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Producer responsibility of third-country producers in e-commerce

Final report

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Producer responsibility of third-country producers in e-commerce

Final report

by

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Abstract: Development of a concept addressing the third-country free-rider problem within the EPR-framework, using the e-commerce with electrical and electronic equipment, batteries and packaging as an example

The research project examines changes to waste-management legislation which would ensure that producers with registered office outside the EU also meet their extended producer responsibility (EPR) obligations when selling electrical and electronic equipment, batteries and packaging via electronic marketplaces in Germany. Up to now, third-country free-riders take advantage of a 'legal loophole', which allows electronic marketplace operators and fulfilment service providers to accept producers without ensuring that these have complied with waste-law registration and notification obligations. The existing enforcement rules are inadequate for German authorities to take effective action against third-country free-riders. As a consequence, these have little incentive to contribute to their share of costs for collecting and dis-posing of waste electrical and electronic equipment or batteries and packaging. The project developed various proposals for addressing the free-rider problem in German legislation and examined their compatibility with constitutional, European and world-trade law. To introduce compulsory verification for electronic marketplace operators and fulfilment service providers is recommended as the most important measure.

Kurzbeschreibung: Entwicklung eines Konzeptes zum Umgang mit nicht rechtskonformem Verhalten von Herstellern aus Drittländern im Rahmen der abfallrechtlichen Produktverantwortung am Beispiel des Onlinehandels mit Elektro- und Elektronikgeräten, Batterien und Verpackungen und zum Umgang mit der bewussten Vernichtung von Neuware durch Onlinehändler

Das Forschungsprojekt untersucht, mit welchen Änderungen der abfallrechtlichen Vorschriften in Deutschland sichergestellt werden kann, dass auch Hersteller mit Sitz außerhalb der EU ihrer abfallrechtlichen Produktverantwortung beim Verkauf von Elektrogeräten, Batterien und Verpackungen über elektronische Marktplätze in Deutschland nachkommen. Bislang hilft diesen sogenannten Drittland-Trittbrettfahrern eine „Gesetzeslücke", wonach die Betreiber elektronischer Marktplätze und Fulfilment-Dienstleister nicht verpflichtet sind, sicherzustellen, dass die bei ihnen tätigen Händler die abfallrechtlichen Registrierungs- und Anzeigepflichten einhalten. Zudem können die deutschen Behörden aufgrund der geltenden Vollzugsregelungen nicht wirksam gegen Drittland-Trittbrettfahrer vorgehen. In der Folge beteiligen sie sich auch nicht an den Kosten für die Sammlung und Entsorgung von Elektroaltgeräten sowie von Alt-Batterien und Verpackungsabfall. Im Projekt wurden verschiedene Vorschläge für das deutsche Kreislaufwirtschaftsrecht entwickelt und auf ihre Vereinbarkeit mit Verfassungs-, Europa- und Welthandelsrecht geprüft. Wir empfehlen als wichtigste Maßnahme eine Prüfpflicht für die Betreiber von elektronischen Marktplätzen sowie für Fulfilment-Dienstleister einzuführen. Die Überprüfung der Produkte muss abgeschlossen sein, bevor Produkte auf Marktplätzen angeboten und/oder an die Kundin oder den Kunden versandt werden können.

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List of abbreviations

AR	Authorised Representative
Art.	Article
ATLAS	Automated tariff and local customs clearance system (Automatisiertes Tarif- und Lokales Zollabwicklungssystem)
B2B	Business-to-Business
B2C	Business-to-Consumer
Batteries Directive	Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, Official Journal of the European Union L 266/1 of 26 September 2006
BattG	Law on the marketing, return and environmentally sound disposal of batteries and accumulators (Batteries Act – BattG) of 25 June 2009 (Federal Law Gazette I p. 1582), last amended by Article 6 (10) of the Act of 13 April 2017 (Federal Law Gazette I p. 872)
BeckOK	Beck'scher Online Kommentar
BGBl.	Federal Law Gazette
BMU	Federal Ministry for the Environment, Nature Conservation and Nuclear Safety
BT-Drucks.	Bundestag (German Federal Parliament) Document
BVerfG	German Federal Constitutional Court (Bundesverfassungsgericht)
BVerfGE	Decision of the German Federal Constitutional Court (Bundesverfassungsgericht)
BVerwG	German Federal Administrative Court (Bundesverwaltungsgericht)
C2B	Consumer-to-Business
C2C	Consumer-to-Consumer
CDU	Christian Democratic Union
cf.	confer
CFR	Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 326 of 26 October 2012, p. 391
CSU	Christian Social Union
DHL	DHL International GmbH
Dir.	Directive
EC	European Communities
ECJ	European Court of Justice
e-commerce	electronic commerce
E-Commerce Directive	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Official Journal of the European Union L 178 of 17 July 2000 p. 1
ed.	Editor

EEE	Electrical and Electronic Equipment
EHI	EHI Retail Institute
ElektroG	Act on the placing on the market, return and environmentally sound disposal of electrical and electronic equipment - Electrical and Electronic Equipment Act of 20 October 2015 (Federal Law Gazette I p. 1739), last amended by Article 12 of the Act of 28 April 2020 (Federal Law Gazette I p. 960)
EPR	Extended Producer Responsibility
et al.	et alii
et seq.	et sequens
EU	European Union
EUR	Euro
EUWID	Europäischer Wirtschaftsdienst GmbH
EWEN	European WEEE Enforcement Network
EWRN	European WEEE Registers Network
FAQ	Frequently Asked Questions
fn.	Footnote
GATT	General Agreement on Tariffs and Trade
GG	German Basic Law
IMPEL	Implementation and Enforcement of Environmental Law
KrWG	Circular economy Act of 24 February 2012 (Federal Law Gazette I p. 212), last amended by Article 2(9) of the Act of 20 July 2017 (Federal Law Gazette I p. 2808) (Kreislaufwirtschaftsgesetz)
lit.	Littera
MPG	Medical Devices Act in the version published on 7 August 2002 (Federal Law Gazette I p. 3146), last amended by Article 11 of the Act of 9 August 2019 (Federal Law Gazette I p. 1202)
MTES	Ministère de la Transition Ecologique et Solidaire
NJW	Neue Juristische Wochenschrift (Law Journal)
no.	Number
NPC	National People´s Congress
NVwZ	Neue Zeitschrift für Verwaltungsrecht (Law Journal)
OECD	Organisation for Economic Co-operation and Development
OWiG	Act on Regulatory Offences in the version published on 19 February 1987 (Federal Law Gazette I p. 602), last amended by Article 5 para. 15 of the Act of 21 June 2019 (Federal Law Gazette I, p. 846)
p.	Page
PRO	Producer Responsibility Organisation
Reg.	Registration
SAD	Single Administrative Document
sent.	Sentence
SOFIES	Solutions for Industrial Ecosystems (name of company)

SPD	Social Democratic Party of Germany
stiftung ear	stiftung elektro-altgeräte register (national register for waste electric equipment)
subpara.	Subparagraph
TBT	Agreement on Technical Barriers to Trade
TEU	Treaty on European Union, Official Journal of the European Union C 326 of 26 October 2012 p. 1
TFEU	Treaty on the Functioning of the European Union. Official Journal of the European Union C 326 of 26 October 2012, p. 47
UCC	Regulation (EU) No 952/2013 of 9 October 2013 laying down the Union Customs Code (recast), Official Journal of the European Union L 269 p. 1 of 10 October 2013 (Union Customs Code)
UNEA	United Nations Environment Assembly
US	United States
UstG	Act on the Avoidance of Losses of Value Added Tax in the Trade of Goods on the Internet and on the Amendment of Other Tax Regulations of 11.12.2018 (Federal Law Gazette I p. 2338)
VAT	Value Added Tax
VerpackG	Act on the placing on the market, return and high-quality recycling of packaging (Packaging Act – VerpackG) of 5 July 2017 (Federal Law Gazette I p. 2234)
WEEE	Waste Electrical and Electronic Equipment
WEEE Directive	Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE), Official Journal of the European Union L 197/38 of 24 July 2012
WFD	Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, Official Journal of the European Union L 312 of 22 November 2008, p. 3 (Waste Framework Directive)
WTO	World Trade Organisation
ZVSR	Central Agency Packaging Register (Stiftung Zentrale Stelle Verpackungsregister)

Summary

It is often the case that producers and distributors with registered office outside the EU do not contribute to the costs incurred for collecting and disposing of their used electrical and electronic equipment (EEE), spent batteries and packaging waste from their goods sold in Germany.[1]

Sellers acting legally must then cover these costs ensuing from unrecognized producer responsibility obligations. Properly registered producer thereby find themselves at a competitive disadvantage compared to third-country free-riders who benefit from a legal 'loophole'.

This 'loophole' allows the operators of electronic marketplaces to proffer EEE and batteries from producers and distributors operating on them without first ensuring these have been properly registered or notified with the relevant authorities. The same applies to fulfilment service providers who have not verified the correct registration or notification of goods they send out.

Non-compliance with registration and notification obligations can result in significant fine notices. Enforcing payment of these fines in the case of third-country free-riders is seldom possible except where a corresponding international treaty exists with the third-country concerned. No such treaty exists with a number of important EEE-import countries such as China or the USA.

In Chapter 2, the review illustrates those loopholes in current German regulations exploited by third-country free-riders, who offer their goods on electronic marketplaces or make use of fulfilment services. Proposals for closing such legal loopholes follow in Chapter 3.

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].*

In all three German Acts – ElektroG, BattG and VerpackG – the requirement to assume producer responsibility, specifically registration and notification obligations, as well as collection and disposal obligations, is linked to 'producer' and 'distributor' characteristics.

Before placing EEE and packaging on the market, producers must first register them with the competent authority or, notify when batteries are being placed on the market for the first time; this also applies to producers from third countries (non-EU countries) in e-commerce. Non-compliance results in the products being banned from distribution.

Just as in stationary trade, in e-commerce producers, importers, distributors and end-users are involved. In e-commerce these actors are joined notably by the following new economic operators:

- Operators of online shops,
- Operators of electronic marketplaces (for example, online auctioneers, online exchange platforms), and

[1] Parts of this summary have already been published by the authors as an input paper under the title „Product responsibility in e-commerce – regulatory options for the prevention of third country free-riders and of the destruction of returned goods" on 14.05.2020 at www.oeko.de/presse/archiv-pressemitteilungen/presse-detailseite/2020/gesetzesluecke-schliessen-fuer-mehr-umweltschutz-beim-online-shopping.

- Fulfilment service providers.[2]

A legal definition of these new economic operators can be found in neither the Circular Economy Act (KrWG), ElektroG, VerpackG or BattG nor in the corresponding European directives. The research project investigates whether the new e-commerce stakeholders should be classified as producers or distributors according to the ElektroG, VerpackG and BattG. The following Table 1 and Table 2 give an overview of this consideration under the current legal situation:

Table 1: Are e-commerce stakeholders producers according to the ElektroG, the BattG or the VerpackG?

	ElektroG	BattG	VerpackG
Operator of an online shop	**Producer** (Section 3 no. 9b; and/or no. 9a)	**Producer** (Section 2 (15) sent. 1)	**Producer**[3] (Section 3 (14))
	Importer (Section 3 no. 9c)	**Importer** (Section 2 (15) sent. 1 in connection with (16) sent. 2)	
	Direct/distance sales operator (Section 3 no. 9d)	----------	----------
	Deemed a producer (Section 3 no. 9 clause 2)	**Deemed a producer** (Section 2 (15) sent. 2)	**Importer (deemed 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 the 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

[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 [...]".

[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.

	ElektroG	BattG	VerpackG
			the shipping packaging)[4]

Source: Oeko-Institute

Table 2: 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 distributes 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)

Source: Oeko-Institute

Absence of effective legal protection against third-country free-riders

Producers and distributors who fail to comply with their waste-management obligations face various legal consequences, including enforcement of fining notices, and sanctions by the authorities, but also competition law actions by competitors. The sanctions available depend on where the producers have their registered offices (Germany, EU Member State or a third country). For the current enforcement of administrative offences due to violations of registration and notification obligations, the review comes to the following conclusions:

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 Administrative Offences Act. As far as **third-country free-riders** are concerned, ie. those registered outside the EU, the ElektroG, BattG und VerpackG consider them also to be responsible stakeholders. Despite this fact however, even though non-compliance with registration and notification obligations results in the relevant authorities imposing fines, their

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

payment can only be enforced if international treaties are in place with the countries involved. This is not the case for countries such as China and the USA, both of which are significant EEE import countries. Neither electronic marketplace operators nor fulfilment service providers however, can be held responsible for compliance since they are neither producers (do not place on the market) nor are they distributors (do not offer). **Existing traffic bans** under the ElektroG (Section 6 (2) sent. 1&2), BattG (Section 3(3) Section 3(4) sent. 2 and VerpackG (Section 9(5) sent. 1&2) cannot therefore be enforced against third-country free-riders, **electronic marketplace operators** or **fulfilment service providers** (unless they are the producers of shipping packaging).

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

In the following, the three most important proposals are outlined with which third-country free-riders can be curbed:

1) Compulsory verification:

- **Contents:** It is proposed that **electronic marketplace operators and fulfilment service providers be subject to an independent compulsory verification which is not linked to criterion of being a producer**. To ensure producers comply with their national registration requirements electronic marketplace operators 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. In the case of an infringement of these requirements on the part of producers (and/or their authorised representatives), electronic marketplace operators 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 concerning offering/distributing products which are not in line with the ElektroG, BattG, or the VerpackG. The obligations of the producer to register/notify would remain in force.

- **Purpose:** This measure aims at ensuring that only offers for **goods from producers who have properly fulfilled the registration/notification requirements** are published on the electronic marketplaces. Accordingly, services of fulfilment service providers should be provided for goods from producers only once these have properly fulfilled their registration/notification requirements.

- **Conceptualisation:**

  - **Electronic marketplaces:** Under the **ElektroG**, electronic marketplace operators shall document the WEEE reg. no. DE of the producer, or of their authorised representative, for all standardised goods with electronic components, including the brand and type of this equipment. These parameters should be automatically com-pared with the official register, i.e. the stiftung elektro-altgeräte register (stiftung ear) [German WEEE-register] using an existing **IT interface**, which has been appropriately upgraded to cover weight reports and the allocation of WEEE.[5] Automated IT-comparisons with the German Central Agency Packaging Register (Stiftung Zentrale Stelle Verpackungsregister – ZSVR)

[5] See: https://www.stiftung-ear.de/de/startseite/sammlung-news-startseite/default-2fd9051294 (only available in German language, last checked 13 May 2020).

and the German Environment Agency should also be made available with regard to the **BattG and the VerpackG**.

- **Fulfilment service providers**: Insofar as they are regarded as **producers** according to the **VerpackG** (for the shipping packaging), a separate compulsory verification is not necessary. Otherwise, **compulsory verification** is appropriate for this group. The obligation should apply **before the products are shipped** by the fulfilment service provider. Deliveries of goods, purchased on electronic marketplaces established only in third countries, are commonly undertaken by fulfilment service providers in Germany or in the EU, who as a rule ensure the standard delivery times of a few days. Fulfilment service providers also have the advantage of being established in the EU and can therefore be accessed by the responsible authorities more easily than economic actors 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 or are 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 operating 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 would also be required to implement compulsory verification. Corresponding changes at European Union level would further be desirable.

2) Deemed to be a producer[6]:

Instead of compulsory verification, a legal fiction whereby certain actors shall be deemed to be producers could be introduced for electronic marketplace operators and fulfilment service providers (if not already considered producers according to the VerpackG), which would also result in the verification of their contractual partners. However, if these stakeholders are deemed to be producers this would create a situation in which all the other **producers' requirements** (i.e. for labelling, monthly/annual weight reporting, take-back and waste disposal, information, etc.) would also remain in place should the actual producer not properly register/provide notification.

- **Example of a proposed amendment** (according to Section 3 no. 9 last clause ElektroG):
  - "[…] the electronic marketplace operator is also 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 or are not properly registered, or by producers whose authorised representatives are not or are not properly registered; in this case, such enabling is also deemed to be a placing on the market; numbers 11a and 11b remain unaffected;"

This proposal could also be anchored at EU level:

- **Example of a proposed amendment** (Article 3 (1) (f) WEEE Directive):
  - "Every electronic marketplace operator is deemed to be a producer if he enables the marketing or provision of new electrical and electronic equipment from producers not or not properly registered within the meaning of Article 3 paragraph i-iv via his electronic marketplace; Article 3 paragraph i-iv remain unaffected;"

3) Simplified producer responsibility model[7]

According to this proposal, the operator of an electronic marketplace would collect a **fee** from producers offering products on their website in order to ensure the fulfilment of all EPR-obligations. These include, for example, the take-back requirements according to Section 16 ElektroG. Producers are given the option to be exempted from the registration, take-back and waste-disposal obligations. These obligations would then be fulfilled collectively for all producers by the electronic marketplace operator. The fee amount should be based on the quantity of equipment traded on the electronic marketplace. Local facilities commissioned by the electronic marketplaces should be responsible for the proper waste-disposal, i.e. generally, the recycling of waste equipment. Electronic marketplaces would therefore become a single interface for sellers and authorities. They would hold all the necessary information on the sellers and all the sales data and would collect the fees required to secure the take-back and recycling of the waste equipment financially.

- Example of a proposed amendment

[6] Fiction of law.

[7] Originally named "Flat Fee Model" and presented on 26 November 2019; having been proposed by an electronic marketplace operator, and updated on 10 March 2020 and again on 13 March 2020 – but without significant changes to the proposed legal text; up-dated version of the simplified producer responsibility model were presented to the German Environment Agency and the Oeko-Institute e.V.

- Section 8a ElektroG – new: Simplified fulfilment of obligations
  - "(1) Notwithstanding the obligations under this Act, with the exception of the obligations under Sections 4, 9 and 28, notified online marketplaces shall carry out a simplified fulfilment of the producer obligations under Section 3 paragraph 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 from these producers is comparable in its nature and quantity to the waste equipment normally generated 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 Appendix 2a, points 1 and 2.
  - (3) Alternatively to the simplified fulfilment of obligations, producers within the meaning of Section 3 number 9 (d) are free to fulfil their obligations under this Act themselves. If the producers decide to fulfil their obligations themselves, this must be communicated to the notified online marketplaces selling the producers' goods by means of a declaration in automated electronic form.
  - (4) In order to simplify the fulfilment of their obligations, producers shall pay to notified online marketplaces which act on behalf of their mandating producers, pursuant to Section 3 paragraph 9 (d), an amount calculated per kilogram of electrical and electronic equipment made available on the market via the distribution channels of the online marketplace within a calendar year, to finance the collection, treatment, recovery and environmentally sound disposal of the electrical and electronic equipment provided by these producers. The competent authority shall be notified of the relevant sum per kilogram of electrical and electronic equipment at least 14 days before the first billing."
  - Section 45 (1) no. 7a ElektroG – new:
    "in contravention of Section 8a paragraph 2 is an online marketplace which does not make notification, or does not do so correctly, or does not ensure that producers who fulfil their obligations themselves in accordance with Section 8a paragraph 3 sentence 2 have notified the online marketplace of this by means of a declaration".

Legal issues

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

► **Compulsory verification**:

- The proposal would be **compatible with world-trade law requirements**, regardless of whether they fall within the scope of the TBT Agreement or are assessed against the general GATT rules.
- Compulsory verification would be compatible with the **fundamental freedoms of the internal market** (freedom of goods and services). The simplified producer responsibility model is not an equally suitable instrument and as such it is not compatible with the fundamental freedoms of the internal market.
- Compulsory verification for electronic marketplace operators and fulfilment service providers would be compatible with **secondary EU legislation**.
- Potential encroachments on fundamental freedom rights (**occupational freedom** according to Art. 12 GG [Basic Law for the Federal Republic of Germany], freedom of property according to Art. 14 GG, and the **general freedom of action** according to Art. 2 (1) GG) would be justified. The equal treatment of electronic marketplace operators and distributors (both online and stationary), or of electronic marketplace operators 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**:

- With regard to internal market freedoms and fundamental rights, in the light of the proposal´s greater implications for the above-mentioned stakeholders, **compulsory verification** is shown to be a **milder method**; hence, the legal fiction proposal would not be needed. If several producers were registered, this could lead to an unclear allocation of responsibilities.

► **Simplified producer responsibility model**[8]:

- This model would privilege the group of producers according to Article 3 (1) (f) (iv) WEEE Directive offering products on electronic marketplaces over all other producers, as the former would hold a superior competitive position. According to recital 7 of the WEEE directive, however, this is exactly what should be prevented. The simplified producer responsibility model would privilege e-commerce over stationary retail, since only producers within the meaning of Art. 3 (1) (f) (iv) WEEE Directive would benefit. The model is based on (double) voluntariness (for the electronic marketplace as well as for the seller), therefore it **does not seem appropriate** for addressing the problem of third-country free-riders. Moreover, its introduction would, to a certain extent, re-ward the hitherto non-compliant behaviour of online sellers. There are no objective reasons for condoning this unequal treatment. According to Article 16 (1) and (2) WEEE Directive, market transparency is the main purpose of producer registration and the publication of the resulting register and/or list of producers. This serves not only the competent authorities but, expressly, also the market participants themselves, thereby

[8] The contents of this point were updated following the technical discussion on 28 February 2020, as on 10 March 2020 and on 13 March 2020, updated versions of the simplified producer responsibility model were presented.

enabling and facilitating market self-regulation. A simplified producer responsibility model would **undermine** this **transparency** to the extent that only marketplaces would be notified, and individual producers would no longer be registered. In particular, it would no longer be possible to allocate brands or types of equipment to their respective producers, rendering it impossible to determine whether or not the producers had fulfilled their obligations. Furthermore, by reducing the frequency of weight reporting from monthly to merely annually, the model would work against the existing WEEE-system of collection coordination. Finally, in comparison with compulsory verification, the model would be less suitable for fulfilling the **producer responsibility concept based on the polluter-pays-principle**. The reason for this lies with the actual WEEE-disposal costs. These costs would not be borne by the party with the greatest in-fluence on an ecological product design, since the electronic marketplace would dis-tribute the total waste-disposal costs according to its own key, on a fixed-rate basis.

In summary, the simplified producer responsibility model appears to constitute an un-justifiable privileging of a certain type of producer. It would also seem superfluous since a specific simplification for third-country producers is already available in the legal concept of authorised representative. Specialist service providers also exist who simplify administration and logistics, with regard to producer obligation fulfilment.

