

“Product responsibility in e-commerce – regulatory options for the prevention of third country free-riders and of the destruction of returned goods”

**Input paper on the prevention of third country free-riders
(Part I of the technical discussion)**

Version for the technical discussion on 28.02.2020

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1) Status quo of the legal situation regarding third country free-riders according to the German ElektroG [*Electrical and Electronic Equipment Act*], the BattG [*Batteries Act*], and the VerpackG [*Packaging Act*].

a) E-commerce stakeholders

The following stakeholders in the area of e-commerce are not defined in the ElektroG, the BattG, or the VerpackG:

- Operators of online shops,
- Operators of electronic marketplaces (for example, online auctioneers, online exchange platforms), and
- Fulfilment service providers.²

¹ Parts of the contents of this input paper were updated following the technical discussion on 28.02.2020, as well as on 10.03.2020 and on 13.03.2020, updated versions of the simplified producer responsibility model were presented to the *German Environment Agency* and the *Öko-Institut e.V.*

² Definition in Art. 3 no. 11, Market Surveillance Regulation (EU) 2019/1020: “Any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching, without having ownership of the products involved [...]”.

b) Are e-commerce stakeholders producers according to ElektroG, BattG or VerpackG?

	ElektroG	BattG	VerpackG
Operator of an online shop	Producer (Section 3 no. 9 (b); and/or no. 9a)	Producer (Section 2 (15) sent. 1)	Producer³ (Section 3 (14))
	Importer (Section 3 no. 9 (c))	Importer (Section 2 (15) sent. 1 in connection with (16) sent. 2)	
	Direct distance sales operator (Section 3 no. 9 (d))	-----	-----
	Deemed to be a producer (Section 3 no. 9 clause 2)	Deemed to be a producer (Section 2 (15) sent. 2)	Importer (deemed to be a producer) (Section 3 (14) sent. 2)
Operator of an electronic marketplace	Not a producer (does not offer)	Not a producer (does not place on the market)	Not a producer (does not initially place on market)
Fulfilment service provider	Not a producer (does not offer)	Not a producer (does not place on the market)	Producer of the shipping packaging (Unless only the name of the seller is shown on the shipping packaging) ⁴

³ **Registered office of the operator is abroad:** Imports packaging that contains goods (shipping packaging, retail packaging and outer packaging) directly to the final consumer in Germany = producer for the retail packaging, outer packaging and shipping packaging;

Registered office of the operator is in Germany: Imports packaging that contains goods of a business from abroad = producer of the retail packaging and of the outer packaging and sends these to the final consumer = producer of the shipping packaging;

Registered office of the operator is in Germany: Places the goods of another domestic business in shipping packaging and sends them to the final consumer = producer of the shipping packaging (other business = producer for retail packaging and for outer packaging);

Registered office of the operator is in Germany: Sends goods in used shipping packaging, retail packaging and outer packaging to final consumer = producer of packaging subject to system participation; does not apply to used packaging that has already been part of system participation.

⁴ This legal interpretation corresponds to the administrative practice of *the Stiftung Zentrale Stelle Verpackungsregister* (the German Central Agency Packaging Register, *Central Agency*; so called: *ZSVR*).

c) Are e-commerce stakeholders distributors according to the ElektroG, the BattG and the VerpackG?

	ElektroG	BattG	VerpackG
Operator of an online shop	Distributor offers and/or makes available (Section 3 no. 11)	Distributor offers (Section 2 (14) sent. 1)	Distributor distribution of the product for commercial purposes (Section 3 (12))
Operator of an electronic marketplace	Not a distributor (does not offer and does not make available)	Not a distributor (does not offer)	Not a distributor (does not place packaging on the market)
Fulfilment service provider	Not a distributor (does not offer) Open as to whether 2nd characteristic "making available" is fulfilled. Even if "making available" is accepted, third country free-riders are not prevented (provider prohibition according to Section 6 (2) sent. 2 does not apply).	Not a distributor (does not offer)	Final distributor (Submission of the retail/outer packaging to the final consumer if a change of custody is not attributed to the seller)

