

Case report 04/2020: Imports and failure to participate packaging in a system in the case of fashion boutiques with an online shop

Osnabrück, 30 October 2020

What is the reason for our case report?

Various affiliated fashion boutiques of an international brand that is located in Germany and sells directly to customers via its own online shop failed to comply with their producer responsibility for packaging and violated statutory packaging law obligations for years. The German fashion boutiques are producers of packaging that is subject to system participation. As they import packaged goods, they are producers of retail packaging under the Verpackungsgesetz (Packaging Act). They also fill shipment packaging with goods and place it on the German market. Under German packaging law, this makes the boutiques the producers / initial distributors of the retail, grouped and shipment packaging in question. Service packaging such as paper bags, which support the handing over of goods to consumers, count as retail packaging subject to system participation. By failing to participate their packaging with a system, the producers gained an unfair advantage over their competitors abiding by the law.

Retail, grouped and shipment packaging for textiles, shoes or leather goods such as ladies' outerwear and accessories such as gloves, bags and fashion jewellery accumulate as waste with private final consumers for the most part. This makes them generally subject to system participation under the Verpackungsgesetz, as further evidenced by product sheets 21-000-0070, 21-000-0170 and 22-000-0350 in the system participation requirement catalogue that is published by the Zentrale Stelle Verpackungsregister (Central Agency Packaging Register – ZSVR).

But even without consulting the system participation requirement catalogue, it can be concluded that the packaging in question mainly accumulates as waste with private finale consumers. Even before 2019, i.e. under the regime of the Verpackungsverordnung (Packaging Ordinance), this packaging was subject to system participation.

The Verpackungsverordnung required boutiques to undertake system participation. 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 fashion boutiques were producers within the meaning of the Verpackungsgesetz, but did not register with LUCID 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



The definition of 'producers' or 'initial distributors' includes anyone importing retail or grouped packaging filled with goods into Germany, the jurisdiction of the Verpackungsgesetz, on a commercial basis if that packaging typically accumulates as waste with a private final consumer or at a comparable source of waste generation after use (section 3 (14) VerpackG). This importer must register and undertake system participation for the packaging. The importer is the party who bears legal responsibility for the goods at the time they cross the border into Germany.

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 system participation requirement also applies to shipment packaging including all packaging and filler material, labels and tape.

Even though the packaging was subject to system participation, the fashion boutiques 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 fashion boutiques in this matter did they enter into system participation agreements in 2020. Non-participation and under-participation triggers late system participation completion.

Actively assisting in resolving an accusation and working to comply with the law are the basis for lawful conduct going forward. But compliance does require more. Producers must have internal control systems in place that check whether packaging is subject to system participation, initiate registration, etc. If producers have failed to meet their extended producer responsibility in whole, they must complete system participation for the past years retrospectively.

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 fashion boutiques 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 fashion boutiques 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 fashion boutiques 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, which 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.

Read more

For further information about the system participation requirement and other obligations under the Verpackungsgesetz, please refer to <https://www.verpackungsregister.org/en/information-orientation/knowledge-base/check-do-the-requirements-apply-to-me>. Information for retail companies can be found at <https://www.verpackungsregister.org/en/information-orientation/instructions-further-information/subject-specific-papers>