Concept for implementing EPR in e-commerce

- **European Union level**– two possible approaches:
  - **Uniform, EU-wide registration** with a European registration agency – subsidiarity reasons and practical considerations argue against this proposal, since, due to their greater proximity to the subject matter, the implementation would need to be carried out by the national authorities; registration for another country could not be sought in Germany, and free-riders could not be identified and prosecuted.
  - **Harmonisation of 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 compulsory verification[9]
  - The existing **producer responsibility** approach is maintained. Producers are subject to registration/notification obligations and the subsequent weight reporting, take-back and waste-disposal obligations, etc.

[9] The *digital policy agenda for the environment* presented by Minister Ms. Svenja Schulze (Federal Ministry for the Environment, Nature Conservation and Nuclear Safety) on 2 March 2020, includes under "Measures that are newly initiated" and "Sustainable consumption" the following aspects: "Anchoring of a compulsory verification for electronic marketplace operators 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, last checked 13 March 2020.

- As existing regulations do not generally apply to **electronic marketplace operators**, they are obliged to check in advance the proper registration/notification of producers offering goods on their websites. **Automated data comparison** at the respective registration and/or notification offices, such as the stiftung ear (national register for waste electric equipment), the ZSVR (Central Agency Packaging Register), and the German Environment Agency would be useful.
- **Fulfilment service providers** may only provide their services if the goods come from producers who have properly fulfilled their registration/notification obligations. They are obliged to fulfil the same **compulsory verifications** as those for electronic marketplaces operators. The obligation of fulfilment service providers is particularly relevant in cases where electronic marketplace operators do not fulfil their obligations, especially if their registered office is abroad.

Zusammenfassung

Die Pflicht zur Übernahme der Produktverantwortung, insbesondere der Registrierungs- und Anzeigepflichten sowie Sammel- und Entsorgungspflichten, knüpft im ElektroG, BattG und VerpackG an die „Hersteller"- und „Vertreiber"-Eigenschaft an. Hersteller müssen vor dem Inverkehrbringen von Elektro- und Elektronikgeräten und Verpackungen diese bei der zuständigen Behörde registrieren bzw. im Fall des erstmaligen Inverkehrbringens von Batterien dies anzeigen; dies gilt auch für Hersteller aus Drittländern (Länder außerhalb der EU) im Onlinehandel. Andernfalls gelten für die Produkte Vertriebsverbote.[10]

Ebenso wie im stationären Handel sind im Onlinehandel Produzenten, Importeure, Vertreiber und Endverbraucher involviert. Allerdings kommen im Onlinehandel insbesondere folgende neue Wirtschaftsbeteiligte dazu:

- Betreiber von Onlineshops,
- Betreiber elektronischer Marktplätze (z. B. Online-Auktionshäuser, Online-Vermittlungsplattformen) und
- Fulfilment-Dienstleister.

Eine Legal-Definition dieser neuen Wirtschaftsbeteiligten ist im Kreislaufwirtschaftsgesetz (KrWG), ElektroG, VerpackG oder BattG bzw. in den entsprechenden europäischen Richtlinien nicht zu finden. Das Forschungsprojekt hat untersucht, ob die neuen Wirtschaftsbeteiligten als Hersteller oder Vertreiber nach dem ElektroG, VerpackG und BattG einzustufen sind. Die folgende Table 3 und Table 4 geben ein Überblick, ob die neuen Wirtschaftsbeteiligten des Onlinehandels als Hersteller oder Vertreiber nach der derzeitigen Rechtslage einzustufen sind:

Table 3: Sind die Akteure im Onlinehandel Hersteller nach ElektroG, BattG und VerpackG?

	ElektroG	BattG	VerpackG
Betreiber Onlineshop	**Hersteller** (§ 3 Nr. 9 lit. b; ggf. Nr. 9a)	**Hersteller** (§ 2 Abs. 15 S. 1)	**Hersteller**[11] (§ 3 Abs. 14)
	Importeur (§ 3 Nr. 9 lit. c)	**Importeur** (§ 2 Abs. 15 S. 1 i.V.m. Abs. 16 S. 2)	

[10] Teile dieser Zusammenfassung haben die Autoren bereits als Inputpapier unter dem Titel „Produktverantwortung im Onlinehandel – Regelungsoptionen zur Verhinderung von Drittland-Trittbrettfahrern und Retourenvernichtung" am 14.05.2020 unter www.oeko.de/presse/archiv-pressemitteilungen/presse-detailseite/2020/gesetzesluecke-schliessen-fuer-mehr-umweltschutz-beim-online-shopping veröffentlicht.

[11] **Auslandssitz des Betreibers:** Importiert mit Ware befüllte Verpackung (Versandverpackung, Verkaufs- und Umverpackung) direkt an den Endverbraucher in Deutschland = Hersteller für die Verkaufsverpackung, Umverpackungen und Versandverpackungen;

Betreiber sitzt in Deutschland: Importiert mit Ware befüllte Verpackung eines Unternehmens aus dem Ausland = Hersteller der Verkaufs- und Umverpackungen und versendet diese an den Endverbraucher = Hersteller der Versandverpackungen;

Betreiber sitzt in Deutschland: Füllt Ware eines anderen Unternehmens aus dem Inland in Versandverpackung und sendet diese an Endverbraucher = Hersteller der Versandverpackung (anderes Unternehmen = Hersteller für Verkaufs- und Umverpackung);

Betreiber sitzt in Deutschland: Schickt Ware in gebrauchter Versandverpackung, Verkaufsverpackung und Umverpackung an Endverbraucher = Hersteller der systembeteiligungspflichtigen Verpackung; für gebrauchte Verpackungen dann nicht, wenn diese bereits zuvor systembeteiligt war.

	ElektroG	BattG	VerpackG
	Direkt-Fernabsatz-Vertreiber (§ 3 Nr. 9 lit. d)	----------	----------
	Fiktive Hersteller (§ 3 Nr. 9 2.HS)	**Fiktive Hersteller** (§ 2 Abs. 15 S. 2)	**Importeur** (Herstellerfiktion) (§ 3 Abs. 14 S. 2)
Betreiber elektronischer Marktplatz	**Kein Hersteller** (bietet nicht an)	**Kein Hersteller** (bringt nicht in Verkehr)	Kein Hersteller (bringt nicht erstmals in Verkehr)
Fulfilment-Dienstleister	**Kein Hersteller** (bietet nicht an)	**Kein Hersteller** (bringt nicht in Verkehr)	**Hersteller der Versandverpackung** (es sei denn, nur der Name des Verkäufers ist auf der Versandverpackung)[12]

Quelle: Öko-Institut e.V.

Table 4: Sind die Akteure im Onlinehandel Vertreiber nach ElektroG, BattG und VerpackG?

	ElektroG	BattG	VerpackG
Betreiber Onlineshop	**Vertreiber** bietet an und/oder stellt bereit (§ 3 Nr. 11)	**Vertreiber** bietet an (§ 2 Abs. 14 S. 1)	**Vertreiber** gewerbsmäßiges Inverkehrbringen (§ 3 Abs. 12)
Betreiber elektronischer Marktplatz	**Kein Vertreiber** (bietet nicht an und stellt nicht bereit)	**Kein Vertreiber** (bietet nicht an)	**Kein Vertreiber** (bringt keine Verpackungen in Verkehr)
Fulfilment-Dienstleister	**Kein Vertreiber** (bietet nicht an) Offen, ob 2. Merkmal „Bereitstellung“ erfüllt ist. Auch wenn man „Bereitstellung“ annimmt, wird Drittland-Trittbrettfahren nicht verhindert (Anbietverbot gem. § 6 Abs. 2 S. 2 greift nicht)	**Kein Vertreiber** (bietet nicht an)	**Letztvertreiber** (Abgabe der Verkaufs-/Umverpackung an Endverbraucher, wenn man Gewahrsamswechsel nicht dem Verkäufer zurechnet)

Quelle: Öko-Institut e.V.

Vollzug gegen Trittbrettfahrer

Produktverantwortliche, die ihren abfallrechtlichen Verpflichtungen nicht nachkommen, müssen mit verschiedenen Rechtsfolgen rechnen, wozu Vollzugs- und Sanktionsmöglichkeiten der Behörden zählen, aber auch wettbewerbsrechtliche Klagen durch Konkurrenten. Die Sanktionsmöglichkeiten sind dabei abhängig vom Firmensitz des Herstellers (Deutschland, EU-

[12] So die Verwaltungspraxis der Stiftung Zentrale Stelle Verpackungsregister (ZSVR), https://www.verpackungsregister.org/fileadmin/files/Themenpapiere/Themenpapier_Information-fuer-Versand-und-Onlinehandel.pdf (so am 23.07.2020).

Mitgliedstaat oder einem Drittland). Für den Vollzug von Ordnungswidrigkeiten aufgrund von Verstößen gegen Registrierungs- und Anzeigepflichten kommt die Studie zu folgendem Ergebnis:

- Gegen **EU-Trittbrettfahrer** (Sitz in Deutschland oder einem anderen EU-Mitgliedstaat) können die deutschen Behörden aufgrund der derzeitigen Rechtslage – ggf. in Zusammenarbeit mit anderen EU-Mitgliedstaaten – vorgehen, d. h. Bußgeldbescheide nach dem Ordnungswidrigkeitengesetz erlassen und vollstrecken lassen.
- Auch **Drittland-Trittbrettfahrer** (Sitz außerhalb der EU) sind als Verantwortliche vom ElektroG, BattG und VerpackG erfasst. Bei einem Verstoß z. B. gegen die Registrierungs-/Anzeigepflicht ist eine Vollstreckung von Bußgeldbescheiden nur dann möglich, wenn ein entsprechender völkerrechtlicher Vertrag mit dem betroffenen Land besteht. Dies ist aber gerade nicht der Fall bei Ländern wie z. B. China sowie den USA – also wichtigen Importländern für Elektro- und Elektronikgeräte.
- Da **elektronische Marktplätze** weder Hersteller (bringen nicht in Verkehr) noch Vertreiber (bieten nicht an) sind, **greifen bestehende Verkehrsverbote** nach ElektroG (§ 6 Abs. 2, S. 1 und 2), BattG (§ 3 Abs. 3, § 3 Abs. 4 S. 2) und VerpackG (§ 9 Abs. 5 S. 1 und 2) **nicht**.
- **Bei Fulfilment-Dienstleistern greifen bestehende Verkehrsverbote ebenfalls nicht**. (Ausnahme: Sie sind Hersteller der Versandverpackung).
-

Vorschläge zur Änderung der Rechtslage, um „Drittland-Trittbrettfahrer“ zu vermeiden

Im Folgenden werden die drei wichtigsten im Forschungsprojekt erörterten Vorschläge zur Änderung der Rechtslage skizziert, mit denen „Drittland-Trittbrettfahrer“ vermieden werden können:

1. **Prüfpflicht für elektronische Marktplätze und Fulfilment-Dienstleister**

- **Inhalt**: Vorgeschlagen wird eine **eigenständige, nicht an die Herstellereigenschaft anknüpfende Prüfpflicht für elektronische Marktplätze sowie der Fulfilment-Dienstleister**. Die Betreiber elektronischer Marktplätze und Fulfilment-Dienstleister sollen die auf ihren Markplätzen anzubietenden bzw. von ihnen zu versendenden Produkte vorab darauf überprüfen, ob die Hersteller ihren nationalen Pflichten zur Registrierung/Anzeige nachkommen. Bei einem Verstoß der Hersteller (bzw. Bevollmächtigten) gegen diese Pflichten dürfen die elektronischen Marktplatzbetreiber nicht ermöglichen, die Produkte auf ihrer Internetseite anzubieten bzw. die Fulfilment-Dienstleister dürfen ihre Dienstleistungen für diese Waren nicht erbringen. Damit werden die bestehenden Verbote zum Anbieten/Inverkehrbringen nach ElektroG, BattG und VerpackG durchgesetzt. Die Pflichten der Hersteller zur Registrierung/Anzeige bleiben dabei weiter bestehen.
- **Zweck**: Es soll erreicht werden, dass auf den elektronischen Marktplätzen nur noch Angebote für **Produkte von ordnungsgemäß registrierten/angezeigten Herstellern** veröffentlicht werden. Entsprechend sollen Dienstleistungen von Fulfilment-Dienstleistern nur für Produkte ordnungsgemäß registrierter/angezeigter Hersteller erbracht werden.

- **Konzeption**:
  - **Elektronische Marktplätze**: Für den Bereich des **ElektroG** erfassen die Betreiber elektronischer Marktplätze von ihren Vertragspartnern für alle Waren mit elektronischen Komponenten standardisiert die WEEE-Reg.-Nr. DE (die des Herstellers bzw. jene des Bevollmächtigten) einschließlich der Marke sowie Geräteart. Diese Parameter könnten technisch mittels einer **IT-Schnittstelle** automatisiert beim behördlichen Register, also bei der stiftung elektroaltgeräte register (stiftung ear), abgeglichen werden, durch die eine entsprechende Erweiterung der für Mengenmitteilungen und Abholkoordination bereits bestehenden IT-Schnittstelle geschaffen wurde.[13] Für die Bereiche des **BattG und des VerpackG** werden automatisierte IT-Abgleiche mit den Registern der Stiftung Zentrale Stelle Verpackungsregister (ZSVR, im Folgenden auch als „Zentrale Stelle" bezeichnet) und des Umweltbundesamtes ebenfalls ermöglicht.
  - **Fulfilment-Dienstleister**: Soweit diese (für die Versandverpackungen) nach dem **VerpackG als Hersteller** angesehen werden, ist die Einführung gesonderter Prüfpflichten hinfällig. Im Übrigen ist aber auch für diese Gruppe eine **Prüfpflicht** sinnvoll. Diese Pflicht sollte spätestens **vor Versendung der Produkte** durch den Fulfilment-Dienstleister einsetzen. Denn bei Lieferungen, der über allein in Drittländern niedergelassenen elektronischen Marktplätze erworbenen Ware, werden meist Fulfilment-Dienstleister in Deutschland bzw. in der EU in Anspruch genommen, um die üblichen Lieferzeiten von wenigen Tagen sicherstellen zu können. Zugleich bietet sich bei den Fulfilment-Dienstleistern der Vorteil, dass sie in der EU ansässig sind und daher durch die zuständigen Behörden ein **leichterer Zugriff** möglich ist als bei Wirtschaftsakteuren in Drittländern.

- **Beispiele für Änderungsvorschläge (hier: elektronische Marktplätze – ElektroG):**
  - **Prüfpflicht** (§ 6 Abs. 2 S. 3 ElektroG – neu):
    - „(2) … Betreiber elektronischer Marktplätze dürfen über ihren elektronischen Marktplatz das Anbieten oder Bereitstellen von Elektro- und Elektronikgeräten nicht ermöglichen, wenn die Hersteller dieser Geräte oder im Fall der Bevollmächtigung nach § 8 deren Bevollmächtigte nicht oder nicht ordnungsgemäß registriert sind."
  - Definitionen (§ 3 Nr. 11a und b ElektroG – neu): Einführung neuer Definitionen:
    - „11a. **elektronischer Marktplatz**: eine Website oder jedes andere Instrument, mit dessen Hilfe Informationen über das Internet zur Verfügung gestellt werden, die es Herstellern oder Vertreibern, die nicht Betreiber des Marktplatzes sind, ermöglichen, darüber Elektro- und Elektronikgeräte in deren eigenem Namen im Geltungsbereich dieses Gesetzes anzubieten oder bereitzustellen;"
    - „11b. **Betreiber eines elektronischen Marktplatzes**: jede natürliche oder juristische Person oder Personengesellschaft, die einen elektronischen Marktplatz unterhält;"

[13] Vgl.: https://www.stiftung-ear.de/de/startseite/sammlung-news-startseite/default-2fd9051294 (so am 13.05.2020).

- **Ergänzung** von § 3 Nr. 10 2.HS ElektroG:
  - „**Bevollmächtigter** kann auch ein Hersteller nach Nummer 9 Buchstabe c, ein Vertreiber nach Nummer 11 oder ein Betreiber eines elektronischen Marktplatzes nach Nummer 11b sein;“

- **Aufnahme einer Ordnungswidrigkeit** (§ 45 Abs. 1 Nr. 4a ElektroG – neu):
  - „4a. entgegen § 6 Absatz 2 Satz 3 das Anbieten oder Bereitstellen von Elektro- und Elektronikgeräten ermöglicht,“

Vergleichbare Änderungen im VerpackG und im BattG sind zur Installierung von Prüfpflichten geboten. Entsprechende Anpassungen auf Unionsebene wären wünschenswert.

2. Herstellerfiktion[14]

Anstelle der Normierung von Prüfpflichten könnten in Bezug auf elektronische Marktplätze sowie Fulfilment-Dienstleister (soweit diese nicht nach dem VerpackG bereits als Hersteller anzusehen sind) jeweils Herstellerfiktionen normiert werden, die ebenfalls zur Überprüfung ihrer Vertragspartner führen. Allerdings führt die Herstellerfiktion dazu, dass auch alle anderen **Herstellerpflichten** (die Pflichten zur Kennzeichnung, monatlichen/jährlichen Mengenmeldung, zur Rücknahme und Entsorgung, zur Information etc.) zur Anwendung kommen, sofern sich der eigentliche Hersteller nicht ordnungsgemäß registriert/anzeigt.

► **Beispiel für Änderungsvorschlag** (nach § 3 Nr. 9 letzter HS ElektroG):

- „als Hersteller gilt darüber hinaus der Betreiber eines elektronischen Marktplatzes, der vorsätzlich oder fahrlässig ermöglicht, dass Elektro- oder Elektronikgeräte nicht oder nicht ordnungsgemäß registrierter Hersteller oder von Herstellern, deren Bevollmächtigte nicht oder nicht ordnungsgemäß registriert sind über seinen elektronischen Marktplatz angeboten oder bereitgestellt werden; in diesem Fall gilt das Ermöglichen als Inverkehrbringen; Nummer 11a und 11b bleiben unberührt;“

Die Verankerung der Herstellerfiktionen könnte auch auf EU-Ebene vorgenommen werden.

► **Beispiel für Änderungsvorschlag** (hier: Ergänzung in Art. 3 (1) (f) WEEE-RL[15]):

- „jeder Betreiber eines elektronischen Marktplatzes gilt als Hersteller, wenn er die Vermarktung oder Bereitstellung neuer Elektro- und Elektronikgeräte von einem nicht oder nicht vorschriftsgemäß registrierten Hersteller im Sinne von Artikel 3 (1) Ziffern i-iv über ihren elektronischen Marktplatz ermöglicht; Artikel 3 (1) Ziffern i-iv bleiben unberührt;“

3. Vereinfachtes Herstellerverantwortungsmodell

Das vereinfachte Herstellerverantwortungsmodell (wurde ursprünglich als sog. „Flat-Fee-Modell" bezeichnet und auf Vorschlag eines Betreibers eines elektronischen Marktplatzes am

[14] Rechtsfiktion.

[15] Richtlinie 2012/19/EU des Europäischen Parlaments und des Rates vom 4. Juli 2012 über Elektro- und Elektronik-Altgeräte (ABl. L 197 vom 24.07.2012, S. 38) – im folgenden WEEE-RL genannt.

26.11.2019 vorgelegt sowie am 10.03.2020 und am 13.03.2020 – allerdings ohne durchgreifende Änderungen im Rechtstextvorschlag – nochmals aktualisiert)[16]:

Nach diesem Vorschlag wird durch den Betreiber eines elektronischen Marktplatzes ein **Entgelt** von den auf seiner Webseite anbietenden Herstellern erhoben, mit dem die Erfüllung aller Herstellerpflichten aus der abfallrechtlichen Produktverantwortung gewährleistet werden soll. Dies gilt z. B. für die Rücknahmepflichten nach § 16 ElektroG. Hersteller sollen hiernach die Option erhalten, von den Registrierungs-, Rücknahme- und Entsorgungspflichten freigestellt zu werden. Die Pflichten werden durch den elektronischen Marktplatz kollektiv für alle Hersteller wahrgenommen. Die Entgelthöhe soll nach der Menge der auf dem elektronischen Marktplatz gehandelten Geräte bemessen werden. Für die ordnungsgemäße Entsorgung, d. h. in der Regel Verwertung der Altgeräte sollen „die von den Online-Marktplätzen beauftragten inländischen Strukturen" verantwortlich sein. Elektronische Marktplätze würden dadurch „zu einer einheitlichen Schnittstelle für Verkäufer und Behörden, wobei sie bereits über alle erforderlichen Informationen über den Verkäufer und sämtliche Verkaufsdaten verfügen und die Gebühren einziehen, die zur finanziellen Sicherstellung der Rücknahme und Verwertung von Abfällen erforderlich sind."

Beispiel für Änderungsvorschlag

§ 8a ElektroG – neu: „Vereinfachte Pflichtenerfüllung

(1) Abweichend von den Pflichten dieses Gesetzes, ausgenommen den Pflichten nach §§ 4, 9 und 28, führen gemeldete Online-Marktplätze eine vereinfachte Pflichtenerfüllung hinsichtlich der Pflichten von Herstellern nach § 3 Nummer 9 Buchstabe d durch. Ferner vorbehaltlich der Bestimmungen in den nachstehenden Absätzen, gilt die vereinfachte Pflichtenerfüllung nur für Hersteller, die für den Verkauf ihrer Waren die Dienstleistungen eines gemeldeten Online-Marktplatzes in Anspruch nehmen und wenn die Altgeräte dieser Hersteller in ihrer Beschaffenheit und Menge mit den üblicherweise in privaten Haushalten anfallenden Altgeräten vergleichbar sind.

(2) Um ein gemeldeter Online-Marktplatz zu werden, muss ein Online Marktplatz der zuständigen Behörde seinen Namen, seine Adresse, eine Kennnummer einschließlich der europäischen oder nationalen Steuernummer in dem in Anlage 2a Nr. 1 und Nr. 2 vorgesehenen Format mitteilen.

(3) Anstelle der vereinfachten Pflichtenerfüllung steht es jedem Hersteller

i.S.d. § 3 Nummer 9 lit. (d) frei, seine Pflichten gemäß diesem Gesetz selbst zu erfüllen. Entscheidet sich der Hersteller, seine Pflichten selbst zu erfüllen, ist dies den gemeldeten Online-Marktplätzen, die die Waren des Herstellers verkaufen, mittels Erklärung in automatisierter elektronischer Form mitzuteilen."