d) Action against free-riders

- The German authorities can take action against **EU free-riders** (registered office in Germany or another EU member state) on the basis of the current legal situation – possibly in cooperation with other EU member states – i.e. issue and enforce regulatory fining notices according to the Regulatory Offences Act.
- **Free-riders in third countries** (registered office outside the EU) are recorded as responsible according to the ElektroG, BattG and VerpackG. In the case of an infringement of the registration/notification requirement for instance, the enforcement of fines is only possible if a corresponding international treaty exists with the country in question. This is not the case in countries such as China or the US, for example – i.e. important countries of import for electrical and electronic equipment.
- As **electronic marketplaces** are neither producers (they do not place on the market) nor distributors (they do not offer), **the current prohibitions on bringing products into market circulation** according to the ElektroG (Section 6 (2) sent. 1 und 2), BattG (Section 3 (3), Section 3 (4) sent. 2) and VerpackG (Section 9 (5) sent. 1 and 2) **do not apply**.
- **Existing prohibitions on bringing products into market circulation do not apply to fulfilment service providers either** (exception: they are producers of the shipping packaging).

2) Proposals for changing the legal situation to prevent third country free-riders

In the following, only the three most important proposals discussed in the report are addressed:

a) Compulsory verification:

- **Contents:** It is proposed that **the electronic marketplaces and fulfilment service providers are subject to an independent compulsory verification which is not linked to criterion of being a producer**. The operators of electronic marketplaces and fulfilment service providers should be required to complete prior verifications of the products to be offered on their marketplaces and/or to be dispatched by them to ensure that the producers comply with their national registration/notification requirements. In case of an infringement of these requirements by the producers (and/or authorised representatives), the operators of electronic marketplaces may not allow the products to be offered on their website and/or the fulfilment service providers may not provide their services for these products. This approach enforces the existing prohibitions of offering/distributing products not in line with the ElektroG, BattG, or the VerpackG according to these Acts. The obligations of the producer to register/notify remain in force.
- **Purpose:** This measure aims at ensuring that on the electronic marketplaces, only offers for **products from producers that have properly fulfilled the registration/notification requirements** are published. Accordingly, also services of fulfilment service providers should only be provided for products from producers that have properly fulfilled the registration/notification requirements.
- **Conceptualisation:**
 - **Electronic marketplaces:** As regards the scope of the **ElektroG**, the operators of electronic marketplaces shall document the WEEE reg. no. DE (of the producer or of their authorised representative), including the brand and type of equipment, of their contractual partners for all goods that are standardised with electronic components. From a technical point of view these parameters could be automatically compared against the official register, i.e. at the *stiftung elektro-altgeräte register* (so called: *stiftung ear*) [*German WEEE-register*] on the basis of an **IT interface** through which an appropriate upgrade of the existing IT interface for weight reports and the allocation of WEEE takes place.⁵ As regards the scope of the **BattG and the VerpackG**, automated IT comparisons with the registers of *the Stiftung Zentrale Stelle Verpackungsregister* (the German Central Agency Packaging Register, *Central Agency*; so called: *ZSVR*) and the *German Environment Agency* are enabled, too.

⁵ See: <https://www.stiftung-ear.de/de/startseite/sammlung-news-startseite/default-2fd9051294> (only available in German language).

- **Fulfilment service providers:** Insofar as they are regarded as **producers** according to the **VerpackG** (for the shipping packaging), the introduction of separate compulsory verifications is not necessary. Apart from this, however, a **compulsory verification** is appropriate for this group. This obligation should apply at the latest **before the products are dispatched** by the fulfilment service provider, as in the case of deliveries of goods that are purchased on electronic marketplaces which are only established in third countries, fulfilment service providers in Germany or in the EU are normally used to ensure the standard delivery times of a few days. Fulfilment service providers also have the advantage that they are established in the EU and can therefore be **accessed more easily** by the responsible authorities than economic operators in third countries.
- **Examples of proposed amendments (here: electronic marketplaces - ElektroG):**

Compulsory verification (Section 6 (2) sent. 3 ElektroG - new):

- *"(2) ... operators of electronic marketplaces may not enable the offering or making available of electrical and electronic equipment via their electronic marketplace if the producers of such equipment, or, in the case of authorisation pursuant to Section 8, their authorised representatives, are not registered or not properly registered."*

Definitions (Section 3 no. 11a and b ElektroG - new): **Introduction of new definitions:**

