideration needs to be given to the level of 'representativeness' of the Schemes boards. Please see further Annex 2 to this Report in this regard. Rather than the DECLG mandating specific percentages of representation on each board, it is recommended to include a clause in the Code to the effect that the Board of each Scheme shall be representative of all relevant stakeholders, that any Board member who has resigned from or otherwise left a producer company shall immediately resign from the Board, and that each Board shall include a certain number of independent Board directors. It is interesting to note that the Eversheds Report[5] which analysed the impact of board composition on company performance (in particular in the financial sector) noted that overall, better performing companies had a higher proportion of female directors and a higher proportion of independent directors.

4.3.1.2 Rotation of Directors on the Board

The Code can also mandate the length of term of a directorship, and it may also oblige a rotation of new directors over a given period. It should be noted that the tenure of any given director does not per se impact on good governance. There is no fixed best practice model as the appropriate length of tenure of a directorship will vary considerably from sector to sector and depending on the nature of the company, its aims, ethos etc. This is also reflected in the Eversheds Report[6] which concludes that adopting a rules-based approach to how long directors should serve is generally inappropriate. We have analysed the current directorships of the Scheme which demonstrate that to date there has been limited rotation. However, many of the Schemes are relatively new entities so the opportunity for rotation has been limited.

[5] Measuring the impact of board composition on company performance; The Eversheds Board Report 2011
[6] The Eversheds Board Report 2011

Typically in companies where the directors are required to rotate the procedure would be that a portion (one quarter, for example) would be required to retire at each AGM and that those to retire should be those who have been longest in office since their last appointment. The new directors can then be elected by the members. The main advantage to obliging directors to rotate is that there is a guarantee that a fresh approach will be injected into a given Board at specified intervals, and that the Board is comprised of directors who are up to date with the latest technological and process developments. However, we recognise that smaller Schemes may find it difficult to source new directors at regular intervals who are representative of the membership, and that it is important for the Schemes to retain 'corporate memory' by keeping directors on the board for a sufficient period of time.

We recommend that if mandatory rotation is the preferred option, retiring directors should be eligible for re-nomination and appointment to the Board up to a maximum of serving two consecutive terms or two terms over their life. We also recommend that Directors should not be permitted to sit on a Board indefinitely and consider that a maximum term of 10 years might be considered appropriate, subject to rotation (if applicable) as set out above.

4.3.1.3 Remuneration of Directors

The levels of remuneration of the board of directors can also be addressed in the Code, either by prescribing maximum levels, or by reserving decision making on remuneration to the members of the Scheme. We are cognisant that mandating fixed or maximum remuneration for directors of the Schemes may be viewed as an unwarranted interference in the autonomy of the Schemes and would therefore urge that careful consideration (if necessary in collaboration with the Schemes) is given to whether imposing remuneration levels is a realistic and practical solution. It is recommended that the Code should refer to the fact that remuneration shall be in line with industry standards, and that in the interests of transparency and accountability to members, Board directors' remuneration and benefits shall be published annually, together with information on levels of attendance by individual Board directors at meetings, sub-committees and AGMs.

4.3.1.4 Role and Function of the Board

We recommend that the Code specifies that the directors should exercise full and effective control over the activities of the Scheme and should monitor executive management and performance. Provisions such as this are designed to ensure that best practice in Corporate Governance is promoted and that transparency is encouraged. We recommend that the Code also provides for specific functions or obligations for the chairperson of the Board, including an obligation to keep the Minister advised of specified matters of significance arising in respect of the Scheme, and to brief the members on the functioning of the Scheme at given intervals in time. Depending on the level of concern of the DECLG around the internal financial regulation of the Schemes, the DECLG could also mandate that each Scheme's board of directors operates audit and finance sub committees. Typically such committees are composed of a subset of the main board of directors with specific expertise

and will retain specific responsibility for control of the finances of the Scheme. The Code can specify how often directors should meet and can also mandate that directors engage with the Members of the Scheme at specified intervals of time.

4.3.2 Reporting, Transparency and Information

In order to ensure the effectiveness of reporting we recommend that the second chapter of the Code addresses transparency and imposes information reporting requirements on the Schemes. These would include an obligation to furnish the DECLG with audited accounts annually (and could extend as far as receiving quarterly management accounts if the DECLG considered that this was merited). This chapter of the Code should also include detail on the information in relation to the carrying out of the Services and the meeting of Targets which the DECLG requires in order to report onwards to the European Commission. The DECLG has freedom to mandate the manner and frequency with which such information comes to it and should carefully consider how best and how often to receive this information.

A related issue which can be neatly dealt with in the Code is the external information which the Schemes routinely provide in the public domain (by way of advertising campaign or otherwise).

The principles and objectives underpinning the requirements for greater levels of reporting, transparency and information can be found in the Aarhus Convention, which was ratified by Ireland on 12 June 2012, and the EC (Access to Information on the Environment) Regulations 2007-2011.

4.3.3 Cooperation between Schemes

We recommend that the Code mandates that Schemes (either within a stream or across streams) shall cooperate with each other and with producers who have chosen to self-comply to ensure that information provided to the public is at all times clear and consistent, and that operational activities which might lead to synergies and cost savings are explored and undertaken where possible.

This may necessitate either a particular officer/director within each Scheme being nominated as the responsible officer or it may require that a representative from each Scheme meets at specified intervals to ensure that this obligation is respected. The DECLG may wish to go further than this by mandating that the Schemes engage with one another with a view to launching cross Scheme/ cross stream education and awareness initiatives. The DECLG should be aware that such cooperation must at all times occur within the confines of applicable competition law.