§ 45 Abs. 1 Nr. 7a ElektroG – neu:

„entgegen § 8a Absatz 2 als Online-Marktplatz eine Meldung nicht oder nicht richtig macht oder nicht sicherstellt, dass Hersteller, die gemäß § 8a Absatz 3 Satz 2 ihre Pflichten selbst erfüllen, dies dem Online-Marktplatz mittels Erklärung mitgeteilt haben".

Rechtsfragen

Wo immer unter Berücksichtigung des Subsidiaritätsgrundsatzes möglich, sollten die genannten Vorschläge vorzugsweise auf **Unionsebene** umgesetzt werden, um einen harmonisierten Voll-

[16] Dem Umweltbundesamt und dem Öko-Institut e.V. wurden am 10.03.2020 sowie am 13.03.2020 aktualisierte Versionen des verein-fachten Herstellerverantwortungsmodells vorgelegt.

zug zu gewährleisten. In der Rechtsprüfung wurde das Hauptaugenmerk dennoch auf Instrumente gelegt, die mit den Mitteln des **nationalen Rechts** umgesetzt werden können.

- **Prüfpflichten:**
  - Die vorgeschlagenen **Prüfpflichten** wären – unabhängig davon, ob sie dem Anwendungsbereich des TBT-Übereinkommens unterfallen oder am Maßstab der allgemeinen Regeln des GATT bewertet werden – mit den **welthandelsrechtlichen Vorgaben vereinbar**.
  - Sie wären mit den **Grundfreiheiten des Binnenmarkts** (Waren- und Dienstleistungsfreiheit) vereinbar. Das vereinfachte Herstellerverantwortungsmodell ist angesichts seiner Freiwilligkeit zumindest kein gleich geeignetes Mittel.
  - Die Prüfpflichten für Betreiber elektronischer Marktplätze und Fulfilment-Dienstleister wären mit dem **EU-Sekundärrecht** vereinbar.
  - Mögliche Eingriffe in Freiheitsgrundrechte (**Berufsfreiheit** nach Art. 12 GG, **Eigentumsfreiheit** nach Art. 14 GG**, allgemeine Handlungsfreiheit** nach Art. 2 Abs. 1 GG) wären gerechtfertigt.
  - In der Gleichbehandlung zwischen Betreibern elektronischer Marktplätze einerseits und Vertreibern (online wie stationär) andererseits sowie zwischen Betreibern elektronischer Marktplätze und Fulfilment-Dienstleistern ist keine Verletzung des allgemeinen Gleichheitssatzes aus Art. 3 Abs. 1 GG zu sehen.
- **Herstellerfiktion:**

  Wegen der größeren Tragweite der Herstellerfiktion für die Verantwortlichen können die Prüfpflichten aus Sicht der Grundfreiheiten des Binnenmarkts und aus Grundrechtssicht als **milderes Mittel** angesehen werden, so dass die Herstellerfiktion nicht erforderlich wäre. Ggf. könnte es zu einer unklaren Verantwortungsverteilung kommen, falls mehrere Hersteller registriert sind.
- **Vereinfachtes Herstellerverantwortungsmodell[17]:**

  Hiermit würde die Gruppe der Hersteller nach Art. 3 Abs. 1 lit. f) iv) WEEE-RL, die auf elektronischen Marktplätzen anbieten, gegenüber allen anderen Herstellern bevorzugt, weil erstere eine bessere Position im Wettbewerb erhalten. Dies soll aber nach dem 7. Erwägungs-grund der WEEE-RL gerade verhindert werden. Die Befürchtung, dass der Onlinehandel gegenüber dem stationären Handel privilegiert wird, könnte durch das vereinfachte Herstellerverantwortungsmodell noch verstärkt werden, indem nur Hersteller nach Art. 3 Abs. 1 lit. f) iv) WEEE-RL von diesem Modell profitieren. Das vereinfachte Herstellerverantwortungs-modell beruht weiterhin auf (doppelter) Freiwilligkeit (für den elektronischen Marktplatz wie auch für den Anbieter), so dass es **nicht geeignet** erscheint,

[17] Dieser Punkt wurde im Nachgang des Fachgesprächs am 28.02.2020 inhaltlich aktualisiert, da am 10.03.2020 sowie am 13.03.2020 aktualisierte Versionen des vereinfachten Herstellerverantwortungsmodells vorgelegt wurden.

dem Problem der „Drittland-Trittbrettfahrer“ zu begegnen.[18] Im Übrigen würde durch die Einführung von vereinfachten Herstellerpflichten nach diesem Modell das frühere nicht rechtskonforme Verhalten von Online-Anbietern gewissermaßen belohnt. Sachliche Gründe für diese Ungleichbehandlung sind nicht erkennbar. Wesentlicher Zweck der Herstellerregistrierung und der Veröffentlichung des daraus resultierenden Registers bzw. Herstellerverzeichnisses ist gemäß Art. 16 Abs. 1 und 2 WEEE-RL die Markttransparenz, die nicht nur den zuständigen Behörden dient, sondern ausdrücklich auch den Marktteilnehmenden selbst, um so die Selbstkontrolle des Marktes möglich und nutzbar zu machen. Ein vereinfachtes Herstellerverantwortungsmodell würde diese **Transparenz unterlaufen**, soweit nicht mehr der einzelne Hersteller registriert, sondern allein die Marktplätze gemeldet wären. Insbesondere ließen sich Marken und Gerätearten nicht mehr den jeweiligen Herstellern zuordnen, so dass sich nicht mehr feststellen ließe, ob diese nicht nur grundsätzlich, sondern auch im erforderlichen Umfang ihren Verpflichtungen nachkommen. Weiter widerspricht das Modell mit der nur jährlichen Mengenmeldung dem bisherigen, auf einer monatlichen Mengenmeldung basierenden System der Abholkoordination. Letztlich genügt das Modell im Vergleich zur Prüfpflicht weniger dem **Grundkonzept einer verursachergerechten Produktverantwortung**, da die Kostenübernahme im Rahmen der konkreten Entsorgung von Elektroaltgeräten nicht direkt durch denjenigen erfolgen würde, der Einfluss auf die ökologisch wichtige Produktgestaltung hat, denn der elektronische Marktplatz würde die Gesamtentsorgungskosten nach seinem eigenen Schlüssel pauschal verteilen. Zusammenfassend erscheint ein vereinfachtes Herstellerverantwortungsmodell als nicht zu rechtfertigende Privilegierung eines bestimmten Herstellertypus. Diese ist zudem auch nicht notwendig, da mit der Rechtsfigur des Bevollmächtigten bereits eine spezifische Erleichterung für im Drittland sitzende Hersteller zur Verfügung steht und zudem sämtlichen Herstellern zur konkreten Wahrnehmung ihrer Pflichten spezialisierte Dienstleister zur Verfügung stehen, die ihrerseits zu einer administrativen und logistischen Erleichterung beitragen.

Konzept für die Umsetzung der Produktverantwortung im Onlinehandel

- **Unionsebene** – zwei mögliche Wege:
  - **einheitliche, EU-weite Registrierung** mit einer europäischen Registrierungsagentur – dagegen sprechen Subsidiaritätsgründe sowie praktische Erwägungen, denn der eigentliche Vollzug müsste wegen der größeren Sachnähe bei den nationalen Behörden

[18] Der letztlich allein maßgebliche Rechtstextentwurf ist insoweit eindeutig, auch wenn seit der am 10.03.2020 vorgelegten aktualisierten Version des vereinfachten Herstellerverantwortungsmodells in den erläuternden Vorbemerkungen zum Rechtstextentwurf steht, dass die Teilnahme an dem vereinfachten Herstellerverantwortungsmodell für die Anbieter auf den elektronischen Marktplätzen nunmehr verpflichtend sein soll. Auch der am 13.03.2020 vorgelegte Rechtstextentwurf des § 45 Nr. 7a führt zu keiner anderen Bewertung, denn diese Ordnungswidrigkeit greift wegen der Bezugsnorm nur für „gemeldete Online-Marktplätze“, sodass es den elektronischen Marktplätzen auch weiterhin freisteht, ein solcher zu werden; ein „gemeldeter Online-Marktplatz“ zu sein ist jedoch Voraussetzung, damit das vereinfachte Herstellerverantwortungsmodell überhaupt zur Anwendung kommt. Insofern lässt sich angesichts der Freiwilligkeit des Instruments eine wirksame Verhinderung von „Drittland-Trittbrettfahrern“ auch nicht dadurch sicherstellen, dass der gemeldete Online-Marktplatz sanktioniert wird, wenn dieser nach der Bezugsnorm des § 8a Abs. 2 „eine Meldung nicht oder nicht richtig macht“. Darüber hinaus führt die Ordnungswidrigkeit auch für einen „gemeldeten Online-Marktplatz“ nicht dazu, dass „Drittland-Trittbrettfahrer“ wirksam verhindert werden, da eine inhaltlich ungeprüfte Hersteller-Erklärung insoweit keinen Mehrwert hat. Insofern lässt sich eine wirksame Verhinderung von „Drittland-Trittbrettfahrern“ auch nicht dadurch sicherstellen, dass ein gemeldeter Online-Marktplatz sanktioniert wird, wenn dieser „nicht sicherstellt, dass Hersteller, die gemäß § 8a Abs. 3 S. 2 ihre Pflichten selbst erfüllen, dies dem Online-Marktplatz mittels Erklärung mitgeteilt haben“.

liegen; eine Registrierung in einem anderen Land könnte nicht in Deutschland vollzogen werden, „Trittbrettfahrer“ könnten nicht identifiziert und geahndet werden,

- **Harmonisierung der Registrierungs-/Anzeigeverfahren** für Elektro- und Elektronikgeräte, Batterien und Verpackungen durch abgestimmte Vorgaben in den entsprechenden EU-Richtlinien. Diese Option erscheint vorzugswürdig.

► **Nationale Ebene**: Einführung einer Prüfpflicht[19]

- Es bleibt bei dem bestehenden Ansatz der **Verantwortlichkeit der Hersteller**. Sie unterfallen den Registrierungs-/Anzeigepflichten und den nachfolgenden Mengenmelde-, Rücknahme- und Entsorgungspflichten etc.
- Da die bestehenden Regelungen in aller Regel für **Betreiber elektronischer Marktplätze** nicht greifen, werden diese verpflichtet, die ordnungsgemäße Registrierung/Anzeige der auf ihren Webseiten anbietenden Hersteller vorab zu kontrollieren. Dabei wäre ein **automatisierter Datenabgleich** bei den jeweiligen Registrierungs- bzw. Anzeigestellen wie der stiftung ear, der Stiftung ZSVR und dem Umweltbundesamt sinnvoll.
- **Fulfilment-Dienstleister** dürfen ihre Dienstleistungen nur erbringen, wenn die Produkte von ordnungsgemäß registrierten/angezeigten Herstellern stammen. Für sie werden die gleichen **Prüfpflichten**, wie für die Betreiber elektronischer Marktplätze normiert. Die Verpflichtung der Fulfilment-Dienstleister ist vor allem deshalb relevant, falls die Betreiber elektronischer Marktplätze ihre Pflichten nicht wahrnehmen und vor allem wenn diese im Ausland ihren Firmensitz haben.

Die nachfolgende Tabelle gibt eine Übersicht über alle im Forschungsprojekt betrachteten Lösungsvorschläge zur wirksamen Verhinderung von „Drittland-Trittbrettfahrern“ (auf Einzelfragen kann in dieser Tabelle nicht eingegangen werden):

Table 5: Sind die Akteure im Onlinehandel Vertreiber nach ElektroG, BattG und VerpackG?

	Lösungs-vorschlag	Adressat	Inhalt	Normierung	Rechtliche Bewertung	Empfehlung
1	**Prüfpflicht**	elektronische Marktplätze	bedingtes V**erkehrsverbot** mit Pflicht zur **Prüfung der ordnungsgem. Registrierung/Anzeige** von Anbietern auf Webseite des Marktplatzes	ElektroG und WEEE-RL/ VerpackG und Verpack-RL/ BattG und Batterie-RL	mit Unionsrecht, EU-Primär- und Sekundärrecht sowie nationalem	zunächst **national**, wenn möglich auf **Unionsebene** umsetzen
		Fulfilment-Dienstleister	bedingtes **Verkehrsverbot** mit Pflicht zur **Prüfung der**			

[19] In der am 02.03.2020 von Frau Bundesumweltministerin Svenja Schulze vorgestellten umweltpolitischen Digitalagenda steht unter dem Punkt „Maßnahmen, die neu initiiert werden“ beim Punkt „Nachhaltiger Konsum“ folgendes: „Verankerung einer Prüfpflicht für Betreiber elektronischer Marktplätze sowie von Fulfillment-Dienstleistern zur ordnungsgemäßen Registrierung der Hersteller angebotener Elektro- und Elektronikprodukte und Verpackungen durch Änderungen des Elektro- und Elektronikgerätegesetzes (ElektroG) und des Verpackungsgesetzes (VerpackG)“ (vgl. https://www.bmu.de/digitalagenda/massnahmen-der-digitalagenda/#c44301 sowie Seite 22 und 39 unter https://www.bmu.de/download/umweltpolitische-digitalagenda/, so am 13.05.2020).

	Lösungs-vorschlag	Adressat	Inhalt	Normierung	Rechtliche Bewertung	Empfehlung
			ordnungsgem. Registrierung/Anzeige von Kunden, die Serviceleistungen in Anspruch nehmen		Verfassungsrecht **vereinbar**	
2	**Hersteller-fiktion**	elektronische Marktplätze Fulfilment-Dienstleister	**Fiktion der Herstellereigenschaft** für den Fall, dass originärer Hersteller Registrierungspflichten verletzt; Erfasst **sämtliche Herstellerpflichten.**	ElektroG und WEEE-RL/ VerpackG und Verpack-RL/BattG und Batterie-RL	nur zweckmäßig, wenn Prüfpflichten allein nicht ausreichen	nur **bedingt zu empfehlen**
3	**Vereinfachtes Hersteller-verantwortungs-modell**	elektronische Marktplätze	**Entgelt an elektr. Markplätze** für Erfüllung sämtlicher Pflichten aus abfallrechtlicher Produktverantwortung; für elektronische Marktplätze wie dortige Anbieter **optional**; Berechnung nach **Menge**; **zentralisierte Meldungen** an stiftung ear	ElektroG und WEEE-RL	**intransparent**; nur von **großen Marktplätzen** umsetzbar; **ungeeignet**	**nicht zu empfehlen**
4	**Begriffs-bestimmungen und Registrierungsverfahren**	Gesetzgeber, Hersteller	verfahrensrechtliche **Harmonisierungen**, europäisches **Zentralregister**, einheitliche Vorgaben an die Registrierung	ElektroG und WEEE-RL/ VerpackG und Verpack-RL/BattG und Batterie-RL	**Subsidiarität**, Zweckmäßigkeit z. T. **fraglich**	nur **z. T. zu empfehlen**
5	**Importverbot**	Gesetzgeber, Hersteller	für **Produkte nicht registrierter/angezeigter Hersteller**; Anknüpfung an bestehendes Verbot im BattG; Anwendung des zollamtlichen Überwachungssystems ATLAS	ElektroG, VerpackG, BattG	nicht auf **Marktüberwachungs-VO** zu stützen; nicht verhältnismäßig	**nicht zu empfehlen; erfordert im Übrigen Änderung ElektroG und VerpackG**
6	**Bevollmächtigte**	Gesetzgeber, Hersteller	stärkere und vereinheitlichte Einbeziehung in die Registrierung; Harmonisierung der Regelungen durch Anknüpfung an ElektroG	BattG und VerpackG	alleine ungeeignet	nur in Kombination etwa mit der Prüfpflicht sowie nach weiterer Prüfung der tatsächliche

	Lösungs-vorschlag	Adressat	Inhalt	Normierung	Rechtliche Bewertung	Empfehlung
						n Wirkung ggf. zu empfehlen
7	**informa-torische Instru-mente**	Gesetzgeber; stiftung ear, ZSVR, Umweltbundesamt	Vereinheitlichung der Informationen für Hersteller und weitere Marktakteure; gute fachliche Praxis; durchgehende Informationen in englischer Sprache	keine Gesetzesänderungen erforderlich	keine rechtl. Probleme	zu empfehlen
8	**Kooperation mit anderen Behörden**	zust. Behörden und Register	auch Behördenkooperation bzgl. BattG/Batterie-RL und VerpackG/Verpack-RL etablieren	Batterie-RL und Verpack-RL an WEEE-RL anpassen	keine rechtl. Probleme	zu empfehlen
9	**inter-nationale Überein-kommen**	Regierungen der Staaten	Harmonisierung von Registrierungs- und Entsorgungspflichten auf Basis der United Nations Environment Assembly – UNEA	Abkommen zur zwischenstaatlichen Rechts- und Vollstreckungshilfe	politische Umsetzbarkeit fraglich	nach Möglichkeit zu empfehlen

Quelle: Öko-Institut e.V.

1 Introduction

For years, online trade or e-commerce, with regard to consumer products, has accounted for an increasing share of retail sales in Germany. In 2014, the online non-food retailing share was around 15 %, compared with 85 % for traditional retailing.[20] The trading volume of e-commerce in the same year was highest in the divisions 'Technology & Media' 20.9% (EUR 15.1 billion), 'Sports & Leisure' 20.2% (EUR 3.8 billion) and 'Fashion & Lifestyle' 18.9% (EUR 9.7 billion).[21] In Germany in 2017, the two generalists Amazon.de and Otto were among the top-selling online shops with EUR 8.8 billion and EUR 2.9 billion respectively. Five online shops from the consumer electronics sector were among the top 10: Notebook Cheaper (EUR 751 million), Mediamarkt (EUR 734 million), Cyberport (EUR 533 million), Conrad (EUR 494 million) and Alternate (EUR 472 million).[22] Numerous other (foreign) distributors (online retailers) of electrical and electronic equipment also offer their goods in Germany via electronic marketplaces.

The number of online retailers – including those selling electrical and electronic equipment – with registered office in China, Hong Kong and Taiwan, who registered for VAT with the tax office in Berlin Neukölln, increased a remarkable 28-fold from 432 in May 2017 to 7,500 in December 2018, reaching as many as 12,000 in February 2019.

Such rapid development leads to the problematic situation where producers and distributors seated solely outside the EU (so-called third-country producers/distributors) deliberately or negligently fail to comply with extended producer responsibility (hereafter EPR) waste-management obligations regarding the electrical and electronic equipment, batteries or packaging they sell in Germany.

Under Section 6 (1) ElektroG[23] producers of electrical and electronic equipment are obliged to register with the (Stiftung Elektro Altgeräte Register) stiftung ear before they are allowed to place these on the German market or offer them on the Internet. Since 1 January 2019, the same applies to fulfilment service producers under Section 9 (1) VerpackG[24] who must register with the (Stiftung Zentrale Stelle Verpackungsregister) ZSVR before bringing such packaging into circulation. In accordance with Section 4 (1) sent. 1 BattG, producers placing batteries on the market in Germany for the first time are obliged to notify the German Environment Agency (UBA). These registration and notification obligations ensure that all these producers contribute to the collection and disposal costs for used electrical and electronic equipment or spent batteries and packaging waste. By passing on the costs to those who are properly registered/notified, non-compliant third-country producers avoid a fair distribution of said costs. The lack of agreements with relevant third countries (countries outside the EU) makes enforcement currently impossible, despite the waste law provisions for authorities to levy fines on producers violating these obligations (see the provisions on administrative offences in Section 45 (1) no. 3 ElektroG, in Section 34 (1) no. 7, 9 VerpackG and Section 22 (1) no. 2 BattG).

In Chapter 2, this research project offers detailed descriptions of the factual and legal situation with regard to these third-country producers in e-commerce who do not comply with the law,

[20] Doplbauer, Gerold, in: Gfk GeoMarketing GmbH (2015) (ed.), p. 4.

[21] Ibidem, p. 6.

[22] Data on the basis of EHI and Statista: "E-Commerce-Markt Deutschland 2018", see the EHI-website: https://www.ehi.org/?p=73865 (30 August 2019).

[23] Act on the placing on the market, return and environmentally sound disposal of waste electrical and electronic equipment (Elektric- and Electronic Appliances Act - ElektroG) of 20 October 2015 (Federal Law Gazette. I, p. 1739), last amended through Artikel 16 of the Act of 27 June 2017 (Federal Law Gazette I, p. 1966).

[24] Act on the placing on the market, take-back and high-grade recycling of packaging (Packaging Act -VerpackG) of 5 Juli 2017 (Federal Law Gazette I, p. 2234).

hereafter referred to as third-country free-riders. Subsequently, in Chapter 3, a concept is presented for developing and evaluating legal measures to strengthen enforcement of and improve compliance with registration and notification requirements for e-commerce.

The research project aims to promote producer responsibility implementation regarding electrical and electronic equipment, batteries and packaging under waste law in e-commerce, and to develop proposals for adapting the legislation. To this end, it examines the current enforcement problems regarding producers and distributors from third countries in e-commerce (Chapter 2) and develops a concept for compliance with EPR-obligations for e-commerce (Chapter 3) The concept contains detailed recommendations for all levels of regulation (national, European and international), with which third-country producers can be persuaded to register under the ElektroG and VerpackG, to notify under the BattG and to bear the costs of collecting and disposing separately collected waste. The concept includes proposals for repressive action should third-country producers display improper behaviour.

2 Status quo of the legal situation regarding third-country free-riders according to the German ElektroG, the BattG and the VerpackG

This chapter describes why currently third-country free-riders cannot be obliged to fulfil their EPR obligations, as well as the role played by electronic marketplace operators and fulfilment service providers. These producers and distributors, whose registered offices are outside the EU, are abetted by the existing legal loopholes in the ElektroG, BattG and VerpackG. EPR obligations apply for producers, importers, distributors and end-consumers in e-commerce and in stationary trade alike.[25] Other than in stationary trade, e-commerce allows electrical and electronic equipment (EEE), batteries and packaged goods to be offered in Germany by producers and traders seated outside the EU. Failure on the part of third-country producers to comply with waste-management obligations can have legal consequences as described in Section 2.3. The relevant authorities can levy fines which, in the case of third-country free-riders, are rendered ineffective because they cannot be enforced (see Section 2.4). E-commerce introduces new economic actors in the shape of electronic marketplace operators and fulfilment service providers, described in Section 2.1. Why these actors cannot be included under the EPR-obligations which apply to third-country free-riders is explained in Section 2.2.