- *"11a. **electronic marketplace:** a website or any other instrument with the support of which information is made available via the Internet which enables producers or distributors, who are not operators of that marketplace, to offer, or make available, electrical and electronic equipment within the geographical scope of application of this Act on their own behalf;*
- *"11b. **Operator of an electronic marketplace:** any natural or legal person or partnership which operates an electronic marketplace;"*

Supplementation of Section 3 no. 10 clause 2 ElektroG:

- *"Also, a producer according to number 9 point c, a distributor according to number 11, or an operator of an electronic marketplace according to number 11b can be an **authorised representative**;"*

Inclusion of a regulatory offence (Section 45 (1) no. 4a ElektroG - new):

- *"4a. enables the offering or making available of electrical and electronic equipment in contravention of Section 6 paragraph 2 sentence 3,"*

Comparable amendments of the VerpackG and the BattG are required in order to include the compulsory verification. Corresponding changes at the level of the European Union would also be welcomed.

b) Deeming to be a producer⁶:

Instead of the standardisation of a compulsory verification, the proposal that certain actors shall be deemed to be a producer could be standardised as regards electronic marketplaces and fulfilment service providers (as long as they are not already considered producers according to the VerpackG); this approach would also lead to the verification of their contractual partners. However, if the stakeholders are deemed to be producers, this leads to a situation in which all the other **requirements of producers** (requirements for labelling, monthly/annual weight reporting, take-back and waste disposal, information, etc.) also apply to those deemed to be a producer in case the actual producer does not register/provide notification properly.

- **Example of a proposed amendment** (according to Section 3 no. 9 of the last clause of the ElektroG):
 - *"In addition, the operator of an electronic marketplace is deemed to be a producer if the operator deliberately or negligently enables electrical or electronic equipment to be offered, or made available, via its electronic marketplace by producers who are not registered or not properly registered, or by producers whose authorised representatives are not registered or not properly registered; in this case, the facilitation is deemed to be a placing on the market; numbers 11a and 11b remain unaffected;*

The anchoring of this proposal could also take place at EU level:

- **Example of a proposed amendment** (in this case: supplementation in Article 3 (1) (f) of the WEEE directive):
 - *"any operator of an electronic marketplace is deemed to be a producer if it enables the marketing or making available on its electronic marketplace of new EEE from a producer who is not registered or not properly registered according to the provisions of Article 3 (1) (i-iv); Article 3 (1) (i-iv) remains unaffected;"*

c) Simplified producer responsibility model (originally named "Flat Fee Model" and presented on 26.11.2019 upon the proposal of an operator of an electronic marketplace, and updated again on 10.03.2020 and on 13.03.2020 – but without convincing changes in the proposed legal text)⁷:

According to this proposal, the operator of an electronic marketplace will collect a **fee** from producers offering products on its website in order to ensure the fulfilment of all the obligations of producers arising from product responsibility according to the legislation on waste. This applies, for example, to the take-back requirements according to Section 16 ElektroG.

Accordingly, producers are offered the option to be exempted from the registration, take-back and waste disposal obligations. These obligations are then fulfilled collectively for all producers by the electronic marketplace operator. The amount of the fee should be based on the quantity of the equipment that is traded on the electronic marketplace. The "local structures

⁶ Fiction of law.

⁷ The contents of this point were updated following the technical discussion on 28.02.2020, as on 10.03.2020 and on 13.03.2020, updated versions of the simplified producer responsibility model were presented to the *German Environment Agency* and the *Öko-Institut e.V.*

commissioned by the online marketplaces" should be responsible for the proper waste disposal, i.e. generally, the recycling of the waste equipment. Electronic marketplaces would therefore become "a single interface for sellers and authorities, having all the necessary information on the sellers and all the sales data and collecting the fees required to financially secure the take-back and recycling of the waste equipment."

- **Example of a proposed amendment**

- Section 8a ElektroG - new: "Simplified fulfilment of obligations

"(1) Contrary to the requirements of this Act, with the exception of the obligations according to Sections 4, 9 and 28, notified online marketplaces shall carry out a simplified fulfilment of requirements in terms of the obligations of producers according to Section 3 no. 9 (d). Furthermore, subject to the provisions in the following paragraphs, the simplified fulfilment of obligations shall only apply to producers who use the services of a notified online marketplace for the sale of their goods and if the waste equipment of these producers is comparable in nature and quantity to the waste equipment normally arising in private households.

