

## OVERVIEW:

### ZSVR strikes off expert from the register of auditors

Last updated: November 2023

**What happened?** With a notice dated 23 December 2022, the ZSVR had removed a registered expert from the register of auditors for two years following repeated and gross breaches of the audit guidelines on systems' volume flow records and declarations of completeness. These guidelines are published by the ZSVR in agreement with the German Federal Cartel Office.

The strike off was confirmed by a recent decision taken by the Osnabrück Administrative Court (7 B 28/23). The expert is banned from conducting audits under the Verpackungsgesetz (Packaging Act) until the start of 2025. Given its critical importance to how breaches of audit guidelines are dealt with in future, the ZSVR's decision will also be submitted to a trade journal for publication to give stakeholders detailed information.

**What are the reasons for the strike off?** There are serious doubts about the expert's reliability and expertise that arose from the gross breaches of the audit guidelines committed by this expert. These breaches concern

- ◆ the auditing and certification of two recycling plants as part of the systems' record-keeping obligations regarding documentation of the actual recovery of the volumes participated with the systems, and
- ◆ the specific violations committed during the audit and confirmation of declarations of completeness.

The strike off is justified in order to avert the threat of significant damage to market participants caused by improper auditing and to ensure a level playing field. In addition, the harm inflicted by the audit activities are in striking contrast to the goals of the Verpackungsgesetz and undermine compliance with legal requirements.

**What is the legal framework for a strike off?** With its decision, the Osnabrück Administrative Court has set an important precedent for assessing auditor violations and has thus provided legal certainty by establishing

- ◆ when the audit guidelines are considered to have been violated in gross breach of duty, and
- ◆ when a breach is considered to have been committed repeatedly.

Whether or not the breach was committed intentionally or negligently does not matter. A total of two cases are sufficient for a repeated breach. An auditor acts in gross breach of duty if they, according to objective standards, have deviated particularly far from the applicable law or violated a particularly important requirement.

**What are the specific breaches committed by the auditor?** The auditor failed to comply with both the provisions of the declaration of completeness audit guidelines and the statutory provisions for deducting volumes due to unsaleability. Due to their failure to carry out the audits, they overlooked the fact that a company had failed to fulfil its documentation and record-keeping obligations, that its deductions were unjustified and that this led to under-participation. Mere recovery documentation stating that food has past the best-before date is not sufficient evidence for a volume deduction. In each individual case, evidence of spoilage, return to the producer and a refund of participation fees is required.

**What significance does the court decision have?** The decision to strike off the auditor has far-reaching significance – even beyond the Verpackungsgesetz. First, the results of audits of declarations of completeness must set out whether the producer has participated all of the volumes subject to system participation that were placed on the German market. This [transparency] contributes to achieving the goal of reducing under-participation. Second, when striking off auditors, the ZSVR may also consider breaches of the audit guidelines under the Einwegkunststofffondsgesetz (Single-Use Plastic Fund Act) identified by the Federal Environment Agency, in addition to the factual determinations the ZSVR has made itself.

**Conclusion:** The decision of the Osnabrück Administrative Court has confirmed that registered experts and auditors must comply with the Verpackungsgesetz and the audit guidelines when conducting audits. Improper audits run counter to this requirement and, according to the Court's decision, may justify being struck off the register of auditors.