2.1 Economic operators in e-commerce

In the ElektroG, BattG and VerpackG, the obligation to assume producer responsibility, in particular the registration and notification obligations as well as collection and disposal obligations, is linked to 'producer' and 'distributor' characteristics.[26] Before placing EE-equipment and packaging on the market, producers must register them with the competent authority or, in the case of batteries, notify the authorities when these are placed on the market for the first time; this also applies to producers from third countries in e-commerce. Otherwise, distribution bans apply to the products.

The following new economic operators are particularly involved in e-commerce:

- **Operators of online shops**: Similarly to the stationary mail-order business, where the goods are offered via a catalogue, online shops offer the goods via a website at a fixed price. The e-commerce market sector is business-to-business (B2B) and business-to-consumer (B2C), whereby the seller could be located in Germany, in the EU or outside the EU. Some traders are involved in more than one activity on a website. The 'Amazon.de' website includes both the Amazon.de online shop and the electronic marketplace 'Amazon.de Market-place', for example.
- **Electronic marketplace operators** (for example, online auctioneers, online exchange platforms).

[25] Waste law regulations generally refer to the 'end-user'; the VerpackG refers to the 'end-consumer' instead (see Section 3 (10) VerpackG).

[26] The Batteries Directive speaks of 'manufacturers', the WEEE Directive and the Packaging Directive use the term 'producer'. To cover both, this review refers generally to producers as the synonyms are interchangeable.

- **Fulfilment service providers**: Fulfilment service providers offer economic operators their contractual handling of sales.[27] These services can include the storage of goods, assembling goods according to the order, packaging, transport, returns management, invoicing, dunning, repairs or customs clearance for products imported into the EU. Third-country economic operators profit significantly from the fact that final customers in Germany or other EU-Member States can expect prompt delivery of ordered goods already being stored there.[28] Some companies such as the 'Amazon Fulfilment Centre' (Fulfilment by Amazon-FBA)[29] and 'ebay Fulfilment'[30] function as both electronic marketplaces and fulfilment services.[31]
- Art. 3 No. 11Market Surveillance Regulation (EU) 2019/1020[32] provides a definition for 'fulfilment service providers'.[33]

A legal definition of these new economic operators cannot be found in the KrWG, ElektroG, VerpackG or BattG nor in the corresponding European directives. The research project investigates whether the new economic operators should be classified as producers or distributors according to the ElektroG, VerpackG and BattG.

2.2 Are economic operators in e-commerce producers or distributors according to ElektroG, BattG und VerpackG?

The ElektroG, BattG and VerpackG allocate producer responsibility obligations to 'producers' and 'distributors'. The same applies for these actors under Section 23 (1) sent. 1 and (2) KrWG.[34] On the other hand, the new e-commerce trading actors, electronic marketplace operators and fulfilment service providers have, so far, been defined in neither the KrWG nor in the other three producer responsibility laws, nor have specific obligations been imposed on them. The review therefore poses the question whether these new e-commerce stakeholders would not already be burdened with producer responsibility obligations if they fall under the ElektroG, BattG and VerpackG producer and distributor definitions. Meanwhile, those e-commerce traders putting e.g. packaged electrical and electronic equipment containing batteries on the market in Germany are confronted with different producer and distributor definition formulations in the ElektroG, BattG and VerpackG. While the three definitions under these acts are not conform, no comprehensive definitions of the terms exist at all in the KrWG. Despite sharing a number of similar or even identical features, these formulations do still partially differ significantly from each other:

[27] See for instance DHL fulfilment, https://www.dhl.de/de/geschaeftskunden/paket/leistungen-und-services/fulfillment.html, RHIEM Fulfillment, https://rhiem.com/de/fulfillment/ or ideal-pack, https://www.ideal-pack.de/ (13 May 2020).

[28] EU-Commission (2017), p. 6.

[29] See the website under: https://services.amazon.com/fulfillment-by-amazon/benefits.html (30 August 2019).

[30] See the eBay Fulfillment-website under: https://www.efulfillmentservice.com/ebay-fulfillment/ (30 August 2019).

[31] See the reference at EU-Commission (2017), p. 10 fn. 67.

[32] Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 L 169/1 Official Journal of the European UnionL 169 of 25 June 2019, p. 1.

[33] 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 [...]".

[34] See Mann, in: Versteyl/Mann/Schomerus (2019), § 25 marginal no. 9.

- For example, in all three laws, the producer definition presupposes their **commercial activity in Germany**.
- In the ElektroG and the BattG, the term producer also includes the **importer**. In the VerpackG, a legal fiction is applied (i.e. the importer is deemed a producer).
- Both the ElektroG and the BattG impose **producer obligations** on the distributor via a **legal fiction** (i.e. the distributor is **deemed a producer**) if they offer goods from producers not properly registered or notified in the relevant register. Under all three laws, distributors are prohibited from offering goods if the producers have not (properly) registered/notified themselves (Section 6 (2) sent. 2 ElektroG, Section 3 (4) sent. 2 BattG, Section 9 (5) sent. 2 VerpackG).

The **definitions** in the three laws **differ mainly** in that:

- **The producer definition in Section 3 No. 9 ElektroG** is linked to **offering**. This refers to the time prior to placing a product on the market, when producers must fulfill essential obligations, such as registration, proof of guarantee and credibility.
- To-date, only the ElektroG obliges producers to appoint an **authorised representative** should their registered office not be in Germany. In line with the transposal of European Law, an amendment to the BattG covering the optional appointing of an authorised representative is pending. The VerpackG declares packaging-producer registration an obligation of strictly personal nature which may not be carried out by an authorised third party.

Quite apart from the **conceptual differences, the actual application of the producer and distributor definitions under the three laws is complex**. Altogether, this creates a confusing situation in which third-country economic operators either do not recognise or incorrectly assess their producer responsibilities. Language can play a role in this situation.[35]

Results from the analysis are shown in the following table. It offers an overview of new e-commerce stakeholders' classification as producers under the current ElektroG, BattG and VerpackG:

[35] See below under 2.4 and 3.2.3.1.1, 3.2.3.2.2.

Table 6: Are e-commerce stakeholders producers according to the ElektroG, the BattG or the VerpackG?

	ElektroG	BattG	VerpackG
Operator of an online shop	**Producer** (Section 3 no. 9b; and/or no. 9a)	**Producer** (Section 2 (15) sent. 1)	**Producer**[36] (Section 3 (14))
	Importer (Section 3 no. 9c)	**Importer** (Section 2 (15) sent. 1 in connection with (16) sent. 2)	
	Direct distance sales operator (Section 3 no. 9d)	----------	----------
	Deemed a producer (Section 3 no. 9 clause 2)	**Deemed a producer** (Section 2 (15) sent. 2)	**Importer (deemed a producer)** (Section 3 (14) sent. 2)
Electronic marketplace operator	**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)[37]

Source: Oeko-Institute

[36] **Registered office of the operator is abroad**: Imports packaging containing 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.

[37] This legal interpretation corresponds to the administrative practice of the Stiftung Zentrale Stelle Verpackungsregister (the German Central Agency Packaging Register; so-called: ZSVR).

Table 7 gives an overview of whether the e-commerce stakeholders should be classified as distributors under the current ElektroG, BattG und VerpackG:

Table 7: 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** distributes 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 were 'making available' 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)

Source: Oeko-Institute

To summarise, a legislative gap exists for electronic marketplace operators or fulfilment service providers, with regard to their producer responsibility for electrical and electronic equipment, batteries and packaging. In the case of third-country free-riders, electronic marketplace operators are not involved in the purchase contract between sellers on their marketplace and customers in Germany. They do not offer the goods for sale themselves nor are they required to ensure that sellers who make use of them comply with the legal provisions. The same applies to fulfilment service providers who store the goods and despatch them to customers on behalf of the sellers (especially sellers outside the EU).

2.3 Legal consequences of non-compliance with waste-management obligations (registration obligations)

Under Section 6 (1) ElektroG, producers of EEE are obliged to register with the competent authority before placing these on the market. The producers are subject to waste-management obligations, specifically regarding labelling EEE, reporting the quantity of equipment placed on the market, taking back and disposing equipment. Battery producers must also report their market participation in the German Environment Agency BattG register. Here too, the producer status involves various obligations such as labelling batteries and the take-back of spent batteries. Section 3 (8) VerpackG requires producers of packaging subject to the obligation to participate in the system, to register with the ZSVR before bringing their packaging into circulation (Section 9 (1) sent. 1 VerpackG). These producers (i.e. of sales packaging, including service packaging, outer packaging and shipping packaging) must participate in one or more (dual) systems. Should the packaging being brought into circulation in Germany exceed a given amount they must also submit an annual letter of representation to the ZSVR.

Producers who are non-compliant with the afore-mentioned EPR-obligations must reckon with various consequences, such as enforcement actions and sanctions through the authorities, or competition law actions through competitors. Sanctioning depends on where the producer's registered office is, i.e. in Germany, EU Member State or a third country.

Under Section 45 ElektroG, deliberate or negligent non-compliance can constitute a number of administrative offences. For example, intentionally placing not properly registered EEE on the market i.e. regarding brand and type, can make producers liable for a fine of up to EUR 100,000 (Section 45 (1) no. 3 in conjunction with (2) ElektroG). In the case of negligence, under Section 17 (2) OWiG the sum is halved.

Non-compliant battery producers and distributors can also be fined up to EUR 100,000 for either deliberate or negligent violation of obligations under the BattG (Section 22 (1) in conjunction with (2) BattG). This would be the case if battery producers tendered their products without complying with their notification and take-back obligations (Section 22 (1) No. 2 BattG).

Section 34 VerpackG recognises several regulatory offences if producers and distributors fail to comply with their obligations either deliberately or negligently. For example, a fine of up to EUR 200,000 may be imposed if producers and distributors do not fully and properly participate in a system (Section 34 (1) (3) in conjunction with (2) VerpackG). A fine of up to EUR 100, 000 may be imposed for breach of the registration obligation or breach of the prohibition on tendering under Section 9 (5), sent. 2, (Section 34 (1), points 7 and 9 in conjunction with (2) VerpackG).

According to all three laws, market participants can defend themselves against unfair conduct on the part of competitors with injunctive relief and claims for damages under the UWG.[38] This is underlined by the reference to competition law in Section 1 (3) ElektroG and Section 1 (1) and (4) VerpackG.

2.4 Legal safeguards against third-country free-riders

For the enforcement of administrative offences due to violations of registration and notification obligations, the study comes to the following conclusions:

On the basis of the current legal situation, German authorities can take action against EU free-riders, i.e. those with a registered office in Germany or another EU Member State, possibly in cooperation with other Member States, in the shape of issuing and enforcing regulatory fining notices according to the Act on Regulatory Offences (OWiG). WEEE sanctioning bodies from several Member States have joined forces with the European WEEE Enforcement Network (EWEN), which plays a central role here. Among other things, this has removed the need for translations and notifications in mutual legal assistance procedures. Sole responsibility for prosecution lies with the WEEE sanctioning authority of the Member State in which the producer is located. For example, under Section 45 (3) sent. 1 ElektroG, based on Art. 18 WEEE Directive, the responsible WEEE sanctioning body in Germany informs the WEEE sanctioning body of the Member State, in which the free-rider has its registered office, of a possible implementation violation of Art. 17 (2) in connection with Art. 17 (2) WEEE Directive. Then, freed from translation, service and enforcement procedures, the WEEE sanctioning body of the other Member State enforces designation of an authorised representative in Germany through the producer.

Free-riders in third countries (registered office outside the EU) are equally considered responsible with regard to EPR-obligations under the ElektroG, BattG and VerpackG. In the case

[38] Act against Unfair Competition in the version published on 3 March 2010 (Federal Law Gazette I p. 254), as last amended by Article 5 of the Act of 18 April 2019 (Federal Law Gazette I, p. 466).

of their non-compliance with registration/notification requirements for instance, fines can only be enforced if a corresponding international treaty exists with the country in question. With significant EEE import countries such as China or the US, for example, this is not the case.

As electronic marketplace operators 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 (unless they are producers of the shipping packaging).

2.5 Excursus: Country case-studies (legislative measures against third-country free-riders)

The review looked for preventive and repressive regulatory approaches as well as courses of action within the EU designed to address the problems involved with producers from third countries. France is the only Member State which seems to have achieved significant results. In section 2.5.1 the French regulations are described. As far as third countries are concerned, a large proportion of EEE, batteries and packaged goods offered on electronic marketplaces in Germany comes from producers and distributors seated in the People's Republic of China, a country which plays a large role in the e-commerce market. Section 2.5.2 therefore also looks into Chinese producer responsibility and market surveillance regulations

2.5.1 France

The WEEE Directive is transposed into national law in France by the following regulations:

- Environmental Code (Code de l'environnement)[39]: Art. L. 541-10 establishes the principle of extended producer responsibility (EPR).
- Décret n° 2014-928[40]: This defines the concepts of producer and distributor.
- Arrêté du 30 juin 2009[41]: This edict regulates electrical and electronic equipment registration details.

The French Ministry of the Environment (Ministère de la Transition Ecologique et Solidaire – MTES)[42] is responsible for implementing the WEEE Directive.

The definitions of producer and distributor of electrical and electronic equipment in Art. 2 R. 543-174.-I. (1) and (2) of the French Décret n° 2014-928 corresponds in content to Art. 3 (1) f

[39] Code de l'environnement, Version consolidée au 17 octobre 2019; see under: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074220&dateTexte=20190911 (11 February 2020).

[40] Décret n° 2014-928 du 19 août 2014 relatif aux déchets d'équipements électriques et électroniques et aux équipements électriques et électroniques usagés, JORF n°0193 du 22 août 2014 page 13928 texte n° 1; see under: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029387124&categorieLien=id (11 February 2020).

[41] Arrêté du 30 juin 2009 relatif à la procédure d'enregistrement et de déclaration au registre national pour les équipements électriques et électroniques prévu à l'article R. 543-202 du code de l'environnement, et abrogeant l'arrêté du 13 mars 2006 relatif à la procédure d'inscription et aux informations figurant au registre national des producteurs prévu à l'article 23 du décret n° 2005-829 du 20 juillet 2005 relatif à la composition des équipements électriques et électroniques et à l'élimination des déchets issus de ces équipements; see under: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020830487 (11 June 2020).

[42] See under: https://www.ecologique-solidaire.gouv.fr/dechets-dequipements-electriques-et-electroniques (11 February 2020).

and g WEEE Directive.[43] Neither covers electronic marketplace operators or fulfilment service providers. The French regulations read as follows:

"Producer is any person in a Member State who, irrespective of the selling technique used, including by means of distance communication as defined in Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts:

a) is established in France and produces electrical and electronic equipment under their own name or brand or allows others to produce or distribute electrical or electronic equipment in France.

b) is established in France and sells equipment, which have been produced by other distributors, under their own name or brand without identifying the distributor as producer on said equipment, in accordance with lit. a);

c) is established in France and places electrical and electronic equipment from third countries or other Member States on the market in a professional capacity;

d) is established in another Member State or third-country and sells electrical and electronic equipment to households or consumers other than households in France via distance communication."[44]

The distributor is defined as

"any natural or legal person in the supply chain who tenders electrical and electronic equipment. This definition does not prevent a distributor from being deemed a producer pursuant to Section 1 of this article."[45]

On 10 July 2019, the French Council of Ministers published the draft law "Projet de Loi relatif à la lutte contre le gaspillage et à l'économie circulaire",[46] which was adopted by the National Assembly on 10 February 2020 as Law No 2020-105[47] (referred to hereafter as the "Closed Substance Cycle and Waste Management Act"). In the Code de l'environnement, producer responsibility ("Le principe de responsabilité élargie des producteurs (REP)") is extended to include electronic marketplace operators, cf. Art. 62 Art. L. 541-10-10:[48]

"Where a natural or legal person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar device, the distance sales or delivery of products covered by the principle of extended producer responsibility on behalf of a third party, that person is

[43] Ibid.

[44] No official translation.

[45] No official translation.

[46] See the draft law under: https://www.legifrance.gouv.fr/affichLoiPreparation.do;jsessionid=E47CCFCD49CC5E8BB2FC81F0CA588ED3.tplgfr43s_2?idDocument=JORFDOLE000038746653&type=contenu&id=2&typeLoi=&legislature= (21 October 2019). See also the report "France to force online retailers to tackle compliance free-riding" of 27 January 2019 at: https://resource.co/article/france-force-online-retailers-tackle-compliance-free-riding-13061 (19 March 2020).

[47] See under: https://www.legifrance.gouv.fr/eli/loi/2020/2/10/2020-105/jo/texte (19 March 2020).

[48] Art. 62 Closed Substance Cycle and Waste Management Act: « Art. L. 541-10-9.-Lorsqu'une personne physique ou morale facilite, par l'utilisation d'une interface électronique telle qu'une place de marché, une plateforme, un portail ou un dispositif similaire, les ventes à distance ou la livraison de produits relevant du principe de responsabilité élargie du producteur pour le compte d'un tiers, cette personne est tenue de pourvoir ou de contribuer à la prévention et à la gestion des déchets qui en proviennent conformément aux dispositions des articles L. 541-10 et L. 541-10-8.

« Toutefois, les dispositions du premier alinéa du présent article ne s'appliquent pas lorsque la personne physique ou morale dispose des éléments justifiant que le tiers a déjà rempli ces obligations. Dans ce cas, elle est tenue de consigner les justificatifs correspondants dans un registre mis à disposition de l'autorité administrative. La détention d'un identifiant unique délivré pour ces produits en application de l'article L. 541-10-13 au titre de la responsabilité élargie du producteur est réputée valoir conformité du tiers à ses obligations. »

required to provide or contribute to the prevention and management of the waste arising therefrom in accordance with the provisions of Articles L. 541-10 and L. 541-10-8.

However, the provisions of the first paragraph of this Article shall not apply where the natural or legal person provides evidence that the third party has already fulfilled these obligations. In such cases, the natural or legal person shall be required to record the relevant evidence in a register made available to the administrative authority. The possession of a unique identifier issued for these products in application of Article L. 541-10-13 under the extended producer responsibility is deemed to mean that the third party has fulfilled its obligations."[49]

In France, under the Circular Economy and Waste Management Act, producer responsibility (EPR) is to be extended to electronic marketplace operators. Art. L. 111-7 of the Code de la consommation[50] considers electronic marketplace operators and companies selling goods via their own websites to be among the stakeholders classified as operators.[51]

The draft-law comments justify the definition of producer being applied to marketplace operators because their activities provide dealers access to a broader market. Electronic marketplace operators proffer a variety of services, such as listing producer offers, guiding customers in their search for specific products as well as offering logistics and delivery services. These are all designed to facilitate producers´ access to a wider market than would otherwise have been possible.[52]

2.5.2 China

A large number of products (electrical and electronic equipment, batteries and other packaged products) offered on electronic marketplaces for consumers in Germany and other EU Member States originate from producers and distributors with registered office in the People's Republic of China.[53] The market share of e-commerce in the People's Republic continues to grow. E-commerce in China grew by 24% in 2018, the market volume of online retail trade is EUR 1.2 trillion with almost 650 million online customers.[54] With this in mind, it seems reasonable to outline the People's Republic of China's internet trade regulations with reference to producer responsibility and market surveillance.

On 31 August 2018, the Standing Committee of the National People's Congress (NPC) of the People's Republic of China adopted the E-Commerce Act, which came into force on 1 January 2019[55] (hereafter referred to as E-Commerce Act 2018). The scope of application covers

[49] No official translation.

[50] Code de la consommation, Version consolidée au 20 octobre 2019; see under: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069565&dateTexte=20191022 (21 October 2019).

[51] Art. L111-7 (1) defines operators of online-platforms: "I.-Est qualifiée d'opérateur de plateforme en ligne toute personne physique ou morale proposant, à titre professionnel, de manière rémunérée ou non, un service de communication au public en ligne reposant sur:

1° Le classement ou le référencement, au moyen d'algorithmes informatiques, de contenus, de biens ou de services proposés ou mis en ligne par des tiers ;

2° Ou la mise en relation de plusieurs parties en vue de la vente d'un bien, de la fourniture d'un service ou de l'échange ou du partage d'un contenu, d'un bien ou d'un service"; cf. The comments on the the draft law, ibid., p. 213.

[52] See the draft law "Projet de Loi relatif à la lutte contre le gaspillage et à l'économie circulaire", ibid., p. 213.

[53] PostNord (2018), p. 14.

[54] Ruppert (2019).

[55] See the Chinese version under: http://www.gov.cn/xinwen/2018-12/05/content_5345812.htm (1 November 2019); see also an unofficial translation by the EU at: https://ipkey.eu/sites/default/files/documents/resources/PRC_E-Commerce_Law.pdf (1 November 2019).

electronic business transactions (electronic e-commerce) in accordance with Art. 2. Pursuant to Art. 2 (2), this includes

"all business activities involving the sale of goods or the provision of services via the Internet or other information networks."

The following are exempted under Article 2 (3):

"financial products and services, and services which provide news, audio and video programmes, publications or cultural products via information networks".

- The law distinguishes between three addressees: Art. 9(2) defines **e-commerce platform operators** as a

  "legal entity or other unregistered business providing online business premises, transaction matching, information distribution and other services to two or more parties involved in an e-commerce transaction, to enable these parties to conduct independent transactions."

  This definition corresponds to this research project's understanding of electronic marketplace operators.[56] In other words, marketplace operators do not offer goods themselves, but enable purchase agreements.

- **Market operators on platforms** (B2C) are defined in Art. 9 (3) as

  "*e-commerce distributors who sell goods or provide services via an e-commerce platform."*

  The definition largely corresponds to the understanding of producers and distributors under the ElektroG, VerpackG and BattG as described in this review.[57] In this respect 'selling' can be understood as equivalent to 'offering' or the 'making available' of goods on electronic marketplaces. The E-Commerce Act 2018 does not distinguish between producer and distributor, however, so that both can be understood as 'distributor' when selling goods on the Internet.

- **Other e-commerce distributors** are natural and legal persons or businesses without legal capacity,

  "who sell goods or provide services through their self-developed websites or other web services."