(2) In order to become a notified online marketplace, an online marketplace shall inform the competent authority of its name, address, an identification number including the European or national tax number in the format set out in annex 2a No 1 and No 2.

(3) Instead of simplified fulfilment of obligations, each producer within the meaning of Section 3 no. 9 (d) shall itself be free to fulfil its obligations according to this law. If the producer decides to fulfil its obligations itself, this must be communicated to the notified online marketplaces selling the producer's goods by means of a declaration in automated electronic form."

- Section 45 (1) No. 7a ElektroG – new:

"In contravention of Section 8a paragraph 2 as an online marketplace does not make a notification or does not make it correctly or does not ensure that producers who fulfil their obligations themselves in accordance with Section 8 paragraph 3 sentence 2 have notified the online marketplace of this by means of a declaration".

d) **Legal issues:**

Wherever possible, taking into account the principle of subsidiarity, the above proposals should preferably be implemented at the **level of the European Union** to ensure a harmonised implementation. The focus of the legal review, however, has been on instruments that can be implemented by means of **national law**.

- **Compulsory verification:**

- The proposed **compulsory verification** would be **compatible** with the **requirements of world trade law**, regardless of whether they fall within the scope of the TBT Agreement or are assessed against the general GATT rules.

- They would be compatible with the **fundamental freedoms of the internal market** (freedom of goods and services). In comparison with the simplified producer responsibility model, the latter is not an equally suitable method, at least given its voluntary nature.
- The compulsory verification for electronic marketplace operators and fulfilment service providers would be compatible with **secondary EU legislation**.
- Possible interventions on fundamental rights of freedom (**occupational freedom** according to Art. 12 GG [*Basic Law for the Federal Republic of Germany*], **property freedom** according to Art. 14 GG, **general freedom of action** according to Art. 2 (1) GG) would be justified. The equal treatment between operators of electronic marketplaces on the one hand and distributors (online as well as stationary) on the other hand, as well as between operators of electronic marketplaces and fulfilment service providers, does not constitute an infringement of the **general principle of equality** according to Art. 3 (1) GG.
- **Deemed to be a producer:**
 - Due to the greater implications of this proposal for those responsible, from the perspective of the fundamental freedoms of the internal market and from the perspective of fundamental rights, the **compulsory verification** can be regarded as a **milder method**; hence, this proposal would not be necessary. If several producers are registered, this could lead to an unclear allocation of responsibilities.
- **Simplified producer responsibility model⁸ :**

This would privilege the group of producers according to Article 3 (1) (f) (iv) of the WEEE directive which offer products on electronic marketplaces compared to all other producers, as the former would have a superior competitive position. However, according to recital 7 of the WEEE directive, this is exactly what is to be prevented. The fear that e-commerce will be privileged over stationary retail could be further reinforced by the simplified producer responsibility model, such that only producers according to Article 3 (1) (f) (iv) of the WEEE directive will benefit from this model. The simplified producer responsibility model continues to be based on (double) voluntariness (for the electronic market place as well as for the seller), therefore it **does not** seem **appropriate** to address the problem of third country free-riders.⁹ Moreover, the introduction of simplified producer obligations

⁸ The contents of this point were updated following the technical discussion on 28.02.2020, as on 10.03.2020 and on 13.03.2020, updated versions of the simplified producer responsibility model were presented.

⁹ The draft legal text, which is ultimately the only authoritative text, is clear in this respect, even if, since the updated version of the simplified producer responsibility model presented on 10.03.2020, the explanatory notes to the draft legal text states that participation in the simplified producer responsibility model is now to be mandatory for sellers on electronic marketplaces. Even the draft

