

Retail & Consumer - Regulations News Alert

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Summary

Extended producer responsibility (ERP) schemes across the European Union are intended to place the financial and operational burden for product end of life waste management with the producers of the products. A number of EU Member States, including Germany, France and the UK, already have EPR legislation with regard to packaging, batteries and waste electronics and electrical equipment (WEEE).

Producers, importers and suppliers of products, as well as online marketplace operators and online retailers need to be aware of upcoming obligations in Germany, which result in changes to the existing EPR schemes and new compliance, registration and reporting requirements.

Companies will need to take steps now to prepare for the regulatory changes, which in Germany in relation to WEEE entered into force on 1 January 2022 and the packaging changes will be in force from 1 July 2022.

The changes in EPR legislation in Germany include the introduction of further administrative fines for non-compliance, an obligation (in the worst case) of removal of non-compliant products from sale and new powers for regulators to confiscate offending products.

Background

Background to extended producer responsibility (ERP) schemes in Europe

EPR legislation for certain products has been in place across Europe, including Germany, for many years. The EPR legislation imposes obligations in relation to management of packaging, waste electronics and electrical equipment (WEEE), batteries and in other European jurisdictions like France, there are a number of other EPR categories.



The 2008 EU Directive 2018/851 on waste and waste management stated:

“Extended producer responsibility scheme’ means a set of measures taken by Member States to ensure that producers of products bear financial responsibility or financial and organisational responsibility for the management of the waste stage of a product’s life cycle.”

Against this regulatory backdrop, we are now seeing the Circular Economy Action Plan, expansion of the environmental social and governance agenda and the drive to net zero carbon emissions leading to EPR returning to the forefront of policy making.

Subsequent guidance has developed the stated intentions of the EU with regard to EPR to be:

- ▶ the transfer of the financial burden of waste collection and waste treatment from local authorities (and local taxpayers) to the manufacturer/operator placing the product on the market (and therefore to the end-customer) in satisfaction of the polluter pays principle;
- ▶ the encouragement of Eco-conception (i.e., design with environmental and reuse concerns in mind) as a means of reducing the eco-fee demanded by EPR scheme operators; and
- ▶ the encouragement of repair, recycling, and re-use of products to reduce waste production.

In recent years we have seen a substantial increase in consultations and subsequent legislation relating to EPR, as EU Member States have tried to implement the above intentions. Legislative changes have focused on expansion of the types of product caught by EPR schemes, as well as pushing the responsibility for reporting and paying the fees on to producers and away from local authorities and others collecting the various different waste streams.

The German government has recently made some significant changes to the established schemes for packaging, WEEE and batteries, with additional legislation likely to follow shortly adding new sectors.

Key changes in the German ERP law (1 January and 1 July 2022)

The changes in relation to WEEE entered into force on 1 January 2022 and from 1 July 2022 the German market will see huge reforms to the existing packaging EPR framework. Existing schemes are continuing but being overlaid with new legislation that extends the scope of existing EPR sectors, creating new obligations on producers and online marketplaces.

Key changes in Germany include:

- ▶ updates to the existing legislative frameworks for Batteries, WEEE and Packaging;
- ▶ the introduction of obligations on digital marketplaces to verify the registration status of producers prior to listing products for sale on their platform; and
- ▶ the introduction of further administrative fines for non-compliance as well as empowering the regulators to confiscate offending products.

Producers in Germany will need to register with the relevant regulator for their particular sector and enter into a system participation agreement with a dual system. The dual system will require producers to provide information regarding

their products, including the composition and quantities sold. The dual system will then calculate the required fee due on the products and charge this to the producers. Any producer found not to comply with the EPR regulations will face fines from the regulator.

Online retailers and marketplaces will become liable under the new EPR legislation in Germany if they fail to verify that the producers of the products they allow to be sold on their platform, comply with the requirements. New administrative offences will be committed by online marketplaces where non-compliant products are listed for sale. The sanctions range from substantial fines, to the confiscation of the products and removing products from sale on the market. It is also possible for third parties to bring civil competition claims against a party failing to comply.

There have been similar changes, albeit further advanced, to the EPR framework in France and it is expected that changes in other EU Member States and the UK will follow. Each Member State and the UK are looking at the types of products covered by EPR schemes, as well as the mechanics of those schemes, so it's essential to understand the subtle differences in each jurisdiction.

Implications

Companies selling goods into the German market (or other European markets as other Members States enact EPR legislation), acting as marketplace operators or online retailers for the sale of goods, need to:

- first assess whether their goods fall within the existing or new EPR schemes
- consider the jurisdictions involved in the production and supply chain, and
- confirm if, in the circumstances, the product falls within the scope of any relevant schemes. This is particularly important as the definition of who is considered a “producer,” has recently been expanded.

Companies caught by the definition of producer within relevant EPR schemes will need to ensure that in relation to each product category (packaging, batteries and WEEE):

- ▶ they have assessed their compliance obligations for each product produced or imported;
- ▶ reporting requirements are understood and that processes are in place to collect the required data;
- ▶ any collective schemes or dual systems for products (such as WEEE) are identified, where applicable and that appropriate registrations are made in good time;
- ▶ a process is developed for assessing the costs of the schemes and consideration is given to how these can be managed or reduced within the business - for instance by restructure of the supply chain or ecodesign; and
- ▶ in the case of online marketplaces and online retailers, that suppliers/ sellers providing or listing goods are aware of their EPR obligations and that there is a compliance structure within the business to track the checks carried out by online marketplaces and online retailers on suppliers/sellers.

Services

With the expansion of EPR regulation coming into force across Europe, our legal specialists can help our clients to:

- ▶ understand the updates to existing EPR frameworks and the new EPR schemes and their application to your product lines in countries where you are selling products;
- ▶ assess data collection and reporting requirements and the relevant timelines and make changes as necessary to adapt to the new requirements;
- ▶ consider and respond to any questions that may arise as a result of preparation for the expanded regulations;
- ▶ liaise with regulatory authorities and scheme operators;
- ▶ produce bespoke guidance to assist internal teams, as well as supply chain partners where relevant; and
- ▶ advise on structuring and optimisation of compliance costs.

We can work with our clients across all sectors to help prepare them for the changes to the EPR requirements and the increased demands on online marketplaces and retailers.

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