This group of actors is congruent in part with the review's understanding of online shops.[58]

Fundamental to the Chinese E-Commerce Act 2018 are its actors' tax and business registration (Art. 10), personal data protection (Art. 23 and 24), e-commerce platform operator liability (Art. 38) and intellectual property protection (Art. 42). The scope of this research project does not allow personal data protection or intellectual property protection regulations to be examined. It focusses, rather, on registration and liability regulations for electronic marketplace operators and distributors, which are described below.

[56] See Chapter 2.1.

[57] See Chapters 2.1 et seq.

[58] See Chapter 2.1.

Pursuant to Art. 13 E-Commerce Act 2018, the **sale of e-commerce goods or services** must comply with safety of persons and property, and environmental protection requirements. The E-Commerce Act does not specify which requirements, in particular environmental protection requirements are meant, nor whether EPR obligations are intended. Violation of the Art. 13 obligations by e-commerce sellers can result in punishment according to Art. 75 (i) E-Commerce Act 2018 under the legal and administrative provisions.

Pursuant to Art. 27 para. 1 E-Commerce Law 2018, **electronic marketplace operators** are burdened with extensive verification obligations vis-à-vis distributors applying for access to their platforms. They must request, check and register the identity, address, contact information and business registration from distributors and regularly check and update the data. Platform operators must also transmit the identity of the distributors registered with them to the market surveillance authorities (Art. 28 (1)). Information on goods or services discovered by the platform operator to be in violation of Art. 13 must be reported to the competent authorities and pursuant to Art. 29, necessary legal measures must be taken.

Art. 38 (2) of the E-Commerce Act 2018 stipulates electronic marketplace operator liability. In accordance with the statutory provisions, electronic marketplace operators are liable for those goods or services that harmfully affect the life or health of consumers, if these do not either comply with e-commerce distributor requirements or do not fulfil consumer safety obligations.

If an electronic marketplace operator does not meet the requirements of Art. 38 (2) E-Commerce Act 2018, the state market authorities may instruct the operator to make corrections within a certain period of time pursuant to Art. 83. In the case of non-compliance, market surveillance authorities may impose a fine of between CNH 50,000 (approx. EUR 6,375) and CNH 2 million (approx. EUR 255,000).

EPR obligations as in the EU or in Germany, are not part of the 2018 E-Commerce Act. This is because China's legislation on product stewardship under waste-law is still in its infancy; however, a legal framework for electrical and electronic equipment and batteries is scheduled to come into force by 2025.

Art. 26 of the E-Commerce Act 2018 makes provision for **cross-border e-commerce**. Distributors must comply with the legal and administrative provisions and the relevant import and export regulations of the importing country (export from China). However, so far this provision seems to be purely declaratory, since the E-Commerce Act 2018 contains no further details, specifically, neither provisions for control by competent authorities nor penalties for violations under Chapter VI Commerce Act 2018.

To assess the effectiveness of the E-Commerce Act 2018 in practice, a brief look at how Chinese legislation works is necessary: The legislative process in China envisages laws often providing little more than a rough framework, to be enacted by the NPC or its Standing Committee. These are then substantiated in the provinces and large cities either as national regulations (e.g. NPC binding rules of interpretation) or as laws and administrative rules.[59]

Fundamental to the regulations' effectiveness is whether producers and distributors register at all, to what extent this is controlled by the Chinese authorities, and the extent to which electronic marketplace operators are subject to verification obligations, e.g. whether they need only ensure that distributors provide (registration) information or whether they must also verify its accuracy.

[59] Wang (2017), p. 8 et seq.

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

3.1 Preliminary remarks

Specific proposals for addressing the problems are divided into three instrumental ranges in the literature:

- **Stricter and more transparent regulations at EU- and Member State level,**
- **stronger law enforcement and improved coordination between the jurisdictions and the authorities responsible for product regulation** as well as
- **improved flow of information concerning market actor obligations and simplified, more transparent procedures.**[60]

These approaches are already familiar and form part of environmental instrumental options regarding direct behaviour governance through command and control, the indirect behaviour governance through, for example, user advantages and soft-law instruments in the form of information etc.[61]

Careful selection and evaluation would avoid one category being awarded basic advantage over another. In particular, soft consensual or market-based instruments should not generally be chosen above regulatory law. Environmental regulatory law has considerable advantages, particularly with regard to accurate behavioural governance.[62] An evaluation must always have a basic focus on the principle of proportionality. The specific instrument selected must be suitable for reaching the chosen goal, it must be necessary, unless milder, similarly suitable instruments exist. It must be appropriate, whereby it is important to maintain an input/output-balance. In the area of this is emphasized by Hilton et al.:

"There is no single, entirely effective solution to address online free-riding in the context of EPR schemes. However, there are a wide range of potential options to help reduce the problem. The key is getting the balance right in terms of cost-effectiveness."[63]

There is a difference between **preventive and repressive** solutions. Prevention refers to the precautionary principle as one of the leading principles in environmental law.[64] In the context of this paper, prevention-instruments are understood as aiming at compliance with the law from the very start. The preventive effect is reached when infringements of the relevant laws do not occur or are at least greatly reduced. Repressive instruments take effect later, once laws have been violated. This latter effect can be compared to criminal law or administrative offences and understood as a deterrent (general or specific prevention). Ultimately, repressive instruments also aim to prevent legal infringements. As a rule, preventive solutions must be given priority – repressive instruments should only be applied if prevention has not produced the expected successful results. The introduction of compulsory verification for electronic marketplace

[60] Cf. Hilton et al. (2019), p. 47; WEEE-Forum, Successfully countering online free-riders, 2019, p. 2.

[61] Cf. Rehbinder, in Rehbinder/Schink (2018), p. 245.

[62] See Lübbe-Wolff, NVwZ 2001, 481, 483.

[63] Hilton et al. (2019), p. 8.

[64] See Calliess/Ruffert/Calliess, 5th edition 2016, TFEU, Art. 191 marginal no. 26.

operators and fulfilment service providers[65] can be considered a preventive instrument which– due to its importance – is safeguarded via repressive supplementary administrative-offence regulation.

One can further differentiate between the **levels** at which the specific instruments can be found. To a certain extent, the proposals discussed in this paper are designed for international level, particularly with regard to the high importance of their compliance with the provisions of international law, especially the WTO-treaty. To a greater extent, however, the proposals and their legal review play their most significant role at EU- and national level. For reasons of competency or appropriateness, some instruments must be established at EU-level. With regard to subsidiarity, others should preferably be regulated at national level. Implementation on national level is vital when EU Directives leave Member States scope for implementation.

The discussed solutions will be shown in the form of a comprehensive **table**.[66]

3.2 Possible Solutions

In the following, the identified options for solving the free-rider issue with regard to online sales are presented in terms of content, sorted by relevant subjects. Proposals are made regarding the autonomous obligations of electronic marketplaces and fulfilment service providers, the expansion of registration regulations, informational tools and overarching solutions. In each case, an **assessment** is given as to whether the proposal should be pursued from a legal, legal-political or enforcement perspective, and the preferred solutions are **prioritized**. The described classification according to more formal criteria such as command & control law / economic and informational instruments, preventive vs. repressive, and according to the desired location in the multi-level system of international, European and national law, will take place in the individual chapters.

The proposals discussed in the following are: compulsory verification for electronic marketplace operators and fulfilment service providers (3.2.1), electronic marketplace operators and fulfilment service providers deemed to be producers (3.2.2), the simplified producer responsibility model (3.2.3), standardisation of definitions and registration procedures (3.2.4), import ban on products of unregistered/non-notified producers (3.2.5), stronger and uniform involvement of authorised representatives in the registration procedure (3.2.6), information tools (3.2.7), cooperation with other authorities (3.2.8) and international agreements for preventing third-country free-riders (3.2.9).

3.2.1 Compulsory verification for electronic marketplace operators and fulfilment service providers

As a suggested solution, an **independent compulsory verification** for electronic marketplace operators and fulfilment service providers is conceivable. It is not linked to the criterion of being a producer. Electronic marketplace operators 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 (and, in the case of the WEEE Directive and the ElektroG, and, in future, possibly also with regard to the Batteries Directive and the BattG, the authorized representative) comply with their national registration requirements.[67] In the case of infringement of these requirements by the producers (and/or authorised representatives), the electronic marketplace operators may not allow the products to

[65] See below in the following chapter.

[66] See Chapter 3.5.

[67] According to Section 4 BattG, a notification is required.

be offered on their website and/or the fulfilment service providers may not provide their services for these products. The obligations of the producer to register remain in force, even if they have no branch within the scope of the various laws. Regardless of this, electronic marketplace operators and fulfilment service providers should check the implementation of the registration/notification requirements.

3.2.1.1 Compulsory verification for electronic marketplace operators

According to applicable law, electronic marketplace operators have no specific standardized obligation to verify that actors offering products on online exchange platforms or in online auction houses fulfil their producer responsibility requirements. As described above, electronic marketplace operators, online exchange platforms and online auction houses do not fall under the term 'producer', which covers, among other aspects, the obligations to register etc.[68]

At crucial points, electronic marketplace operators are integrated in the distribution chain for, batteries and packaging. Electronic marketplaces enable producers from EU Member States as well as from third countries to offer their goods to potential customers more easily. These marketplaces not only facilitate sales, but also help producers to save costs. Illegal behaviour of producers is aided so long as electronic marketplace operators fail to meet the corresponding verification obligations. Non-fulfilment of producer registration obligation and their downstream disposal obligations allows free-riders to cut costs further. They are subject to the control of the competent authorities, although electronic marketplace operators are considerably closer to the producers than the authorities. These operators could immediately check which goods are being offered by which producers via their website, or for which goods their fulfilment services are being used. This **proximity** would lend itself ideally to the imposition of the proposed verification obligations.

As non-producers, electronic marketplace operators could have an independent **verification obligation with regard to registration according to the ElektroG, the BattG and the VerpackG**. At national level, the operators would thereby be obliged to ensure compliance of producers offering on their websites according to Section 6 ElektroG, Section 4 BattG and Section 9 VerpackG.[69] The German Environment Agency has also called for the introduction of such a compulsory verification.[70]

Compulsory verification obligation would have the purpose of ensuring the restriction of offers to be published on the market operators' website to solely those from checked and properly registered producers.[71] Legally correct registration by the producer or authorised representative could be achieved if electronic marketplace operators have to ensure that only properly registered or notified persons may offer or provide products on the electronic marketplace. This verification obligation implies a legal ban on uncontrolled placing on the market. Violations must be sanctioned for effective enforcement.

This does not refer solely to the instrument 'compulsory verification'. Rather, its implementation would take the shape of a conditional ban regarding the placing of products on the market as it involves, as a prerequisite, their correct and comprehensive registration. Compulsory

[68] See Chapter 2.2.

[69] Cf. BMU/BMJV, Konferenzdokumentation Herausforderungen des Onlinehandels für Umwelt- und Verbraucherschutz, Bedeutung und Ansätze für Regelsetzung, Vollzug und Marktüberwachung, Berlin, 18 June 2019, Workshop 1: Vollzugsprobleme im Kreislaufwirtschaftsrecht mit Herstellern aus Drittländern, p. 5, https://www.ioew.de/veranstaltung/herausforderungen_des_onlinehandels_fuer_umwelt_und_verbraucherschutz/ (7 July 2020).

[70] EUWID, Herstellerverantwortung: Umweltbundesamt fordert Prüfpflicht für Online-Plattformen, 20 June 2019.

[71] See the Federal Environmental Agency proposal, Mehr Umweltschutz beim Onlinehandel, 18 June 2019, https://www.umweltbundesamt.de/presse/pressemitteilungen/mehr-umweltschutz-beim-onlinehandel (7 July 2020).

verification resulting from the market placement ban aims to prevent illegal behaviour, in particular by third-country free-riders. The existing conditional bans regarding placing products on the market laid down in the ElektroG, BattG and VerpackG, also lead to verification obligations without their being formulated as such directly. In the following, the term '**compulsory verification**' refers to technical means of a marketing prohibition. It is always understood as an **implied compulsory verification**.

3.2.1.1.1 Links to existing approaches

Prior to developing completely new verification obligations for electronic marketplace operators, it makes sense to examine existing approaches as to their suitability.

3.2.1.1.1.1 Liability according to the model of Section 25e Value Added Tax Act (UStG)-model and the verification obligation

The liability provision of the new Section 25e UStG (Value Added Tax Act), which came into force on January 1, 2019,[72] could be used as a template for compulsory verification of electronic marketplaces.

Relevant elements of the Value Added Tax Act

With the entry into force of Section 25e UStG, a **liability provision** comes into place for electronic marketplace operators under which they are liable "*for the unpaid tax generated by an entrepreneur placing supplies onto the marketplace they provide*" (Section 25 (1) UStG).The purpose of the legislation is to prevent VAT evasion, in particular involving the trade of goods from third countries using electronic marketplaces.[73] According to the legal definition for Section 25 (5) UStG, "*within the meaning of this provision, an electronic marketplace is [...] a website or any other instrument by means of which information is made available via the Internet, enabling a third party who is not the operator of the marketplace to carry out transactions*."

Under Section 15e (6) UStG, the **operator** is defined as a person who "*maintains an electronic marketplace and enables third parties to carry out transactions on this marketplace*."

Section 25e UStG regulates a **strict liability**, under which the operators, even if they are not at fault, are responsible for the unpaid turnover tax from the supply of entrepreneurs.[74] The regulation is supplemented by a right of the tax office relevant for the supplying entrepreneur to inform the operator in the case of an entrepreneur's breach of duty (Section 25e (4) UStG). The instruments involved with a strict liability are not to be confused with an administrative offence, which always requires fulfilment of the subjective element of the offence.

Transfer of the approaches to the verification obligations of electronic marketplace operators

Instrument-related differences do not allow the model of Section 25e UStG to be transferred directly to the registration or notification obligations according to the ElektroG, VerpackG or BattG. The **UStG-approach** is more far-reaching since it carries a direct liability for electronic marketplaces, demanding from them unpaid sales tax. The proposed compulsory verification is not so far-reaching, since electronic marketplaces are only directly liable for their own, but not for the producer's misconduct.

[72] Article 9 no. 8 of the Act on the Avoidance of Losses of Value Added Tax in the Trade of Goods on the Internet and on the Amendment of Other Tax Regulations of 11 December 2018 (Federal Law Gazette I p. 2338).

[73] Draft law of the Federal Government, draft of a law for the avoidance of loss of turnover tax when trading with goods on the Internet and for the amendment of other tax regulations, Bundestag Document 19/4455 of 24 September 2018, p. 1.

[74] Draft law of the Federal Government, draft of a law for the avoidance of loss of turnover tax when trading with goods on the Internet and for the amendment of other tax regulations, Bundestag Document 19/4455 of 24 September 2018, p. 61.

3.2.1.1.1.2 Links to the obligation to record and provide information according to Section 22f UStG

The **recording obligation** in accordance with Section 22f UStG has the potential to provide insight into the verification obligation of electronic marketplace operators.

Relevant elements of the UStG

Section 22f UStG was amended by the "*Law on the avoidance of sales tax defaults when trading goods on the Internet*". Electronic marketplace operators are thereby required to keep records documenting **compliance with VAT obligations**. They are obliged to record names, addresses, tax numbers, delivery and shipping addresses, as well as the times and amount of sales of those retailers or service recipients represented on the marketplace:

"(1) Concerning supplies by an entrepreneur which have been legally justified on a marketplace provided by an electronic marketplace operator as described in Section 25e (5) and (6), and of which the transport or dispatch begins or ends in the country, said operator shall record the following:

1. the supplier's full name and address,

2. the tax number given to the supplying entrepreneur by the relevant tax office in accordance with Section 21 of the tax code and, if available, the sales tax identification number given by the Federal Central Tax Office,

3. the begin and expiry dates of the certificate´s validity according to sentence 2,

4. the place of outset of transport or dispatch as well as the destination and

5. the time and volume of turnover.

The operator must verify the information in accordance with sentence 1 numbers 1 to 3 […]"

Just such a combination was also suggested by Hilton et al.:

"Link EPR registration with other regulatory measures. For example, when companies are applying for a Value Added Tax registration for Electrical and Electronic Equipment, they could be made aware of the need to also register for EPR."[75]

The German Federal Legislator estimates that the implementation of Section 22f UStG will require a relatively high level of economic expenditure. The estimated sum of over one billion euros is most easily explained by the fact that, as yet no electronic procedure exists for creating the necessary certificates.[76] This large amount is, however, deemed to be justifiable.[77]

Application of the approaches to the verification obligations of electronic marketplace operators in the context of producer responsibility

One conceivable form of this application would be to collect relevant product data (in particular, registration numbers) in connection with VAT-data. Nevertheless, in practice, significant effects cannot be expected since sufficient verification of individual device types, in accordance with ElektroG, BattG and VerpackG, cannot be achieved with merely one-off data collection.

[75] Hilton et al. (2019), p. 47; examples from Belgium and Lithuania are mentioned: "Recupel in Belgium, and the register in Lithuania, were in 2007 refusing to register companies for EPR that did not have a domestic VAT registration…".

[76] Draft law of the Federal Government, draft of a law for the avoidance of loss of turnover tax when trading with goods on the Internet and for the amendment of other tax regulations, Bundestag Document 19/4455 of 24 September 2018, p.34.

[77] Draft law of the Federal Government, draft of a law for the avoidance of loss of turnover tax when trading with goods on the internet and for the amendment of other tax regulations, Bundestag Document 19/4455 of 24 September 2018, p. 60.

3.2.1.1.1.3 EU Market surveillance regulation

In addition to this, the EU Market Surveillance Regulation needs to be examined as to the design of potential approaches for electronic marketplace operators' verification obligations.

Relevant elements of the Market Surveillance Regulation

According to Art. 44, the new Market Surveillance Regulation[78], will partially enter into force on January 1, 2021, with the whole Market Surveillance Regulation entering into force on July 16, 2021. The Market Surveillance Regulation expects "*economic operators throughout the entire supply chain […] to act responsibly and in full accordance with the legal requirements applicable when placing or making products available on the market, so as to ensure compliance with the Union harmonisation legislation on products."*[79]

The wording of Art. 3 no. 13 Market Surveillance Regulation defines the broad term **economic operator** as referring to "*the manufacturer, the authorised representative, the importer, the distributor, the fulfilment service provider or any other natural or legal person who is subject to obligations in relation to the manufacture of products, making them available on the market or putting them into service in accordance with the relevant Union harmonisation legislation*". According to the German Federal Government, "*economic operators*" are only those persons listed in Art. 3 no. 13 of the Market Surveillance Ordinance, but not "*online trading platforms, unless they are also fulfilment service providers*".[80]

On the other hand, it can be argued that electronic marketplaces fall under the term '**information society service provider'** as stated in Art. 3 no. 14 of the Market Surveillance Ordinance. These are *providers "of a service as defined in point (b) of Article 1 (1) of Directive (EU) 2015/1535 of the European Parliament and of the Council*".[81] The ***'service'*** is defined as "*any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*".

This definition explains that:

"'at a distance' means that the service is provided without the parties being simultaneously present;

'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request."

Electronic marketplaces are therefore subject to the Market Surveillance Regulation, despite not being mentioned expressly. Whether or not this is the case is irrelevant as far the verification obligations are concerned, since the Market Surveillance Regulation does not regulate any such obligations.

[78] Regulation (EU) 2019/1020 of 20 June 2019 on market surveillance and compliance of products, Official Journal of the EU p. 1 of 25 June 2019.

[79] 12th recital of Regulation (EU) 2019/1020; see also Article 1 of the Regulation.

[80] Answer of the Federal Government to the question of the Members of Parliament Carl-Julius Cronenberg, Michael Theurer, Reinhard Houben, other Members of Parliament and the Parliamentary Group of the FDP, Bundestag Document 19/10948 of 9 July 2019, p. 3.

[81] Directive (EU) 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), Official Journal of the EU L 241 of 17 September 2015, p. 1.

According to Art. 7 (2) Market Surveillance Regulation, *"Information society service providers shall cooperate with the market surveillance authorities, at the request of the market surveillance authorities and in specific cases, to facilitate any action taken to eliminate or, if that is not possible, to mitigate the risks presented by a product that is or was offered for sale online through their services."*

Application of the approaches to the verification obligations of electronic marketplace operators

According to Art. 7 (2) Market Surveillance Regulation, information society service providers, and thus the operators of electronic marketplaces, are not obliged to produce any form of verification. Potential obligations are limited to service providers´ cooperation with market surveillance authorities "on request" "and in specific cases". No general verification requirements exist regarding compliance with the rules on product responsibility. Behind this rather soft requirement for service providers may be the wish to protect e-commerce, only making provision for a cooperation obligation in Article 7 Market Surveillance Regulation, with the aim of removing products from the "supply side".

This means that the new Market Surveillance Regulation cannot replace independent verification obligations with regard to electronic marketplace operators' compliance with producer responsibility. Simply cooperating with market surveillance authorities in individual cases, as prescribed in Art. 7 (2), leaves much to be desired in comparison with general, area-wide verification obligations. These limited obligations for electronic marketplace operators are inadequate, in light of the need to ensure that respective online providers fulfil registrations/notifications in accordance with ElektroG, VerpackG and BattG.

Most importantly, the Market Surveillance Regulation is unable to fully address the **free-rider problem** regarding producers' non-compliance with registration/notification requirements. According to Art. 11 (1) Market Surveillance Regulation, surveillance authorities' activities only include "*effective market surveillance within their territory of products made available online and offline*", "*the taking by economic operators of appropriate and proportionate corrective action*" and "*the taking of appropriate and proportionate measures where the economic operator fails to take corrective action"*.

Pursuant however to Art. 14 (1) Market Surveillance Regulation, national authorities must be equipped with the necessary investigation and enforcement **powers**. Article 14 (4) Market Surveillance Ordinance only lists certain minimum powers, such as "*the power to require economic operators to provide relevant documents"*, "*to carry out unannounced on-site inspections"* or "*to impose penalties"*. Regarding online-interfaces, Art. 14 (4k) i) and ii) Market Surveillance Regulation only provides power to the market surveillance authorities, "*where no other effective means are available to eliminate a serious risk*". Specifically – in correspondence to the electronic marketplace operators' cooperation obligation under Art. 7 Market Surveillance Regulation – the authority should be given the power *"(i) to require the removal of content referring to the related products from an online interface or to require the explicit display of a warning to end users when they access an online interface; or (ii) where a request according to point (i) has not been complied with, to require information society service providers to restrict access to the online interface, including by requesting a relevant third party to implement such measures.*"

According to Art. 16 (1) Market Surveillance Regulation, market surveillance authorities "*shall take appropriate measures if a product subject to Union harmonisation legislation, … does not conform to applicable Union harmonisation legislation.*" To this purpose, the economic operator may take corrective action towards "*preventing the product from being made available on the market*" or "*withdrawing or recalling the product immediately [*…]".