according to this model would, to a certain extent, reward the previous legally non-compliant behaviour of online sellers. There are no objective reasons for this unequal treatment. According to Article 16 (1) and (2) of the WEEE directive, the main purpose of producer registration and the publication of the resulting register and/or list of producers is market transparency, which serves not only the competent authorities but expressly also the market participants themselves, thus making the self-regulation of the market possible and usable. A simplified producer responsibility model would **undermine this transparency** to the extent that only the marketplaces would be notified, and no longer the individual producers would be registered. In particular, it would no longer be possible to allocate brands or types of equipment to the respective producers, so that it would no longer be possible to determine whether the producers fulfilled their obligations not only in principle but also to the necessary extent. Furthermore, by stipulating an only annual weight reporting, the model contradicts the previous system of the allocation of WEEE on the basis of a monthly weight reporting. Finally, in comparison with the compulsory verification, the model is less adequate to the **basic concept of a source-based product responsibility**, as the costs of the actual disposal of the waste electrical equipment would not be borne directly by the party that has an influence on the ecologically important product configuration, as the electronic marketplace would distribute the total costs of the waste disposal according to its own key on a fixed-rate basis. In summary, a simplified producer responsibility model appears to constitute an unjustifiable privileging of a specific type of producer. This is not necessary, since, with the legal concept of the authorised representative, a specific simplification for producers from third countries is already available, and in addition, specialist service providers are available to all producers for the specific fulfilment of their obligations, who in turn contribute to an administrative and logistical simplification.

legal text of Section 45 No. 7a presented on 13.03.2020 does not lead to a different assessment, because this regulatory offence only applies to "notified online marketplaces" due to the reference standard, so that the electronic marketplaces are still free to become such; however, being a "notified online marketplace" is a condition for the simplified producer responsibility model to be applied at all. In this respect, given the voluntary nature of the instrument, an effective prevention of third country free-riders cannot be ensured either by sanctioning the notified online marketplace if, according to the reference standard of Section 8a (2), it "does not make a notification or does not make it correctly". In addition, the regulatory offence also leads to "notified online marketplace" does not have the effect of effectively preventing third country free-riders, since a producer's declaration with no verified content has no added value in this respect. In this respect, an effective prevention of third country free-riders cannot be ensured by sanctioning a notified online marketplace if it "does not ensure that producers who fulfil their obligations themselves according to Section 8a (3) sent. 2 have notified the online marketplace of this by means of a declaration".

e) Concept for the implementation of product responsibility in e-commerce

- **At the level of the European Union** - two possible approaches:
 - **uniform, EU-wide registration** with a European registration agency – reasons of subsidiarity as well as practical considerations contradict this, as the actual implementation would have to be carried out by the national authorities due to their greater proximity to the subject matter; a registration in another country could not be carried out in Germany, free-riders could not be identified and prosecuted,
 - **Harmonisation of the registration/notification procedures** for electrical and electronic equipment, batteries, and packaging through coordinated requirements in the relevant EU directives. This option seems preferable.
- **National level:** Introduction of a compulsory verification¹⁰
 - The existing approach of **producer responsibility** is maintained. They are subject to the registration/notification obligations and the subsequent weight reporting, take-back and waste disposal obligations, etc.
 - As the existing regulations do not generally apply to **operators of electronic marketplaces**, they are obliged to check the proper registration/notification of the producers that are offering goods on their websites in advance. **An automated comparison of data** at the respective registration and/or notification offices, such as the *stiftung ear*, the *Stiftung ZSVR*, and the *German Environment Agency* would be useful.
 - **Fulfilment service providers** may only provide their services if the products come from producers that have fulfilled their registration/notification obligations properly. For them, the same **compulsory verifications** are set as obligations like those for the operators of electronic marketplaces. The obligation of fulfilment service providers is particularly relevant in cases where the operators of electronic marketplaces do not fulfil their obligations, especially if their registered office is abroad.

¹⁰ The *digital policy agenda for the environment* presented by Minister Ms. Svenja Schulze (Federal Ministry for the Environment, Nature Conservation and Nuclear Safety) on 02.03.2020, includes under “Measures that are newly initiated” and “Sustainable consumption” the following aspects: „Anchoring of a compulsory verification for operators of electronic marketplaces as well as fulfilment service providers for the proper registration of the producer of electrical and electronic equipment and packaging offered by amendments to the Electrical and Electronic Equipment Act (ElektroG) and the Packaging Act (VerpackG)“ (see: <https://www.bmu.de/digitalagenda/massnahmen-der-digitalagenda/#c44301> and page 22 and 39 under: <https://www.bmu.de/download/umweltpolitische-digitalagenda/>) – only available in German language.