



Please note: This subject-specific paper was written to support those affected by the Verpackungsgesetz who would like to verify whether a certain item qualifies as packaging. As the delineation criteria are covered in depth, the paper is of academic/legal nature.

Verifying the packaging status

Preliminary notes

Before answering the question of whether an article of packaging is subject to system participation (in this respect see the explanations in the system participation requirement catalogue), it must be verified whether the item is indeed packaging within the meaning of the Verpackungsgesetz (Packaging Act – VerpackG) or whether it is goods (non-packaging). This preliminary question is not included in the system participation requirement catalogue. Only if the item in question indeed qualifies as packaging does it need to be determined – using the catalogue – whether it is subject to system participation.

The term 'packaging' is defined in section 3 (1) VerpackG. This definition is supplemented by annex 1 (to section 3 (1)) VerpackG, which includes the criteria as well as corresponding examples.

The delineation between packaging and non-packaging was also the subject of court rulings under the Verpackungsverordnung (Packaging Ordinance), the predecessor of the Verpackungsgesetz. From first-instance rulings to decisions of the Bundesgerichtshof (Federal Supreme Court), fundamental guiding principles were established for determining an item's status as packaging or non-packaging. Where these are still applied today, it must be checked in each case which version of the Verpackungsverordnung they are referring to. This is because the wording of the definition of packaging in national law was also amended over the years due to changes in the provisions of the EU Packaging Directive.

Where reference to packaging is made below, it always refers to 'packaging within the meaning of the Verpackungsgesetz'.

Test item and scope

To carry out a test, the test item must be specified in each individual case (test process). The test item is the item for which it has not yet been established whether it qualifies as packaging within the meaning of the Verpackungsgesetz.

The test scope always includes all of the components of the test item (cf. annex 1 to section 3 (1) no. 1 VerpackG), including labels, hangtags, other attached items as well as items that are located inside the goods (such as rolls, hangers, latches, filler material). In addition, the goods contained by the test item may be relevant for the assessment in individual cases, e.g. their handling or their value in itself as well as in connection to the value of the respective test item (i.e. the container for the goods).



Assessment criteria for the delineation between packaging and non-packaging

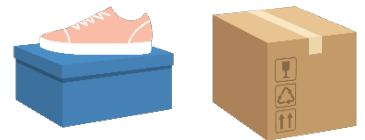
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Criterion 1: Existence of a packaging function

Explanation: The test item must fulfil at least one function of packaging. The possible functions according to section 3 (1) VerpackG are: containment, protection, handling, delivery or presentation of goods. In the context of practice and court rulings, as well as from an academic perspective¹, these functions can be further specified as follows:

- | | |
|----------------------------|-----------------------------|
| → Protection | → Handling |
| → Transport and loading | → Dosage and extraction |
| → Storage and preservation | → Bundling |
| → Presentation and sales | → Labelling and information |

This variety of functions demonstrates that packaging is a very broad term. Many consumer goods also fulfil these functions without qualifying as packaging. Thus, the packaging function is a necessary, but not a sufficient requirement for an item to qualify as packaging. To qualify as packaging within the meaning of the Verpackungsgesetz, further conditions must be fulfilled (cf. criteria 2 to 5 below).



Conversely: If the test item does not fulfil any of the above functions, it cannot be packaging, i.e. in this case it will always be non-packaging and the further criteria have no relevance.

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Criterion 2: Connection with goods

Explanation: Pursuant to section 3 (1) VerpackG, to qualify as packaging, the test item always must have a connection with goods. This 'connection' between the packaging and goods may be established with the manufacturer of the goods immediately following production or later, e.g. in the distribution chain of the goods through to the final distributor (e.g. service packaging pursuant to section 3 (1) no. 1 (a) VerpackG). In any case, the connection must be present at the time it is transferred to the final consumer.