In this way, the new market surveillance regulation would seem to promise an improvement as far as registration requirement compliance is concerned. It could at least result in the opportunity to block non-CE-compliant products. Such control powers albeit, remain merely selective, concerning individual cases, and only allow an ex-post procedure. The power of the market surveillance authorities is limited to **individually proven infringements,** and the admissibility of the measures is linked to strict conditions laid down in the Market Surveillance Regulation. This does not imply a nationwide, comprehensive preventive compliance-check of registration requirements within the product responsibility-framework, which would result in only verified offers being published on electronic marketplaces. This is especially true since the Market Surveillance Regulation focuses on the individual products, while the registration requirements do not address the products but their producers. In this respect, the Market Surveillance Regulation takes a different view. Even under the new Market Surveillance Regulation, considerable competitive disadvantages must be feared for those producers abiding by their registration requirements. They must bear the costs arising from producer responsibility requirements, but also waste disposal costs for free-rider products. This demonstrates how insufficient the Market Surveillance Regulation is for tackling the free-rider problem, especially with regard to third countries.[82]

3.2.1.1.1.4 EU-Medical Device Regulation

The following section investigates whether the EU Medical Device Regulation that came into force on 25 May 2017,[83] contains applicable monitoring requirements with regard to electronic marketplace operators' and fulfilment service providers' verification obligations.[84]

Relevant elements of the Medical Device Regulation

Art. 6 Medical Device Regulation on **distance sales** does not set an example for potential verification obligations. According to its paragraph 1, *"a device offered by means of information society services, as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535, to a natural or legal person established in the Union shall comply with this Regulation"*[85] According to Article 6 (3), providers of online services must *"upon request by a competent authority …make available a copy of the EU declaration of conformity of the device concerned"*, and according to Paragraph 4 "*a Member State may, on grounds of protection of public health, require a provider of information society services … to cease its act".* Neither of these paragraphs comes close to requiring adequate general verification obligation for electronic marketplace operators.

However, as a control instrument for compliance with the requirements of the Medical Device Regulation, **Notified Bodies** could be of interest for potential verification obligations. Art. 2 No. 42 Medical Device Regulation defines these as conformity assessment bodies, designated through a special procedure. Notified Bodies are private inspection bodies designated and monitored by state authorities. Their task is to carry out, accompany and control the conformity assessment of medical device producers (within the meaning of Art. 2 No. 1 Medical Device Regulation). From a legal perspective, they must be classified as private bodies and entrusted with this task by public authorities. These bodies work independently, in their own name and have the authority to issue administrative acts within the meaning of Section 35 VwVfG.[86] Notified Bodies can be considered a milder means of control compared to a state approval. A

[82] Cf. German Environment Agency, Mehr Umweltschutz beim Onlinehandel, 18 June 2019 https://www.umweltbundesamt.de/presse/pressemitteilungen/mehr-umweltschutz-beim-onlinehandel (7 July 2020).
[83] Regulation (EU) 2017/745 of 5 April 2017 on medical devices, Official Journal of the EU L 117 of 5 May 2017, p.1.
[84] See BMU/BMJV, Konferenzdokumentation Herausforderungen des Onlinehandels für Umwelt- und Verbraucherschutz, Bedeutung und Ansätze für Regelsetzung, Vollzug und Marktüberwachung, Berlin, 18 June 2019, Workshop 1: Vollzugsprobleme im Kreislaufwirtschaftsrecht mit Herstellern aus Drittländern, p. 5.
[85] See also Directive (EU) 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, Official Journal of the EU L 241 of 17 September 2015, p. 1.
[86] Cf. BeckOK VwVfG/M. Ronellenfitsch, 44th edition 1 July 2019, VwVfG § 1 marginal no. 71.

review by Notified Bodies, i.e. private, neutral bodies such as TÜV or DEKRA, allows a less intensive infringement of producer rights than an approval procedure by the state. Possible risks regarding the reliability of producers´ self-auditing can be avoided in this manner. Where appropriate, non-European organisations may also act as Notified Bodies.[87] According to Section 15 (4) **Medical Device Act (MPG)**,[88] German Notified Bodies are published with their respective tasks and identification numbers on the "Central Authority of the Länder for Health Protection with regard to Medicinal Products and Medical Devices" website.[89] Art. 35 Medical Device Regulation requires the Member State to designate an authority responsible for the Notified Body, "*which may consist of separate constituent entities under national law and shall be responsible for setting up and carrying out the necessary procedures for the assessment, designation and notification of conformity assessment bodies and for the monitoring of notified bodies, including subcontractors and subsidiaries of those bodies.*" Notified Bodies "*shall satisfy the organisational and general requirements and the quality management, resource and process requirements that are necessary to fulfil those tasks*" (Art. 36 (1) Medical Device Regulation). "*Notified bodies shall, without delay, and at the latest within 15 days, inform the authority responsible for notified bodies of relevant changes*" (Art. 44 Medical Device Regulation). They must coordinate their activities and are obliged to work together in the form of a coordination group (Art. 49 Medical Device Regulation). According to Art. 57 Medical Device Regulation, "*the Commission … shall set up and manage an electronic system to collate and process"* information. The concept of the Notified Bodies has been criticized regarding the effort involved.[90] In addition to the above-mentioned Notified Bodies, other regulations comparable with producer responsibility exist in the Medical Device Regulation. Art. 10 (1) Medical Device Regulation states that **producer obligations** are of central importance. Producers must ensure conformity with the Regulation's requirements, and they must set up a risk management system when placing their products on the market or putting them into operation. They must "*establish, document, implement, maintain, keep up to date and continually improve a quality management system[…] The quality management system shall address at least the following aspects: a) (a) a strategy for regulatory compliance, including compliance with conformity assessment procedures and procedures for management of modifications to the devices covered by the system[…] l) management of corrective and preventive actions and verification of their effectiveness"* (Art. 10 (9) Medical Device Regulation). "*Manufacturers who consider or have reason to believe that a device which they have placed on the market or put into service is not in conformity with this Regulation shall immediately take the necessary corrective action to bring that device into conformity, to withdraw it or to recall it, as appropriate. They shall inform the distributors of the device in question and, where applicable, the authorised representative and importers accordingly*" (Art. 10 (12)). Art. 11 Medical Device Regulation goes further to say that the device producer not established in a Member State may only place it on the Union market after designating *"a sole authorised representative*." "*Given that pivotal role, for the purposes of enforcement it is appropriate to make the authorised representative legally liable for defective devices in the event that a manufacturer established outside the Union has not complied with its general obligations*."[91]

[87] See, for instance, Art. 2 of the Decision No 1/2006 of the EC-Turkey Association Council of 15 May 2006 on the implementation of Article 9 of Decision No 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union, Official Journal of the EU L 271/58 of 30 September 2006.

[88] Medical Devices Act in the version published on 7 August 2002 (BGBl. I p. 3146), last amended by Article 11 of the Act of 9 August 2019 (Federal Law Gazette I p. 1202).

[89] See https://www.zlg.de/medizinprodukte/dokumente/stellenlaboratorien/benannte-stellen/ (7 July 2020).

[90] See Wallenfels, Neue Medizinprodukteverordnung sorgt für Unruhe, Ärzte Zeitung online of 6August2018, https://www.aerztezeitung.de/extras/druckansicht/?sid=969004&pid=958289; (7 July 2020).

[91] Recital 35 of the Medical Device Regulation.

For distance sales, Article 6 Medical Device Regulation requires that a device be *"offered by means of information society services, as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535, to a natural or legal person established in the Union shall comply with this Regulation*". The Medical Device Regulation further provides requirements for the **registration** of economic operators, for whom an electronic system must be set up in accordance with Art. 30 (1) "*to create the single registration number referred to in Article 31(2) and to collate and process information that is necessary and proportionate to identify the manufacturer and, where applicable, the authorised representative and the importer.*" Art. 31 contains requirements for the registration of producers, authorised representatives and importers.

Last but not least, the Medical Device Regulation also places demands on "**good administrative practice**" (Art. 99) and an electronic system on market surveillance (Art. 100).

In line with the Medical Device Regulation, further details are regulated by the German **Medical Device Act (MPG)**. This Act offers further definitions (e.g. the Notified Body, Section 3 No. 20 MPG, or the importer, Section 3 No. 26 MPG), but does not contain more detailed rules on registration.

Application of the approaches pertaining to the electronic marketplace operators´ verification obligations

The described specifications and mechanisms of the Medical Device Regulation partly run **parallel to the registration regulations** set down in the ElektroG, the VerpackG and the BattG. Overall, however, they appear more differentiated and extensive. A significant advantage over national regulations is that the Medical Device Regulation must be applied EU-wide. Hence, problems caused by differing national provisions can be avoided. For economic operators involved, such provisions can be difficult to understand.

A promising approach could be the establishment of **Notified Bodies** for electronic marketplace verification obligations. This would create a middle path between government surveillance and operator self-monitoring. It would not involve a verification of registration by the electronic marketplace operators themselves, but by private bodies as third parties. One advantage of such a solution would be that control of compliance with registration requirements under the ElektroG, VerpackG and BattG would be carried out by a non-governmental, specialized and competent body. This body could also guarantee a uniform monitoring. The Notified Bodies could thus ensure an effective and efficient control. They would have to be provided with the necessary information by electronic marketplace operators. This could be done by using digitized processes with electronic interfaces. Electronic marketplace operators would only be subject to relevant information requirements, but not to any additional verification requirements.

On the other hand, operators would have to finance the Notified Bodies´ verification activities, thereby incurring **additional costs**. Article 112 Medical Device Regulation provides for the financing of activities related to the designation and surveillance of Notified Bodies, according to which the Commission (i.e. ultimately the taxpayers) must reimburse costs incurred in the joint assessment activities. There exists, however, no fixed price for Notified Bodies since they compete with each other. Ultimately, the economic operators concerned must carry the costs. This could give rise to a discrepancy between small electronic marketplace operators and large operators who have lower costs due to economies of scale. With the proposed IT-supported control options, i.e. within the stiftung ear[92] register, Notified Bodies would not be necessary and bureaucracy and costs could be saved. A closer look at the Medical Device Regulation reveals

[92] See also below Chapter 3.2.1.1.2.

very high administrative efforts regarding the concept of Notified Bodies, and complex underlying regulations. A medical device frequently involves sensitive issues of health protection, requiring different regulations from those regarding producer responsibility under the waste law scheme. The different requirements can therefore not be compared with each other. The starting point for the medical device sector is also different. While the aim of this research project is to ensure that producers from other countries, in particular third countries, comply with registration and notification obligations, and thus also with waste management obligations, the aim of the Medical Device Regulation is to ensure product **quality and safety**. It becomes obvious that the two areas are not comparable, and do not allow transferral, one to the other. This demonstrates that the approaches of the Medical Device Regulation cannot be applied for registration obligations under the ElektroG, the VerpackG and the BattG.

3.2.1.1.1.5 Interim results

In conclusion, none of the models presented lend themselves as a template for the establishment of verification obligations for electronic marketplace operators. Instrument-related differences, with regard to the **UStG** (VAT-Act), in particular liability according to Section 25e UStG, show themselves clearly. The limited intervention scope of competent authorities under the **Market Surveillance Regulation** is insufficient for dealing with the problem of free-riders, in particular those from third countries. The **Medical Device Regulation** contains requirements regarding highly sensitive issues of health protection, which are not transferable to the registration requirements of the waste-law producer responsibility scheme.

3.2.1.1.2 Potential compulsory verification concept

Regarding the ElektroG for example, compulsory verification could be designed for electronic marketplace operators. Operators would have to record the WEEE Reg. No. DE (of the producer or authorised representative) including the brand and type of equipment, before allowing their contractual partners to offer **electrical and electronic equipment** on their websites. These parameters would then be automatically compared with the official registers, i.e. at the stiftung ear,[93] via an IT interface. For quantity notifications and collection coordination, stiftung ear already contains an extension of the existing IT interface.[94] Solely verified offers would then be published via electronic marketplaces. Such electronic checks could minimise the compliance-burden for electronic marketplace operators. With regard to **batteries and packaging**, similar verification obligations for electronic marketplace operators could be introduced, this time in connection with IT-based comparisons with the ZSVR and German Environment Agency registers.

3.2.1.1.3 Embedding electronic marketplace operator compulsory verification within the applicable law

Electronic marketplace operator's compulsory obligations would have to be embedded in the relevant laws regarding registration/notification requirements.

3.2.1.1.3.1 ElektroG and WEEE Directive

It would be appropriate to anchor compulsory verification in the ElektroG's second chapter regarding requirements for placing EEE on the market, in Sections 6 et seq. ElektroG. With regard to the above-outlined concept, an amendment to Section 6 (2) ElektroG would be sufficient to prohibit the sale of EEE via the operators' marketplace if the producers of these devices are not duly registered. This would result in a **compulsory verification**. In accordance

[93] See https://www.ear-system.de/ear-verzeichnis/hersteller#no-back; (7 July 2020).

[94] See https://www.stiftung-ear.de/de/startseite/sammlung-news-startseite/default-2fd9051294; (7 July 2020).

with Section 6 ElektroG, market place operators would be required to check the the registration of offers on their websites in advance. Section 6 (2) Sent. 3 ElektroG –new – could read:

"(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 or are not duly registered."

In addition to these regulations, **definitions** of the terms "electronic marketplace" and "operator" would be necessary, which would be included in Section 3 ElektroG after numbers 9 (producer), 10 (authorised representative) and 11 (distributor).

Section 25 (5) UStG, which came into force on 01.01.2019, could be used as an example. The VAT-Act gives the following legal definition: "*for the purposes of this provision, an electronic marketplace is [...] a website or any other instrument making information available via the Internet which enables a third party who is not the operator of the marketplace to carry out transactions*". According to Section 15e (6) UStG, the operator is defined as a person who "*maintains an electronic marketplace and enables third parties to carry out transactions on this marketplace*." These definitions are, however, aligned with the VAT Act-requirements, according to which the execution of transactions is the decisive factor, while with regard to the ElektroG, this would not be the case. Rather, according to Section 1 ElektroG, it is a matter of defining producer responsibility requirements for EEE in the sense of Section 23 KrWG. An **electronic marketplace** within the meaning of the ElektroG could be defined as follows:

"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;"

The following definition is proposed regarding an electronic marketplace operator:

"11b. Operator of an electronic marketplace: any natural or legal person or partnership operating an electronic marketplace;"

Under the new Section 6 (2) Sent. 3 ElektroG, electronic marketplace operators would be prohibited from allowing producers to offer or provide goods if they or their **authorised representatives** are not, or not properly registered. Alternatively, operators can themselves assume the obligations as the producers´ authorised representatives. Section 3 no. 10 clause 2 ElektroG could thus clarify that an electronic marketplace operator may also assume the role of an authorised representative:

"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;"

To enable legal enforcement regarding violations of compulsory verification, a regulatory offence should be included in the provisions on fines in Section 45 ElektroG. After its number 4, the following could be inserted into Section 45 (1) ElektroG:

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

This amendment would allow the effective prosecution of violations of bans, applicable to electronic marketplace operators, regarding the placing of EEE on the market. Just as with other bans, the German Environment Agency would be responsible for posing a maximum fine of € 100,000 for the illegal placing on the market. The concept of compulsory verification for

electronic marketplace operators could also be anchored in the **WEEE Directive**. EU Member States would then be responsible for providing such compulsory verification when implementing the new rules, while maintaining a certain scope for implementation. To this end, a new recital could be included in the directive:[95]

"*Electronic marketplaces are crucial for placing electrical and electronic equipment on the market and are necessary for concluding contracts between the seller, especially those located in a third-country, and the end user. Electronic marketplaces are also responsible for the actual delivery of equipment originating from third countries to the end user. Without due registration, massive distortions of competition can occur, which cannot be effectively countered without electronic marketplace operators carrying the responsibility. This has led to existing bans regarding the placing of products on the market being extended to electronic marketplace operators, thus further strengthening the existing market self-regulation."*

In line with the proposed changes to the **definitions** in Section 3 ElektroG, the term „electronic marketplace" should also be defined in the WEEE Directive. To this end, the following points could be added to Article 3 (1):

"h) [respective renaming of all paragraphs after the previous point (h)]:

a website or any other instrument used in a Member State with the support of which information is made available via the Internet enabling producers or distributors, who are not operators of that marketplace, to offer, or make available, electrical and electronic equipment within the Member State on their own behalf

not identical with h)

i) [necessary renaming of all paragraphs after the previous point i)]: "electronic marketplace operator" any natural or legal person established and operating an electronic marketplace in a Member State"

The Directive's provisions on **compulsory verification** in Art. 16 WEEE Directive could be further supplemented, similarly to the described proposals for Section 6 ElektroG, by standardising compulsory verification in a new Art. 16 (2a):

„*Member States ensure that*

(a) each distributor makes available only electrical and electronic equipment from producers who themselves or their designated authorised representatives in concordance with Article 17, are properly registered;"

b) "any electronic marketplace operator only allows the marketing or making available of electrical and electronic equipment for which the producer himself or his designated authorised representative in concordance with Article 17, is properly registered;".

3.2.1.1.3.2 Packaging Act and Packaging Directive[96]

As described above, a synchronization of electronic marketplace operators' compulsory verification is advisable with regard to the obligations pursuant to ElektroG, BattG and VerpackG. **Compulsory verification** could be laid down in the VerpackG, within the registration

[95] With regard to the following proposed amendments to compulsory verification of fulfilment service providers, these can also be included in the recital.

[96] Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, Official Journal of the EC No. L 365 of 31 December 1994 p. 10, as last amended by Directive (EU) 2018 of 30 May 2018, p. 852, Official Journal of the EU No. L 150 of 16 June 2018, p. 141 – hereinafter referred to as Packaging Directive.

obligation in Chapter 2 concerning the placing on the market of packaging requiring system participation, e.g. in Section 9 (5) clause 3 (new) VerpackG:

"Electronic marketplace operators may not enable the offering or placing on the market of packaging subject to system participation, through their electronic marketplace if the producers, contrary to paragraph 1, are not or are not properly registered."

The terms 'electronic marketplace' and 'operator' would also have to be defined. Here again, a parallel to the UStG presents itself. Similar to the definition of 'producer' in Section 3 (14) VerpackG, standards could be laid down in new Numbers 14a and b:

"14a An electronic marketplace is a website or any other instrument by means of which information is made available via the Internet, that enables producers or distributors, who are not operators of the marketplace to offer or put into circulation packaging requiring system participation within the scope of this Act on their own behalf."

Regarding electronic marketplace operators, the following definition, which is the same as the proposal for the ElektroG, could be appropriate:

"14b. operator of an electronic marketplace: any natural or legal person or partnership operating an electronic marketplace;"

A new number 9a could also be added to the **provisions on fines** in Section 34 (1) VerpackG:

"9a. [regarding whoever] contrary to Section 9 paragraph 5 sentence 3, allows the offering or placing on the market of packaging subject to system participation,".

In order to achieve EU-wide uniform requirements for electronic marketplace compulsory verification, an amendment to the **Packaging Directive** could be considered. As this is essentially an older directive, in which the definitions are not greatly differentiated, it would not be appropriate to introduce definitions of electronic marketplace operators and of electronic marketplaces as in the WEEE Directive. Art. 3 no. 11 Packaging Directive could however list electronic marketplace operators among the market participants.

3.2.1.1.3.3 BattG and Batteries Directive[97]

Section 3 (4) BattG already contains provisions on sales bans for producers and distributors. **Compulsory verification** of electronic marketplace operators could subsequently be inserted in Section 3 (4) sent. 3 BattG:

"Within the scope of this Act, electronic marketplace operators may not enable the offering or placing on the market of batteries via their electronic marketplace if their producers are not or are not properly notified contrary to Section 4 paragraph sentence 1 in conjunction with an ordinance pursuant to Section 20 No 1."

Definitions should be included in the BattG, for example according to the producer definition in a new Section 2 (15a) BattG:

"15a. 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, batteries within the scope of application of this Act on their own behalf;"

Regarding electronic marketplace operators, the following definition, identical to the ElektroG and the VerpackG proposals, would be appropriate:

[97] 2006/66/EC of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, Official Journal of the EU L 266 of 26 September 2006, p. 1 – hereinafter referred to as Batteries Directive.

"15b. operator of an electronic marketplace: any natural or legal person or partnership operating an electronic marketplace;"

A new number 3b could be added to the **provisions on fines** in Section 22 (1) BattG:

"3b. [regarding whoever] allows the offering or placing on the market of batteries in contravention of Section 3 paragraph 4 sentence 3."

As in the case of EEE and packaging, it makes sense to include EU-wide uniform requirements for compulsory verification of electronic marketplace operators in the Directive. The **Batteries Directive** was last amended in 2018,[98] and is currently under revision. Art. 3 of the Directive has contained definitions of producers, distributors and economic operators since 2006. Definitions of electronic marketplace and of electronic marketplace operators could be inserted after Art. 3 no. 13 Batteries Directive ('distributor'):

"13a. 'electronic marketplace'. a website or any other instrument used in a Member State with the support of which information is made available via the Internet enabling producers or distributors, who are not operators of that marketplace, to offer, or make available, batteries within the Member State on their own behalf"

"13b 'electronic marketplace operator' any natural or legal person operating an electronic marketplace".

Art. 17 Batteries Directive only regulates the register obligation superficially. Member States must hereby only ensure that every producer is registered. The following sentences could therefore be added to Art. 17 Batteries Directive:

"Member States ensure that each distributor makes available only batteries from producers who are properly registered. Member States also ensure that any electronic marketplace operator only allows the offering or placing on the market of batteries for which the producer is properly registered."

