

Case report 03/2020: IT firm fails to meet system participation requirement

Osnabrück, 21 September 2020

What is the reason for our case report?

A large group of affiliated IT firms with a proprietary direct selling organisation did not fulfil its producer responsibility for packaging and failed to comply with its statutory packaging law obligations over many years. The companies are producers of significant volumes of packaging subject to system participation. They fill packaging with goods and place them on the German market. As such, the Verpackungsgesetz (Packaging Act) considers them the producers or initial distributors of this retail, grouped and in particular shipment packaging. By failing to participate that packaging with a system, the companies obtained an unfair advantage over lawful competitors. In spite of having a legal department and a compliance officer, and despite publishing various sustainability reports giving the appearance of the group living up to its producer responsibility, this practice was apparently followed for years.

The vast majority of retail, grouped and shipment packaging for information technology devices such as screens, keyboards, mice, printers, notebooks, desktop computers, servers, storage units, including hard drives, memory cards and USB flash drives, accumulate as waste with private final consumers and comparable sources of waste generation such as administrations, authorities and offices in large commercial enterprises within the meaning of section 3 (11) VerpackG (Packaging Act). This means that they are almost always subject to system participation under the Verpackungsgesetz. In this context, please also refer to the system participation requirement catalogue published by the Zentrale Stelle Verpackungsregister (Central Agency Packaging Register – ZSVR), product sheet 28-030-0030.

But even without consulting the system participation requirement catalogue, and bearing in mind the validity of the Verpackungsverordnung (Packaging Ordinance), it can still be concluded that the vast majority of the relevant packaging accumulates as waste with private final consumers and so was subject to system participation in the years prior to 2019.

The companies were subject to system participation under the Verpackungsverordnung already, and depending on the applicable thresholds they may also have been required to file declarations of completeness. In addition, they have been required to register and report data to the ZSVR since 2019 pursuant to sections 7, 9, 10 and 11 VerpackG.

What happened?

Registration



The companies, as producers within the meaning of the Verpackungsgesetz, did not register with the LUCID Packaging Register until the ZSVR had alerted them to their illegal omission. The requirement to register with the LUCID Packaging Register has been in force since 1 January 2019.

System participation



Producers of packaging that is filled with goods are required to conclude a system participation agreement with one or more system(s) before placing this packaging on the German market. Assuming extended producer responsibility, they are bearing the cost for their packaging's subsequent recovery and recycling. The companies did not participate their packaging with a system for years, not fulfilling their producer responsibility and breaking the law. The system participation requirement has been in force for many years – under the Verpackungsverordnung until 2019 and under the Verpackungsgesetz since then.

Late completion of system participation

Only once the ZSVR had contacted the companies in this matter did they enter into system participation agreements in 2020. Non-participation and under-participation triggers late system participation completion.

When a producer actively assists in resolving an accusation and works to comply with the law, it shows at least some basis for lawful conduct going forward. But compliance does require more. Producers must have internal control systems in place that initiate late registration and system participation. They must not stay idle, as was the case with the IT group, until the ZSVR draws their attention to their obligations.

What are the grounds to suspect breaches of statutory packaging law obligations that are subject to a fine?

Registration

Once the ZSVR had contacted them, the companies registered with the LUCID Packaging Register, but section 9 VerpackG requires producers of packaging subject to system participation to register before placing packaging on the German market. There are specific grounds to suspect administrative offences. Failure to register is punishable with a fine of up to 100,000 euros per incident.

System participation

The companies did not participate their packaging volumes with one or more system(s) for years, contrary to sections 6 and 7 VerpackG. There are specific grounds to suspect administrative offences. which are punishable with a fine of up to 100,000 euros per breach under the Verpackungsverordnung and up to 200,000 euros per breach under the Verpackungsgesetz.

Distribution ban

The companies were not permitted to place their packaging on the German market without participating their packaging volumes and, since 2019, without registering (section 6 (1) VerpackV, section 7 (1) VerpackG and section 9 (5) VerpackG).

There are specific grounds to suspect administrative offences that are punishable with a fine of up to 100,000 euros per breach.

What are the repercussions?

The ZSVR informed the responsible state enforcement authorities that there were specific grounds to suspect that administrative offences have been committed. Possible repercussions of these administrative offences comprise the imposition of fines, including confiscation of profits, and monitoring of the obligation to complete system participation late for packaging volumes for past periods.

Where a company has yet to complete registration and system participation, a statutory distribution ban applies to its packaging subject to system participation.

The ZSVR will review whether the registered companies fulfil their further obligations of participating their packaging volumes with a system, submitting data reports and filing declarations of completeness as applicable. Even where thresholds have not been exceeded, the ZSVR or the responsible state authority can request at any time that a declaration of completeness be filed in the LUCID Packaging Register.