The Verpackungsgesetz does not explicitly define 'goods'. For a definition of goods, please refer to settled case law from the European Court of Justice, according to which goods are deemed to be products that have a monetary value and as such can be the subject of commercial transactions². It is therefore not mandatory for a commercial transaction to take place, the transfer can also be free

¹ Henning, Joachim (Ed.). (2017). *Verpackungstechnik. Mittel und Methoden zur Lösung der Verpackungsaufgabe*. (cf. <https://www.beck-shop.de/hennig-hrsg-verpackungstechnik/product/8893251>), Bleisch, Günter et al. (Ed.). (2014). *Lexikon der Verpackungstechnik*. (cf. <https://www.behrs.de/titel/lexikon-verpackungstechnik/14>), and others

² cf. ECJ ruling dated 3 December 2015, C-301/14, para. 47



of charge (e.g. product samples, advertisement magazines, advertising gifts).³ The ecopolitical spirit and purpose of the Verpackungsgesetz call for an interpretation of the term goods that is as broad as possible.⁴

There are two case groups:

- a. **The item can be filled with goods**
(e.g. bags, folding boxes, glasses, tins)
- b. **The item has another kind of connection with the goods or the test item**
(e.g. through a fixed physical connection (such as labels, hangtags, applicators, or – if the physical connection is not fixed – filler material, rolls)

The point of reference for the assessment is the condition of the item upon its first transfer to a third party after it is filled / connected with the goods. This may be when it is transferred to a distributor or to the final consumer (e.g. service and shipment packaging).

Application:

Non-packaging:

Items that, the moment they are passed on to the distributor or final consumer, are not sold in connection with goods qualify as non-packaging. This includes household items such as wrapping paper, plastic wrapping of all sorts, unfilled bags or (unfilled) disposable party tableware, as well as empty canisters, refill containers or syringes and labels that are sold on a roll or blank in a package.

However, these items may become packaging at a later stage in the value chain if they are filled/connected with goods.

Packaging:

Service packaging qualifies as packaging. Service packaging is packaging that is not filled with goods until it reaches the final distributor and is then handed over to the final consumer (cf. section 3 (1) no. 1 lit. a VerpackG); examples include sandwich bags at a bakery, to-go containers at a fast food restaurant, carrier bags, takeaway coffee cups (cf. appendix 1 to section 3 (1), no. 1 lit. b as well as filled single-use plates and other examples under no. 2 lit b). Shipment packaging, e.g. folding cartons, filler material and envelopes, also qualifies as packaging if the distributor uses it to ship the goods (cf. section 3 (1) no. 1 lit. b VerpackG). Service packaging also qualifies as packaging if it is handed over to customers together with the goods for the customers to fill the packaging themselves (e.g. carrier bags at checkout).



³ Higher Regional Court of Cologne, ruling dated 9 February 1999 – 14 U 25/98 –, BeckRS 1999, 4264, recital 37; Bartholmes, in Schmehl/Klement, VerpackG section 3 para. 6. Section 90 BGB (Civil Code) may also be applied. Pursuant to this authority, goods refers to a moveable item within the meaning of section 90 BGB that are transferred to a third party on a commercial basis with the purpose of distribution, consumption or use (cf. also in reference to the Verpackungsverordnung: Fischer/Arndt in *Kommentar zur Verpackungsverordnung*, 2nd ed., 2007, section 3 para. 8).

⁴ Higher Regional Court of Cologne, ruling dated 9 February 1999 – 14 U 25/98 –, juris



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Criterion 3: Not an integral product component

Explanation: If the test item is an integral part of a product, the test item does not qualify as packaging pursuant to annex 1 to section 3 (1), no. 1 lit. a, if the following properties are cumulatively fulfilled:

- ◆ The item is necessary to encase, support or conserve the product/goods throughout its entire lifespan,

and

- ◆ all of the test item's components are intended for joint use, joint consumption or joint recovery.

The definition of the term packaging has been amended multiple times since the first Verpackungsverordnung (Packaging Ordinance) entered into force in Germany in 1991, reflecting the amendments that entered into force with the EU Packaging and Packaging Waste Directive in 2004 (cf. Directive 2004/12/EC of 11 February 2004, OJ L 47/26 of 18 February 2004) and the evolution of the definition used in the Verpackungsverordnung based on national case law on the matter⁵. Accordingly, a broader definition of packaging needs to be applied. The text in appendix 1 to section 3 (1), no. 1 lit. a makes it clear that it is not enough for a single property, such as protection, to be fulfilled.



Therefore, the first question in the verification process is:

Is the test item (i.e. the container, etc.) necessary for the consumption or use of the product throughout the entire lifespan of the goods?