3.2.1.1.3.4 Interim results

Compulsory verification of electronic marketplace operators, with regard to the registration/notification of producers offering products on the operators' websites, can be incorporated into the **ElektroG, the VerpackG and the BattG** relatively easily. Prerequisite in each case would be that the operators are defined accordingly and that compulsory verification result from **bans for placing on the market**. According to these provisions, electronic marketplace operators would be prohibited from using their platforms to offer or make available EEE, packaging requiring system participation, or batteries, if the producers (or their authorised representatives with regard to the ElektroG) are not or are not properly registered or notified. It would also make sense to impose a **fine for violations**. Preferable to compulsory verification at national level would be a **European solution** through provisions in the WEEE Directive, the Batteries Directive and the Packaging Directive, which would then require implementation by the Member States. This would ensure the introduction of compulsory verification in all EU Member States, which would promote compliance with registration obligations in a more transparent and simple way for third parties.

[98] Directive (EU) 2018/849 of 30 May 2018 amending Directives 2000/53/EC on end-of-life vehicles, 2006/66/EC on batteries and accumulators and waste batteries and accumulators, and 2012/19/EU on waste electrical and electronic equipment, Official Journal of the EU L 150 of 14 June 2018, p. 93.

3.2.1.2 Compulsory verification for fulfilment service providers

As has been explained above, as far as their involvement in shipping packaging[99] is concerned, fulfilment service providers are regarded as **producers under the Packaging Act**.[100] In this case the introduction of separate compulsory verification becomes superfluous, since, as they are here considered producers, fulfilment service providers must themselves fulfil the registration obligation with regard to shipping packaging. Otherwise, to the extent that fulfilment service providers are not considered producers, compulsory verification comes into consideration, as in the case for sales packaging and grouped packaging,[101] and also with regard to the ElektroG and the BattG. An identical **compulsory verification** as that for electronic marketplaces could be introduced for fulfilment service providers. This obligation should commence prior to shipment of products. The reasoning behind this is that fulfilment service providers in Germany or the EU who generally guarantee a delivery goal of merely a few days are normally used for deliveries of goods purchased via electronic marketplaces established solely in third countries. For the most part, fulfilment service providers have the advantage of being established in the EU. They can therefore be more easily policed by the competent authorities than economic operators in third countries.

As in the case of electronic marketplaces, the **purpose** of compulsory verification would be to improve the enforcement of registration/notification obligations under EPR (Section 23 (1) sent. 1 KrWG) as well as ElektroG, VerpackG and BattG. By involving fulfilment service providers in the respective obligations, enforcement of producer or authorised representatives due registration/notification would be facilitated. Fulfilment service providers may only carry out their services if the producers or their authorised representatives are duly registered/notified. Hence, the compulsory verification arises from the **ban on placing on the market**. **Sanctions** for infringements should also be established to ensure effective enforcement.

3.2.1.2.1 Links to existing approaches

The considerations for compulsory verification of electronic marketplace operators with reference to **VAT Act**, the **Market Surveillance Regulation** and the **Medical Device Regulation**[102] can be transferred to potential verification obligations of fulfilment service providers. Instrumental discrepancies with regard to the VAT Act mean no wholesale adoption can be considered, while synergy effects from the recording/information obligation under Section 22f VAT Act could in fact be utilised. Whatever the case, compulsory verification regarding fulfilment service providers would require an individual regulation.[103]

Similarly, **control options** via the market surveillance regulation are insufficiently far-reaching. Also, regarding fulfilment service providers, only selective ex post verifications would be permissible, but not an ex ante comprehensive implementation of registration/notification requirements within the EPR-framework. The same applies to the Medical Device Regulation, which pursues a different objective and, with regard to Notified Bodies, provides a highly complex control system, which may not be transferable to the registration obligations under ElektroG, VerpackG and BattG.

[99] In German: Versandverpackung, see Section 3 (1) no. 1 VerpackG.

[100] Unless only the name of the seller is visible on the shipping packaging.

[101] See also Art. 3 (1) subpara. 2 a) and b) of the Packaging Directive.

[102] See above in Chapter 3.2.1.1.1.

[103] In this context, the Opinion of the Advocate-General in Case C 567/18 (in particular paragraph 84) is also of interest: http://curia.europa.eu/juris/document/document.jsf?text=&docid=221117&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=2148000; (7 July 2020).

3.2.1.2.2 Compulsory verification concept

As explained above regarding electronic marketplaces,[104] services of fulfilment service providers, such as storage, packing, addressing or shipping of electrical and electronic equipment including associated packaging and batteries, would have to be linked to due registration/notification by producers or their authorised representatives. Should contractual partners of the fulfilment service providers violate these obligations, the latter may not act on their behalf. Compulsory verification of fulfilment service providers should also be flanked by an automated control scheme keeping the required effort as low as possible.

With regard to ElektroG, fulfilment service providers would, according to a **standardised procedure**, record the WEEE-Reg. No. DE, the brand and type of equipment for all goods with electronic components. These parameters could automatically be compared with the official registers via an IT interface. As the last link in the chain from producer to final consumer, this would prevent EEE from non-registered producers being delivered to customers. Applying the amended VerpackG and BattG would lead to similar results.

Challenges would arise where electronic marketplace operators and fulfilment service providers met the same or very similar obligations with regard to the compulsory verification under ElektroG, VerpackG and BattG by their respective contractual partners. This would not be uniformly relevant as it only represents one possible constellation, since the compulsory verification procedure does not always involve both actors.

Fulfilment service providers should always make sure to only provide services if the registration is correct. The compulsory verification should therefore be generally applicable, with no priority given to one of the involved parties. Electronic marketplace operator compliance (e.g. in the face of infringement sanctions) often only applies to operators with registered office in Germany. Fulfilment service providers in Germany or the EU are regularly used for goods offered via electronic marketplaces located in third countries. Non-compliance with producer responsibility obligations increases the need for compulsory verification.

3.2.1.2.3 Embedding compulsory verification within the applicable law

3.2.1.2.3.1 ElektroG and WEEE-RL

First of all, the ElektroG should define the term 'fulfilment service provider'. In line with the **definitions** proposed above for the 'electronic marketplace' and 'electronic marketplace operator', a new Section 3 no. 11 c) could be added:

"11c. Fulfilment service provider: any natural or legal person offering at least one of the following services in the course of commercial activity: warehousing, packaging, addressing and dispatching, without having ownership of the electrical and electronic equipment involved, excluding postal services, parcel delivery services, and any other postal or freight transport services;"

The definition follows Art. 3 no. 11 Market Surveillance Regulation. Unlike the electronic marketplace, no suitable model can be found in the UStG for defining the term 'fulfilment service provider'.

Following on from the new definition, Section 3 no. 10 half sent. 2 ElektroG could, in addition to the definition of the electronic marketplace already proposed above, include the following after number 11:

"an electronic market place operator according to Number 11b or a fulfilment service provider according to Number 11c;".

[104] See above in Chapter 3.2.1.

Fulfilment service providers may not render their services to producers who have not properly fulfilled their **registration requirements**. They may however themselves assume the obligations of a producer's authorised representative. In this regard, it should be clarified in Section 3 no. 10 half sent. 2 ElektroG that a fulfilment service provider may be an authorised representative:

"An authorised representative may be a producer according to number 9(c), a distributor according to number 11, an electronic marketplace operator according to number 11b or a fulfilment service provider according to number 11c;"

In a new Section 6 (2) sent. 4 ElektroG – after the new sentence 3 proposed above regarding electronic marketplaces – a further sentence could be added regarding fulfilment service providers:

"Fulfilment Service Providers may not provide storage, packaging, addressing or dispatch of electrical and electronic equipment if the producers or, in the case of authorisation pursuant to Section 8, their authorised representatives are not or are not properly registered."

This core provision would extend the existing **bans for placing on the market** beyond electronic marketplace operators to fulfilment service providers, thus further strengthening the existing market self-regulation. Compulsory verification includes fulfilment service providers in the producer responsibility scheme within the meaning of Section 23 (1) sent. 1 KrWG.

Just as for electronic marketplace operators, a regulation on **fines** could be added regarding fulfilment service providers in Section 45 (1) number 4a (new):

"4b. [whoever] in contravention of Section 6 Paragraph 2 Clause 4 provides warehousing, packaging, addressing or dispatching of electrical and electronic equipment."

In the interest of effective enforcement, this would allow sanctioning of infringements by fulfilment service providers as administrative offences. As with regard to other bans for placing on the market, the German Environment Agency would be responsible for levying a maximum fine of € 100,000 per infringement.

Whether and how the proposed compulsory verification for fulfilment service providers can be enforced requires further discussion. For the consumer, fulfilment service providers are not always or not immediately visibly involved in the dispatch process. It is therefore questionable how the competent authority could be made aware of a breach of the compulsory verification. The situation is quite different for electronic marketplaces, where seller and marketplace are visible for all involved. A further prerequisite for compulsory verification would be the fulfilment service providers being able to obtain knowledge of the products for which they provide their services.

They would have to request and check this information from contractual partners together with all registration data subject to checking.[105] It would hardly be practicable for the relevant authorities to monitor fulfilment service provider compliance through on-site visits. Such enforcement issues could hinder the introduction of such compulsory verification, particularly, the sanctioning of infringements as administrative offences.

Proving that producers have placed products on the market might be difficult. However, potential **enforcement problems** should not be a reason for not sanctioning an actor who is a major player in placing EEE from third countries on the market. Fulfilment service providers can

[105] See the opinion of the Advocate General in Case C 567/18 (in particular marginal no. 84): http://curia.europa.eu/juris/document/document.jsf?text=&docid=221117&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=2148000; (7 July 2020).

often be recognised by the offer on the website, the imprint on the shipping packaging, or by information available online and the contract documents (e.g. cancellation policy, return information, general terms and conditions). Compulsory verification would ensure that fulfilment service providers would query their contractual partners in advance of their services as to whether their products are subject to ElektroG, BattG and/or VerpackG. Business models already exist whereby the fulfilment service provider is aware of the contents of the packaging. Such arguments show that compliance with the fulfilment service provider's compulsory verification can be ensured in practice.

Compulsory verification for fulfilment service providers should also be regulated in the **WEEE Directive,** as proposed for electronic marketplaces. A common recital has already been suggested above. Following the definitions proposed above for electronic marketplaces, a definition of fulfilment service providers could be added to Art. 3 (1) WEEE Directive:

"Fulfilment service provider": any natural or legal person, established in a Member State, offering, in the course of commercial activity, at least one of the following services: warehousing, packaging, addressing and dispatching, without having ownership of the products involved, excluding postal services, parcel delivery services, and any other postal services or freight transport services;"

The definition corresponds to that proposed for the amendment of the ElektroG. In addition, Art. 16 (2a) (new) WEEE Directive could be supplemented by a new letter c) (following the proposals regarding electronic marketplaces), to the effect that Member States ensure that

"each fulfilment service provider only performs storage, packaging, addressing or dispatch of electrical and electronic equipment if its producer or authorized representative, designated in accordance with Article 17, is properly registered;"

This amendment would allow fulfilment service providers to benefit from harmonised requirements regarding compulsory verification to be introduced by Member States according to Union-wide provisions.

3.2.1.2.3.2 Packaging Act and Packaging Directive

In line with compulsory verification of electronic marketplace operators, a **statutory prohibition** could be anchored in the VerpackG of those services rendered by fulfilment service providers which have not undergone compulsory verification. After the amendment proposed above for electronic marketplaces in Section 9 (5) sent. 3 (new) VerpackG, a further sentence 4 could be added:

"Fulfilment Service Providers may not provide storage, packaging, addressing or dispatch of packaging subject to system participation if the producers are not or are not duly registered."

A **legal definition** of the fulfilment service provider in the VerpackG would also be advisable. it would be appropriate to amend Section 3 (14) VerpackG by a no. 14b (after the definition of the electronic marketplace proposed above):

"(14b) 'Fulfilment service provider' is any natural or legal person, established in a Member State, offering, in the course of commercial activity, at least one of the following services: warehousing, packaging, addressing and dispatching, without having ownership of the products involved, excluding postal services, parcel delivery services, and any other postal services or freight transport services;".

The regulation on **fines** in Section 34 (1) VerpackG could be amended by a new no. 9b (after the proposal regarding electronic marketplaces):

"9b. [whoever] in contravention of Section 9 paragraph 5 sentence 4 provides warehousing, packaging, addressing or dispatching of electrical and electronic equipment."

As in the case of electronic marketplaces, an amendment to the **Packaging Directive** regarding fulfilment service providers would be advisable. The explanations above would be applied accordingly. Art. 3 no. 11 Packaging Directive could list not only electronic marketplace operators but also fulfilment service providers among market participants.

3.2.1.2.3.3 BattG and Batteries Directive

With regard to fulfilment service providers, amendments of the BattG could also be made, similar to those for electronic marketplaces. A new sentence 4 could be inserted after the above proposed Section 3 (4) sent. 3 BattG:

"Fulfilment Service Providers may not provide storage, packaging, addressing or dispatch of batteries if the producers, in contravention of Section 4 paragraph sentence 1 in conjunction with an ordinance pursuant to Section 20 number 1, are not or are not properly registered."

Fulfilment service providers would also have to be **defined** in the BattG, according to the proposed definitions regarding electronic marketplaces, in a new Section 2 (15c) BattG:

"15c. 'Fulfilment service provider' is any natural or legal person, established in a Member State, offering, in the course of commercial activity, at least one of the following services: warehousing, packaging, addressing and dispatching of batteries, without having ownership of the products involved, excluding postal services, parcel delivery services, and any other postal services or freight transport services;".

The regulation on **fines** in Section 22 (1) BattG should be amended by a new number 3c – following on from the above proposal regarding electronic marketplace operators:

"3c [whoever] in contravention of Section 3 paragraph 4 sentence 4 provides warehousing, packaging, addressing or dispatching of batteries."

The question arises as to whether compulsory verification could be enforced in practice, and whether the imposition of a fine for an administrative offence would be appropriate. In this respect, reference can be made to the above argumentation for anchoring compulsory verification in the ElektroG.[106] The same arguments would seem to apply to compliance with the fulfilment service provider's compulsory verification concerning the BattG.

As for EEE and packaging, the **Batteries Directive** may also provide uniform compulsory verification regarding fulfilment service providers. The term 'fulfilment service provider' could be defined in Art. 3 in a new no. 13c, in accordance with the definitions proposed above regarding electronic marketplaces:

"13c. 'Fulfilment service provider': any natural or legal person, established in a Member State, offering, in the course of commercial activity, at least one of the following services: warehousing, packaging, addressing and dispatching of batteries, without having ownership of the products involved, excluding postal services, parcel delivery services, and any other postal services or freight transport services;"

The following new sentence could be added to Art. 17 Batteries Directive, after the proposed amendments concerning distributors and electronic marketplaces operators:

"Member States also ensure that each fulfilment service provider only performs storage, packaging, addressing or dispatch of batteries if their producer is properly registered".

[106] See above under 3.2.1.1.3.1.

3.2.1.2.4 Interim results

From a legal point of view, **compulsory verification for fulfilment service providers** can be implemented in a similarly uncomplicated manner as the proposals regarding electronic marketplace operators. It also seems **feasible** practically**.** Separate compulsory verification would be irrelevant if fulfilment service providers were to be classified as producers under the VerpackG for shipping packaging. On the other hand, in addition to the corresponding obligations for electronic marketplace operators, compulsory verification must be regarded as useful for further packaging categories.

3.2.1.3 Interim results regarding compulsory verification

Compulsory verification is to be fully recommended for **electronic marketplace operators**, according to which they may admit only those products to their websites for whom operators have previously verified the producer-related registration/notification obligation fulfilment under ElektroG, BattG and VerpackG. Technically, this can be implemented easily by an automated comparison with registration authorities, and compliance efforts can be regarded as low.

Since **fulfilment service providers** are not considered producers according to ElektroG and BattG, compulsory verification is advisable, just as for electronic marketplace operators. This applies to the VerpackG, insofar as they do not fall under the requirements for being considered a producer.

It would remain the case that only **producers or their authorised representatives** would fall under the registration requirements, without giving rise to a radical breach of system. Electronic marketplace operators and fulfilment service providers would be included with their own obligations, and sanctioned if they failed to comply.

Possible concerns regarding the **enforceability** and enforcement of the compulsory verification for fulfilment service providers can be countered by the fact that, prior to providing their services, they would be required to ask their contractual partners for data concerning the products´ classification with regard to ElektroG, BattG and/or VerpackG. This would provide them with the necessary information for verifying producer compliance regarding registration requirements etc. Comparable business models already exist in which the fulfilment service provider has knowledge of the contents of the packaging.

3.2.2 Electronic marketplace operators and fulfilment service providers deemed to be producers

The need for compulsory verification would become redundant if electronic marketplace operators and fulfilment service providers were deemed producers under a legal fiction. This deeming provision would not only lead to the verification of their contractual partners but also to a situation in which all the other **producer requirements** (for labelling, monthly/annual weight reporting, take-back and waste disposal, information, etc.) would continue to apply, even if the actual producer were not fully in compliance with registration/notification provisions.

Such legal fiction only makes sense if fulfilment service providers do not already fall under the **term 'producer'** per se. Some arguments concerning shipping packaging under the VerpackG consider this to be the case.[107] With this in mind, the following explanations regarding fulfilment service providers can only be understood as auxiliary. On the other hand, according to the

[107] See above under 2.2.

ElektroG and the BattG, electronic marketplace operators and fulfilment service providers are defined as not covered by the term 'producer'.

It needs to be clarified whether being **deemed to be a producer** should only apply if the actual producer does not register properly, or whether electronic marketplace operators or fulfilment service providers should fall under such a legal fiction in general. In the following, only the first variant will be discussed. The reasons for this are to be found in the review's terms of reference.

Proposed solutions are examined with regard to the problem of registration obligations in the EPR-context, but not concerning the general question of who should be deemed a producer within the meaning of these laws. This limitation is necessary under the aspect of the legal analysis feasibility. From the proportionality point of view, addressing only the free-rider problem must be preferred to a general extension of the term 'producer'.[108]

3.2.2.1 Electronic marketplace operators deemed to be producers

In the three relevant laws – ElektroG, VerpackG and BattG -, electronic marketplace operators are neither classified as producers nor as distributors since they provide special services by making available an electronic marketplace to sellers offering their products.

3.2.2.1.1 Electronic marketplace operators deemed to be producers according to the ElektroG

3.2.2.1.1.1 Current legal situation

Electronic marketplaces are not covered by the **term 'producer'** according to Section 3 no. 9 ElektroG. The 2015 amendment has not altered this legal situation. On the one hand, Internet trade was taken into account by including long-distance communication means:

"Producer: any natural or legal person or partnership, regardless of the method of sale, including means of distance communication within the meaning of Section 312c paragraph 2 Civil Code, [...]

d) using distance communication means, offering electrical or electronic equipment directly to end users within the scope of this Act and established in another European Member State or a third-country".

The ElektroG-explanatory memorandum also emphasises the inclusion of e-commerce:

"According to letter d, is also deemed a producer who is not established within the scope of this Act, but in another Member State or outside the European Union, and who offers electrical and electronic equipment directly to end-users exclusively via means of distance communication."[109]

This does not apply to electronic marketplace operators, as they do not offer any products.[110]

3.2.2.1.1.2 Approaches for the inclusion of electronic marketplaces in the producer concept

The WEEE Forum[111] proposes defining online platforms (electronic marketplaces) as producers:

[108] For more information on this see below, Chapter 3.3.1.1.1.

[109] Draft law of the Federal Government, draft of a law to reorganise the law on the placing on the market, the return and the environmentally sound disposal of electrical and electronic equipment, Bundestag Document 18/4901 of 13 May 2015, p. 81.

[110] For details see above under 2.2.

[111] The WEEE Forum, founded in 2002, represents 40 producer responsibility organisations worldwide and serves the exchange of information between members, the development of platforms, software tools and common standards, the implementation of projects on behalf of the EU etc, see https://weee-forum.org/what-we-do/ (7 July 2020).

"Updated regulatory measures, at EU and/or Member State level, to define online platforms as the 'producer' of all products for which they facilitate, by whatever means, the import or entry into the Member State territory".[112]

The aim is to grant online platforms producer status for all products for which they facilitate imports into the EU "*by whatever means*".[113] British authorities, for example, are considering regarding as producers those market players who are neither 'manufacturers' nor importers, such as online platforms:

"The UK authorities, in association with market actors, are toying with the idea that, if the market operator who makes the product available on the market is neither a manufacturer nor an importer, but does facilitate the EU import or market entry, for example through offering a (multi-seller) online platform, he is deemed a 'producer'."[114]

A further approach can be found in the draft law of the French Senate of July 10, 2019, according to which electronic marketplace operators are covered by the term 'producer'.[115]

3.2.2.1.1.3 Considerations for changing the ElektroG and the WEEE directive

Since the term 'producer' in Section 3 no. 9 ElektroG is linked to offering electrical or electronic equipment, and electronic marketplace operators do not offer products in this sense,[116] defining operators as producers would not be coherent. This would interrupt the system behind Section 3 no. 9 ElektroG. The following half-sentences could be added to the existing **legal-fiction** for the distributor according to Section 3 no. 9 last half sent. ElektroG:

"the electronic marketplace operator is also 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 or are not properly registered, or by producers whose authorised representatives are not or are not properly registered; in this case, such enabling is also deemed to be a placing on the market; numbers 11a and 11b remain unaffected;"

The **terms** 'electronic marketplace' and 'electronic marketplace operator' must also be defined in the ElektroG. In this respect, recourse can be taken to the above proposals on compulsory verification with the amendments to Section 3 by numbers 11a and 11b.[117] The electronic marketplace operator would be obliged to register as a result of the fiction. The new words "*the enabling is also deemed to be a placing on the market*", do not make a new standardisation of administrative offences necessary, as the existing sanction in Section 45 (1) no. 3 ElektroG can be considered sufficient.

At EU level, an addition to Art. 3 (1) (f) **WEEE Directive** could be inserted:

"Every electronic marketplace operator is deemed to be a producer if he enables the marketing or provision of new electrical and electronic equipment from producers not or not duly registered within the meaning of Article 3 paragraphs i-iv via his electronic marketplace; Article 3 paragraphs i-iv remain unaffected;".

[112] WEEE-Forum, Successfully countering online free-riders, April 2019, p. 2.

[113] See WEEE-Forum plädiert im Kampf gegen Trittbrettfahrer für schärfere Regelungen, EUWID 18/2019, p. 25.