4.3.4 Membership of the Scheme

The DECLG should consider whether it wishes to impose on the Schemes any particular requirements in terms of their members and membership of their Scheme. We understand that the DELCG may not wish to mandate many particular rules in this regard but have briefly outlined below some issues which the DECLG may wish to consider including.

- Whether it wishes to specify any conditions attaching to membership or to specify that membership should be open to all producers;
- Whether it wishes to specify permissible termination events for membership of the Scheme;
- Whether it wishes to specify any parameters in terms of fees for membership;
- Whether it wishes to specify the type of records the Schemes should hold on their members;
- Whether the Schemes should have any obligations towards their members in terms of training/educating them in data collection or the applicable regulatory environment;
- Whether the Schemes should have particular obligations vis-à-vis monitoring compliance of their members; and,
- Whether it wishes to establish principles to govern the admission of new entrants to a Scheme, who previously self-complied, and scale fees accordingly (in particular to address the question of back fees).

This would also be the appropriate place to mandate that the Schemes provide transparent information in relation to their membership. The Code could require the Schemes to publish up to date membership lists quarterly (or at other specified intervals) either on their website, or directly to the DECLG (having regard to the Data Protection implications for the Schemes and the DECLG.)

4.3.5 Objects of the Scheme

We recommend that the Code of Governance specifies that each Scheme's Objects (which would be contained in their Memorandum and Articles of Association) include a clause to the effect that they shall administer the Scheme as approved by the Minister for the DECLG in accordance with the applicable law and Regulations and in accordance with their SLA with the DECLG and this Code of Governance.

4.3.6 Conflicts of Interest

Directors must understand and manage potential conflicts of interest by making appropriate declarations of their interest and by refraining from voting on matters in which they have an interest.

In this regard we recommend that the Code provides that directors must inform the Board of any potential or actual conflict of interest. A director who has a conflict of interest which is being discussed during a board meeting should absent themselves for the part of the meeting during which the matter is discussed. Such a director should not participate in any vote unless in exceptional circumstances which are clearly documented the Board has expressly determined that it is appropriate for him or her to do so.

5. Other Legal considerations

5.1 Fees and charges

The DECLG has no express legal power at present specifically enabling it to impose charges, either for a one-off fee for processing applications for Scheme approval or an on-going annual approval fee. It is recommended that legislation should first be adopted to provide a statutory basis for the imposition of any such fees or charges. It is recommended that the relevant provisions be included in primary legislation rather than in a statutory instrument. While the Minister has general powers under sections 53A to 53M of the Waste Management Act, 1996 (as amended) (the Act) to make Regulations for '*any matters consequential on, or incidental to'* the various enumerate powers in relation to the Schemes, it is not certain the imposition of an application processing fee, or an annual approval fee, would be considered consequential or incidental to the various powers listed specific to each individual Scheme.

ANNEX 1 SAMPLE TABLE OF CONTENTS TO AN SLA

Draft Proposal for a Service Level Agreement

Contents

ANNEX 2 SUMMARY OF RESPONSES OF STAKEHOLDERS IN RELATION TO THE CORPORATE GOVERNANCE FRAMEWORK

Consultation Question: Should service level agreements or contracts be put in place to manage the performance of compliance schemes?

The waste management industry, existing compliance scheme operators in both Ireland and Northern Ireland agree that service level agreements or contracts should be in place to manage the performance of compliance schemes. This would ensure greater transparency and accountability in relation to the activities of all compliance schemes.

Retail & Industry representative groups note that the highest standards of corporate governance should apply. Compliance schemes should engage with their individual members and use their considerable experience to develop a system of corporate governance that ensures the highest standards are met. These groups also recognise the need for flexibility and minimising the administrative burden.

In the event that membership of compliance schemes is not made mandatory, self-compliant producers should be subject to equivalent reporting requirements as compliance schemes.

Furthermore, a requirement to include a certificate of compliance in the annual accounts of all producers –both compliance scheme members and self-compliant – would ensure that compliance with the waste regulations is part of the declarations of a producer's annual returns.

Consultation Question: If so, should this Department consider introducing a range of sanctions in our approvals with compliance schemes?

Limited comments were received in the consultation regarding this question.

Retail & Industry representative groups believe that the application of financial penalties should not be an issue if an appropriate arbitration system is put in place to address any issues of noncompliance with approval conditions.

Other Issues highlighted by Stakeholders

- **Lack of Transparency from certain compliance schemes** was a concern for
    - Producers with regards to decisions relating to the procurement/subsidies of waste services.
    - Compliance schemes making information available to the public while other compliance schemes competing in the same waste stream did not (e.g. annual report and member list).
- **Compliance Scheme Board Representation** was a concern for businesses not represented.

- **Compliance Scheme Board Rotation** was a greater concern for producers and business representative groups.
- **Contingency Funding** – The issue of who owns the money in this fund and how this fund is used, and what's happening to the contingency fund when a producer leave a compliance scheme to join another is a source of concern for members of compliance schemes.
- **Abuse of dominant power from compliance schemes** – One case was reported by a compliance scheme where a large compliance scheme A is sponsoring an event but prevented Compliance scheme B to sponsor a category. Another case was also reported where a compliance scheme was using its influence on waste management companies to prevent self-compliers to access evidence of recovery to meet their obligations.
- **Dispute resolution mechanism** which could be used for settling disputes between compliance schemes would be useful.