The criterion of necessity narrows the down the process of delineation⁶:

- ◆ Where the goods cannot be used or consumed without the item (i.e. the container, etc.), the item's status as packaging has not been established (e.g., lid to a game that also functions as the board).
- ◆ In the alternative, where goods lack a key quality/product characteristic without the item (without a stick, a lollipop becomes a sweet), the test item is to be classed as an integral product component: it is not packaging.
- ◆ Where the item (i.e. the container, etc.) is not necessary for the goods to be consumed or used, this is an initial indication of its packaging status. However, further differentiations must be made:
 - **Consumer goods** (goods intended for consumption) – these are always packaging, unless the container is necessary for consumption.

⁵ The application of the 1999 decision of the Federal Supreme Court ('telescope box ruling' of the Federal Supreme Court dated 20 October 1999 – I ZR 95/97) is limited in light of the legal developments leading up to the Verpackungsgesetz 2019. This means that the Federal Supreme Court's approach in its telescope box ruling on the element '... or used up to the consumption of the goods' under the Verpackungsverordnung 1991 may, however, be applied to the extent that containers for goods that are consumed are generally deemed to be packaging. However, this may not be construed to mean that containers for goods that facilitate consumption, e.g. board games, should generally be classified as products.

⁶ In this sense, the Federal Supreme Court's former classification of a 'reusable bag to store tokens' as a product could well be decided differently today applying the criteria of the Verpackungsgesetz. Furthermore it must be noted that the Federal Supreme Court at that time also did not answer the packaging status question in the negative, but rather that the Verpackungsverordnung 1998 as amended (special provisions for durable packaging, section 6 (6) in conjunction with section 3 (5)) meant that the obligation to accept returns of durable packaging could mean a negative answer.



→ **Durable goods** (goods intended for use) – the container is considered an integral product component if a permanent container is a key characteristic of the goods. It is important to note that what matters here is not a singular, subjective consumption practice, but an objective, generalised assessment of use practices.



For durable goods, another question should be asked:

Taking into account the nature of the goods, is it customary for the item (i.e. the container, etc.) to stay with the goods throughout their entire lifespan?

First it must be established whether the goods are durable. This is always the case where the goods do not wear out to a considerable extent when used as intended. If the goods are gradually used up or consumed throughout their lifespan, they are consumer goods.

For consumer goods, it must be verified whether the containers are typically, regularly or usually used along with the goods throughout the goods' entire lifespan. For example, this may be the case with a valuable collector's item: if the goods always remain in the container and are 'used' this way (presentation of a piece of art or coins), this is an indicator for non-packaging status. If the goods are only temporarily stored in the container and are 'used' without the container (jewellery, watch, glasses), this is an indicator for packaging status. The particular goal of protecting the goods could be served by alternative means of storage (drawer, jewellery box, etc.). To summarise, the decision criteria include:

- ◆ Value of the goods
- ◆ Value of the goods with and without the container (e.g. value appreciation in the case of re-sale in original packaging, packaging as a part of a collector's item)
- ◆ Suitability of the container for storing the goods throughout the goods' entire lifespan, based on the properties of the container (as such, a high-quality telescope box is suitable for a board game, a thin folding carton is probably not)
- ◆ How long the goods are usually used without the container



The third question relates to the content of the test item:

Are all the test item's components, including the goods contained therein, intended for joint use, joint consumption or joint recovery (cf. appendix 1 to section 3 (1), no. 1 lit. a VerpackG)?

Where there is a mixture of consumer and durable goods, consumer goods cannot be an integral product component. If the packaging contains both durable and consumer goods (e.g. craft kits, needlework kits including wool, experimental kits), clearly not all components will be used to an equal extent. A portion of the components will be used, while another portion will remain in the box. It does not matter if the consumable components can be refilled because the refilled goods would be different goods that needed to be assessed separately. The proportion of durable to consumer goods also does not matter because this question must be answered in the affirmative for all of the components if the test item is to be considered an integral component.

Ultimately, decisions need to be made on a case-by-case basis. This applies in particular to the assessment of the third criterion.



Application⁷:

Non-packaging:

Consumer goods:

This criterion is applied to consumer goods if the goods, in their specific form, will lose their defining characteristic if they are consumed without the item in question. Examples include, but are not limited to:

- ◆ Tea bags, capsules for beverage preparation systems (coffee foil bags, coffee pods, coffee capsules, if recovered along with the product)
- ◆ Wax coatings on cheese, sausage casings
- ◆ Water-soluble films for dishwasher tablets
- ◆ Toner cartridges
- ◆ Death candle holders, lollipop sticks, Advent calendars



Durable goods:

The following non-exhaustive list includes items for which it can be assumed that they cover goods throughout the goods' entire lifespan and/or that they are used/necessary to store the goods throughout the goods' entire lifespan:

- ◆ Flowerpots in which plants remain during their life (usually ephemeral plants or small plants)
- ◆ Toolboxes, plastic cases for drills, shoulder bags for cameras
- ◆ CD, DVD and video cases
- ◆ Mechanical grinders integrated into a re-fillable container
- ◆ High-quality telescope boxes for games if these games are either designed to be played in the box or if the box is intended to be used to store all of the game components throughout the game's lifespan (this definition includes jigsaw puzzles of up to 5,000 pieces as they can be expected to be assembled more than once and to be returned to the box in the meantime to avoid pieces being lost)



⁷ cf. also annex 1 to section 3 (1), no. 2 ('Example for lit. a criterion') Packaging Act.

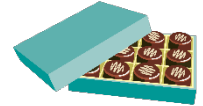


Packaging:

Consumer goods (incl. mixtures of consumer and durable goods):

This criterion is applied to consumer goods if the goods, in their specific form, can be consumed easily without the item in question. Examples include, but are not limited to:

- ◆ Capsules for beverage preparation that are empty after consumption (for coffee, hot chocolate, milk)
- ◆ Sweets boxes
- ◆ Envelopes for shipping catalogues or magazines
- ◆ Baking forms sold with the baked goods
- ◆ Reels, tubes or cylinders around which flexible material has been wound
- ◆ Matchboxes
- ◆ Re-fillable steel bottles for various types of gases, excluding fire extinguishers
- ◆ Telescope boxes for consumable kits (e.g. craft kits, hobby kits)
- ◆ Telescope boxes for mixtures of consumer and durable goods (e.g. experimental kits)



Durable goods:

The following, non-exhaustive list includes items for which it can be assumed that they do not cover goods throughout the goods' entire lifespan and/or that they are not used to store the goods throughout the goods' entire lifespan:

- ◆ Film wrapping CD cases, foil bags for tokens, thin folding boxes for games with a typical lifespan that is shorter than that of the game, telescope boxes for jigsaw puzzles of more than 5,000 pieces as they can be expected to be assembled only once and to be mounted thereafter
- ◆ Flowerpots in which plants remain only for a limited period of time (e.g. all plants that will be replanted or perennial plants that will be repotted to grow or keep them alive)
- ◆ CD spindles sold with CDs that are not intended to store the CDs throughout their entire lifespan (e.g. only until the CDs have been used for recording)

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Criterion 4: Product determination and product value instead of 'secondary benefit'

Explanation: As set out under 3.3 (cf. durable goods), a test item may offer a benefit as a product on its own, above and beyond its packaging function.

This sort of independent product benefit differs from a 'secondary benefit', i.e. cases where there is a packaging function, but the item can be used for other purposes once it has served its packaging function. With regard to the broad interpretation of the term packaging (cf. 3.1 above), this 'potential product benefit' does not affect the packaging function and in particular does not negate its packaging status.



Case law on section 3 VerpackV may be applied to delineation under section section 3 VerpackG:

In its decision dated 2 March 2006 (ruling 12 U 215/00 'multi fresh box' or 'household box'), the Higher Regional Court of Cologne made clear that:

"Ultimately, the goal of the Verpackungsverordnung to reduce packaging waste to the greatest extent possible would be frustrated if the producers of heavily packaged goods intended for consumption could rely on the fact that the packaging itself was of high quality and the product benefit of the packaging therefore exceeded its role of packaging alone."

→ As a consequence, an item that serves a packaging function and offers only a potential product benefit is considered and continues to be considered packaging. As per a decision by the Higher Regional Court of Cologne (OLG), a potential secondary benefit due to a potential use for another purpose⁸ must not be taken into account.

An item qualifying as a product (i.e. it is distributed as a product and not in connection with goods) or an analysis of the value of the test item (in relation to other comparable items) may serve as indications that the packaging status is negated.

Distribution as a product:

- ◆ Is there a comparable version of the item being distributed as a marketable product without a connection with goods, i.e. unfilled? (An example would be a box of watercolours with and without brush. The box not only serves the purpose of containing the brush.)

Value:

- ◆ Is the value of the item significantly higher than the value of packaging of comparable functionality (cf. ruling 15 U 215/00 by the Higher Regional Court of Cologne dated 10 July 2011 for an example of where this was rejected ('multi fresh boxes'))?
- ◆ In the case of multiple items that are distributed jointly: If the value of the item significantly higher than the value of the goods themselves (cf. ruling 12 U 93/05 by the Higher Regional Court of Cologne dated 2 March 2006 for an example of where this was rejected ('crunchy box'))?

Ultimately, decisions will need to be made on a case-by-case basis.

Worked examples:

Non-packaging:

- ◆ Eyeglasses case made from a decorated, solid material that is also sold without eyeglasses in the form being tested.
- ◆ Leather jewellery roll or decorated jewellery box that are sold in the form being tested without the jewellery they are made to contain.



Packaging:

- ◆ Eyeglasses case that is made from pleather/plastics, sold together with eyeglasses and whose value is less than the value of the eyeglasses it contains.

⁸ If the further use is for the same purpose, the question is then whether packaging is reusable packaging pursuant to the requirements set out in section 3 (3).



- ◆ Jewellery box or bag made from cardboard / a cardboard-textile mix / plastics / textile whose value is less than the value of the jewellery it contains.
- ◆ Shopping bag made from paper or (solid)⁹ plastics as they are usually, but not necessarily, sold at checkout at a low price.



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Criterion 5: Packaging components and additional elements

Explanation: Appendix 1 to section 3 (1), no. 1 lit. c VerpackG provides for three scenarios:

- a. The item is an integral part of an article of packaging (component or additional element).
→ The item is deemed to be a part of the packaging it is integrated into.
- b. Additional element that is indirectly connected or attached to a product and serves a packaging function.
→ Packaging
- c. The additional element is an integral part of the product and all the components are meant to be consumed jointly or recovered jointly.
→ Non-packaging

Regarding a.: On a general note, packaging often comprises more than one component. These components are systematically differentiated into packaging materials and packaging aids. DIN 55405:2014-12 includes a list of the components that are considered packaging materials (section 4.4.1) or packaging aids (section 4.4.2). Examples include, but are not limited to:

- | | |
|--|------------------------|
| ◆ Closure aids | ◆ Cushioning materials |
| ◆ Materials for presenting, tagging, information and security purposes | ◆ Opening materials |
| ◆ Protective aids | ◆ Handling materials |

Because packaging materials and packaging aids also serve packaging functions, it can generally be assumed that this makes them an integral component of a given article of packaging.

Examples include, as listed in annex 1 to section 3 (1), no. 2 ('Examples for lit. c criterion'):

- | | |
|---|--|
| ◆ Mascara brush as a component of the product closure | ◆ Dispensing closures |
| ◆ Sticker on the packaging, staples | ◆ Mechanical grinder in a non-refillable container |

⁹ The term 'durable packaging' is not recognised in the Verpackungsgesetz, which means that there is no difference in this respect between packaging that is more or less tearproof, as long as the packaging should not be deemed to be a product given its value and designation otherwise.



Regarding b.: Even if the additional element is directly on the product it qualifies as packaging as long as it fulfils a packaging function. Examples include labels and hangtags directly attached to the product.

Regarding c.: Additional elements on the product are excluded if they are consumed or recovered jointly with the product. Examples as listed in appendix 1 to section 3 (1), no. 2 include RFID tags for radio frequency identification. This should also include care labels attached to clothing as a textile component giving instructions for washing, dry-cleaning or ironing.



Service for technical questions, legal questions and advice

The ZSVR is happy to answer specific legal questions about the interpretation of the Verpackungsgesetz. We thank you for your understanding that it is beyond our remit to provide (legal) consulting services on an individual basis.

We ask that you consult with an appropriately qualified expert or consultant and/or system instead.

Contact list:

→ <https://www.verpackungsregister.org/information-orientierung/hilfe-erklaerung/service>

You can also find the experts/auditors in the register who may be able to provide advice.

List of registered experts/auditors:

→ <https://oeffentlicheregister.verpackungsregister.org>

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