[114] WEEE-Forum, Successfully countering online free-riders, April 2019, p. 4.

[115] Projet de Loi, Sénat, No 660; see above under 2.5.1.

[116] See above under 2.2.

[117] See above under 3.2.1.1.3.

3.2.2.1.2 Electronic marketplace operators deemed to be producers according to the VerpackG

3.2.2.1.2.1 Current legal situation

According to the current VerpackG, electronic marketplace operators are not covered by the **term 'producer'**. 'Producer' is included under the term 'distributor'. Under Section 3 (14) VerpackG, the producer is "[...] *the distributor who, on a commercial basis, places packaging on the market for the first time. A producer is also deemed to be someone who, on a commercial basis, imports packaging into the reach of this Act."*

A producer is a distributor as defined in Section 3 (12) VerpackG:

"A distributor is anyone who, irrespective of the distribution method or level of trade, places packages on the market for commercial purposes."

This is clarified in the VerpackG-explanatory memorandum:

"The producer also belongs to a sub-group of distributors, namely as the distributor that places packages on the market for the first time commercially."[118]

The producer is here the actor who fills goods into packaging or, in the case of imports, has the legal responsibility at the time of border crossing.

Pursuant to Section 9 VerpackG, the producer of packaging subject to system participation must comply with registration obligations.[119] According to Section 3 (8) VerpackG, "*the registration requirement applies to any party who is the first to place retail or grouped packaging filled with goods that typically accumulates as waste with private final consumers after use*".[120] Registration must be carried out with the ZSVR before such packaging is placed on the market.[121] Online sellers must also comply with registration obligations under Section 9 VerpackG. According to Section 3 (9) VerpackG, the place of dispatch is not relevant:

"Placing on the market is any supply to a third party within the scope of this law, whether for a fee or free of charge, with the aim of distribution, consumption or use. The delivery of packaging filled on behalf of a third party is not considered to be placing on the market, if the packaging is exclusively labeled with the name or brand of the third party, or both."

As a consequence, the obligation to register also applies to shipments from abroad, provided that the shipment's destination is in Germany.[122]

Electronic marketplace operators are currently not incorporated under the term 'producer'. The term covers the online seller who imports the packaging or the consignor abroad responsible for the consignment crossing the border, but not the electronic marketplace, as it builds a forum for various suppliers.[123]

3.2.2.1.2.2 Considerations for amending the VerpackG and the Packaging Directive

Since electronic marketplace operators do not fall under the term 'producer', they are not required to meet the **registration obligation** under Section 9 VerpackG. Extending the term to

[118] Draft law of the Federal Government, draft of a law for the further development of the near-household separate collection of waste containing valuable substances, Bundestag Document 18/11274 of 22 February 2017, p. 85.

[119] See above under 3.2.1.2.3.2.

[120] See ZVSR, FAQ no. 4.1, Who need to register with the Packaging Register?, https://www.verpackungsregister.org/en/information-orientation/instructions-further-information/faq; (7 July 2020).

[121] In detail see above under 3.2.1.1.3.2.

[122] Föhlisch/Löwer, CR 2019, 42 marginal no. 14.

[123] Cf. ZSVR, FAQ, 4.1.2, What applies for online retail?, https://www.verpackungsregister.org/en/information-orientation/instructions-further-information/faq; (7 July 2020).

include electronic marketplaces would contribute to improved registration obligation enforcement.

To this end, both terms, 'electronic marketplace' and 'electronic marketplace operator', need to be defined in the VerpackG. Reference can be made to the definitions for electronic marketplace operators within compulsory verification, according to which Section 3 VerpackG should be extended by two new paragraphs 14a and 14b.[124] Amending Section 3 (14) VerpackG with the following sentence is also recommended:

"An electronic marketplace operator who intentionally or negligently enables packaging subject to system participation to be placed on the market via their electronic marketplace by non-registered or not properly registered producers is also deemed a producer; in this case, enabling constitutes placing on the market."

As a consequence, the electronic marketplace operator would individually be obliged to participate in the system and to register. The phrase "*in this case, enabling constitutes placing on the market*", does not give rise to the need for any new provisions on administrative offences, since the existing provisions on penalties under Section 34 (1), (3) and (7) VerpackG are sufficient.

For the reasons mentioned above, a modification of the Packaging Directive is not considered necessary.[125]

3.2.2.1.3 Electronic marketplace operators deemed to be producers, according to the BattG

3.2.2.1.3.1 Current legal situation

Electronic marketplace operators are not covered by the **producer definition** under the BattG either. Section 2 (15) BattG defines the producer as the actor who, within the scope of this Act, places batteries on the market commercially for the first time.[126] The distribution method must not be confused with the term 'producer' which also covers e-commerce.[127] Not covered, however, are electronic marketplace operators who only provide their marketplace for producers. Rather, it is the producer who places the batteries on the market. Producers are also required to comply with notification obligations under Section 4 BattG. Such notification in accordance with Section 4 (1) BattG must be made to the German Environment Agency prior to batteries being placed on the market within the reach of the Act.

Further, Art. 3 no. 12 Batteries Directive refers to whoever, within the territory of a Member State, places batteries on the market for the first time.[128]

3.2.2.1.3.2 Considerations for amending the BattG and the Batteries Directive

As described above, electronic marketplace operators could also be deemed producers. The terms 'electronic marketplace' and 'electronic marketplace operator' should be defined beforehand. Recourse can be taken to the above comments with the proposed amendments to the new paragraphs 14a and 14b in Section 2 BattG.[129] The term 'producer' in Section 2 (15)

[124] See above under 3.2.1.1.3.2.

[125] See above under 3.2.1.1.3.2.

[126] Closer to top under 3.2.1.1.3.3.

[127] Draft law of the Federal Government, draft of a law for the new regulation of the waste-legal product responsibility for batteries and accumulators, Bundestag Document 16/12227 of 12 March 2009, p. 25.

[128] Directive 2006/66/EC of 6 September 2006 on batteries and accumulators and waste batteries and accumulators, Official Journal of the EU L 266 of 26 September 2006, p.1.

[129] See above under 3.2.1.1.3.3.

BattG could be extended through a legal fiction regarding electronic marketplace operators, by adding the following sentences 4 and 5:

"An electronic marketplace operator who intentionally or negligently enables batteries to be placed on the market via their electronic marketplace by non-notified or not properly notified producers according to Section 4 paragraph 1 sentence 1 in conjunction with an ordinance under Section 20 number 1, is also deemed a producer; in this case, enabling is considered placing on the market. Paragraphs 14a and 14b remain unaffected."

As a consequence, the electronic marketplace operator would personally be obliged to notify. The added phrase "*in this case enabling is considered placing on the market*" does not give rise to the need for any new provisions on administrative offences, since the existing provision on penalties under Section 22 (1) no. 2 BattG is sufficient.

As proposed for the WEEE Directive, an electronic marketplace operator could also be deemed a producer within the **Batteries Directive**. To this end, as already proposed for the compulsory verification, the definitions of 'electronic marketplace' and 'electronic marketplace operator' should be included as nos. 13a and 13b in Art. 3 Batteries Directive.[130] The deeming provision regarding electronic marketplace operators could be extended to include the definition of the term 'producer'. Art. 3 (12) Batteries Directive could be amended by the following half sentence:

"Every electronic marketplace operator is deemed a producer if he enables the marketing or provision of batteries, from producers not or not properly registered, via their electronic marketplace;".

3.2.2.1.4 Conclusions

A **deeming provision** with the associated registration and other obligations might prove useful for electronic marketplace operators if the original producer does not or not completely fulfil his obligations. The electronic marketplace operator would have to clarify this in advance. Reinstigating a registration obligation via the legal fiction, combined with further obligations such as take-back and the entire due disposal, would **not be expedient** if the actual producer or his authorised representative has already fulfilled his obligations. This could easily constitute an excess with regard to the actual target, i.e. ensuring fulfilment of EPR-obligations. For reasons of expediency, but also from the proportionality point of view,[131] it is necessary at the same time, to check whether the producer or his authorised representative has fulfilled their obligations. Were compulsory verification necessary, as discussed above, and also sufficient to ensure EPR-compliance, there would be no need for electronic marketplace operators to be deemed producers. Such a legal fiction would only be recommendable if compulsory verification alone, which includes a ban for placing on the market, were not sufficient.

3.2.2.1.5 Interim results

Instead of compulsory verification, electronic marketplace operators could be deemed producers through amendments to the ElektroG, BattG and VerpackG. This deeming provision would lead to the application of all other **producer obligations** (labelling, monthly/annual quantity reporting, return and disposal, information, etc.) if the actual producer does not properly register/notify. Such a legal fiction would also require electronic marketplace operators to check their contractual partners regarding the fulfilment of their obligations. It would therefore only be **appropriate** if the **compulsory verification** discussed above were not sufficient on its own to ensure EPR-compliance.

[130] See above under 3.2.1.1.3.3.

[131] For further details see below under 3.3.1.1.1.3.

3.2.2.2 Fulfilment service providers deemed to be producers

Fulfilment service providers could also be deemed producers. The background and purpose of such a legal fiction is similar to the above-discussed compulsory verification for fulfilment service providers, so that reference can be made largely to the above explanations.[132] Since they are regularly located in EU Member States, fulfilment service providers offer relevant authorities the advantage of better access.

Were fulfilment service providers already deemed producers, the legal fiction would become obsolete, as explained above.[133] The following explanations could be understood as redundant if the fulfilment service provider were already covered by the term 'producer'. As explained above, regarding shipping packaging under VerpackG, fulfilment service providers are considered producers, while under the ElektroG and BattG, and in the case of non-shipping packaging, they are not.

3.2.2.2.1 Fulfilment service providers deemed to be producers according to the ElektroG

3.2.2.2.1.1 Applicable legal situation

Neither electronic marketplace operators nor fulfilment service providers are covered by the term **'producer'** according to Section 3 no. 9 ElektroG.[134] Nor do these actors offer electrical and electronic equipment under terms of Section 3 no. 6 ElektroG. Even assuming that electronic marketplace operators and fulfilment service providers fulfil the definition of "making available on the market" according to Art. 3j WEEE Directive and Section 3 no. 7 ElektroG, deeming these actors producers would be reasonable. This assumption would not hinder third-country free-riders, since the ban on offering, as laid down in Section 6(2) sent. 2 ElektroG, does not apply.[135]

3.2.2.2.1.2 Considerations for amending the ElektroG and WEEE directive

Fulfilment service providers deemed to be producers could be added after the legal fiction regarding distributors according to Section 3 no. 9 last half sentence ElektroG:

"A fulfilment service provider who intentionally or negligently stores, packs, addresses or dispatches electrical and electronic equipment from non-notified or unduly notified producers, or from producers whose authorised representatives are not or are not properly registered, according to Section 4 paragraph 1 sentence 1 in conjunction with an ordinance under Section 20 number 1, is also deemed to be a producer; in this case, the provision of one of these services is considered to be placing on the market."

The term 'fulfilment service provider' would also have to be **defined** in the ElektroG. Recourse can be made to the above proposals on compulsory verification, regarding the amendment to Section 3 by the new no. 11c.[136]

The deeming provision would mean that fulfilment service providers would be obliged to register. As a result of the added phrase "*the provision of one of these services is considered to be placing on the market*", no new legal norm regarding an administrative offence is required, since the existing sanction norm in Section 45 (1) no. 3 ElektroG would suffice.

[132] See above under 3.2.1.2.

[133] See above under 3.2.1.2.

[134] See above under 2.2.

[135] See above under 2.2.

[136] See above under 3.2.1.2.3.1.

The term 'fulfilment service provider' must also be defined at EU level.[137] Art. 3 (1) (f) WEEE Directive could be amended as follows:

„All fulfilment service providers are deemed to be producers who provide the storage, packaging, addressing or dispatch of electrical and electronic equipment from producers not or not properly registered;".

3.2.2.2.2 Fulfilment service providers deemed to be producers according to the VerpackG

3.2.2.2.2.1 Applicable legal situation

Under certain conditions, fulfilment service providers are already **obliged to register** under the VerpackG. Pursuant to Section 9 (1) VerpackG, producers of the packaging obliged to participate in the system under Section 3 (8) VerpackG, must register before placing on the market. The definition of 'producer' in Section 3 (14) VerpackG is comparable to the distributor who puts packaging into circulation commercially for the first time. In the legal opinion of the ZSVR, this could also be a fulfilment service provider acting as shipping service provider, provided the packaging in question is subject to system participation pursuant to Section 3 (8) VerpackG:

"*As the Verpackungsgesetz (Packaging Act) puts the actual initial distributor under obligation, it is generally the commissioned shipping service provider who, as a fulfilment service provider, manufacturer of the goods or wholesaler in relation to the shipment packaging (including filler material, labels, etc.), is subject to registration and system participation (system participation and registration requirement). They must specify the brand names for the shipment packaging (specifying brand names) and ensure that the packaging participates in a system. This applies not only where the seller and the shipping service provider are shown on the outside of the packaging, but also if the goods are shipped in a neutral packaging, i.e. the initial distributor is not shown on the outside of the packaging.*

Only when the seller alone (mail order business or online retailer) can be identified, it is the seller who is subject to registration and system participation. In that case, the shipping service provider has no obligations under packaging law, since their involvement is not apparent from the outside. However, this only applies if the shipping service provider cannot even be discerned as the sender. In this case, the seller under obligation (mail order business or online retailer) must have the shipping service provider submit the data for the system participation (weight/material type of the entire shipment packaging), so that the seller can complete the volume report. Instructing the shipping service provider to carry out volume reporting is prohibited."[138]

The shipping service provider (fulfilment service provider) is therefore obliged to register irrespective of whether they alone, or both seller and shipping service provider, or neither seller nor shipping service provider are visible on the packaging. If only the seller is recognizable on the outside of the packaging, then they are obliged to register. On the other hand, in the case of imports, the importer, i.e. the seller or the buyer, is required to register the direct packaging of the goods (sales and/or outer packaging according to Section 3 (1) no. 1 VerpackG):

"Where imports are concerned, a differentiation must be made between the direct packaging of the goods (retail and/or grouped packaging) and the shipment packaging: retail and/or grouped packaging of an article must be registered by the importer, and participate in a system. The importer may be the seller (mail order business or online retailer) or manufacturer/wholesaler

[137] See above under 3.2.2.1.1.3.

[138] ZSVR, FAQ: Fullfillment und Dropshipping, February 2019, https://www.verpackungsregister.org/fileadmin/files/FAQ/1.3.3.5_FAQ_Dropshipping_Fulfillment_VerA__ffe_ntlichungsfassung_en_FINAL_30072019.pdf, (7 July 2020).

abroad; this generally depends on which party bears legal responsibility for the goods at the time they cross the border. The aforementioned rules apply for shipment packaging."[139]

A further distinction is made between fulfilment and dropshipping:

"We are talking about fulfilment when mail order businesses sell their own goods, but do not pack or ship them; rather, the goods are packed and shipped by a logistics service provider, who as a rule also takes care of warehousing and returns.

We are talking about drop shipping when mail order businesses sell goods that they buy from a manufacturer or wholesaler, and have that manufacturer/wholesaler also ship the goods, as well as usually also take care of returns. Once again, it is not the mail order business who packs or ships the goods."[140]

There is no real difference between the two shipping service providers – the fulfilment service provider – and the dropshipper (producer or wholesaler). The dropshipper is also subject to registration and system participation in the cases mentioned above. The afore mentioned applies in both cases.

3.2.2.2.2.2 Considerations for amending the VerpackG and the Packaging Directive

With respect to the free-rider problem, it would be sensible to extend the producer definition in order to improve enforcement of sales and/or grouped packaging registration requirements. Based on the view taken here that, under the current legal situation, the fulfilment service provider of the packaging can already be considered to be a producer, unless the name of the seller alone appears on the shipping packaging, their being deemed **producers** would make sense under the following constellations, thereby creating the need for amendments to the VerpackG and the Packaging Directive:

a) for **shipping packaging** which only bears the name of the third-country producer, and for which the third-country producer has neither participated nor registered in a system, and

b) for **sales/grouped packaging** for which the third-country producer is a producer without having participated in a system or registered.

Were the fulfilment service provider seen as merely working as a **vicarious agent**, the system participation and registration obligations would remain with the foreign producer. The fulfilment service provider should be deemed producer if the foreign producer has not complied with their producer obligations. This would apply to sales/grouped packaging and shipping packaging.

3.2.2.2.3 Fulfilment service providers deemed to be producers according to the BattG

3.2.2.2.3.1 Applicable legal situation

The obligation to notify according to Section 4 (1) sent. 1 BattG applies to producers before they place batteries on the market within the reach covered by this Act. According to Section 2 (15) BattG, a **producer** is anyone who, irrespective of the distribution method, places batteries on the market commercially for the first time in the reach of application of the BattG. Accordingly, **distributors and intermediaries** who intentionally or negligently offer batteries from producers who have not or have not properly notified are also considered producers. As already

[139] ZSVR, FAQ: Fullfillment und Dropshipping, February 2019, https://www.verpackungsregister.org/fileadmin/files/FAQ/1.3.3.5_FAQ_Dropshipping_Fulfillment_VerA__ffe_ntlichungsfassung_en_FINAL_30072019.pdf (7 July 2020).

[140] ZSVR, FAQ 4.1.2: Fullfillment und Dropshipping, February 2019, https://www.verpackungsregister.org/fileadmin/files/FAQ/1.3.3.5_FAQ_Dropshipping_Fulfillment_VerA__ffe_ntlichungsfassung_en_FINAL_30072019.pdf (7 July 2020).

stated in this report, fulfilment service providers are neither producers nor distributors[141] under the BattG.

3.2.2.2.3.2 Considerations for amending the BattG and the Batteries Directive

Fulfilment service providers could therefore also be **deemed producers**. This would constitute an extension of the existing deeming provision for distributors and intermediaries under Section 2 (15) sent. 2 BattG to include fulfilment service providers. To this end, Section 2 (15) BattG could be supplemented by the following sentences 6 and 7:

"Fulfilment service providers who intentionally or negligently fail to store, package, address or ship batteries, or fail to do so in due accordance with Section 4 paragraph 1 sentence 1 in conjunction with a statutory instrument pursuant to Section 20 number 1 of notified manufacturers, shall be deemed producers within the meaning of this Act. The provision of one of these services is considered to be placing on the market"

The **term 'fulfilment service provider'** would also have to be defined in the BattG. In this respect, recourse can be made to the above proposals on compulsory verification with the amendment to Section 2 by a number 15c.[142] As a consequence of the fiction, the fulfilment service provider would be obliged to notify personally. The added clause "*the provision of one of these services is considered to be placing on the market*" would not make a new legal norm necessary regarding an administrative offence, since the existing sanction norm in Section 22 (1) no. 3 BattG would be sufficient.

Amendments would be equally necessary at **EU level**. As already suggested in the context of compulsory verification, a definition of the fulfilment service provider would have to be included in a new Art. 3 no. 13c Batteries Directive. Fulfilment service providers could also be deemed producers, and the following sentence could be added to Art. 3 no. 12 Batteries Directive:

"All fulfilment service providers are deemed to be producers if they carry out the storage, packaging, addressing or dispatch of batteries that have not been or were not duly registered by the producers;".

3.2.2.3 Conclusions

Instead of the standardization of compulsory verification, electronic marketplace operators could also be **deemed producers** under the ElektroG, BattG and VerpackG. This deeming provision could be extended to include fulfilment service providers with regard to the ElektroG and BattG, and also, but only for certain constellations, regarding the VerpackG. Such deeming provision would lead to an identical verification of their contractual partners, as in compulsory verification. However, this would mean that all other producer obligations (labelling, monthly/annual quantity reporting, take-back and disposal, information, etc.) would also apply. Anchoring the legal fictions at EU level would then also be desirable.

Similarly to the above-proposed compulsory verification for fulfilment service providers, the question can be raised whether **enforcement** of the legal fiction seems feasible in practice. Regarding the pros and cons of possible enforceability, the same arguments can be made as for compulsory verification.[143] The deeming provision would also require fulfilment service providers to find out more about the products covered by their services, to facilitate fulfilling their EPR-obligations. Compared to compulsory verification, fulfilment service providers would additionally have to fulfil the other producer obligations, if original producers or their

[141] See above under 2.2.

[142] See above under 3.2.1.2.3.3.

[143] See above under 3.2.1.3.

authorized representatives have not complied with the requirements. This could lead to a considerably greater additional effort compared to compulsory verification. Fulfilment service providers would be pressured into an unusual and unwanted role, which could affect their willingness to perform their duties, hindering the suitability of being deemed a producer. Compulsory verification, as discussed above, would place less of a burden on fulfilment service providers, simultaneously leading to the same success with regard to EPR. For reasons of expediency, compulsory verification would therefore be preferable to the legal fiction.

3.2.2.4 Interim results regarding the deeming provision

Instead of standardizing compulsory verification by amending the **ElektroG, BattG and VerpackG**, electronic marketplace operators and fulfilment service providers could be deemed producers. This legal fiction would lead to the application of **all producer obligations** (labeling, monthly/annual quantity reporting, return and disposal, information, etc.), if the actual producer has not properly registered/notified. Such legal fiction would also require electronic marketplace operators and fulfilment service providers to **check their contractual partners' compliance**. It would therefore only be **appropriate** if the compulsory verification alone were not sufficient to ensure compliance with EPR requirements.

3.2.3 Simplified producer responsibility model

3.2.3.1 Description of the approach

3.2.3.1.1 Starting point of the approach

The **simplified producer responsibility model** consists of a uniform **fee for the fulfilment of EPR-obligations.** It was presented by a research institute in Europe on behalf of an international electronic marketplace operator, and was primarily designed for electronic marketplace operators. It only concerns EEE. The fee is designed to ensure compliance with EPR-obligations. It is intended to finance the system covering the costs for producer take-back obligations. The aim is to exempt producers from registration obligations. The obligations should be fulfilled by electronic marketplace operators, according to this suggestion. The idea is based on the following considerations:[144]

"The main goal of this draft law is to simplify compliance with the obligations incumbent on the producers of electrical and electronic equipment, according to the German implementation of the WEEE Directive. In particular, this draft law provides a simple and cost-effective solution ('simplified producer responsibility model') to ensure compliance with the Electrical and Electronic Equipment Act (ElektroG) with regard to producers who are not established in Germany and who sell their products solely by means of distance communication ('Distance Selling Dealer'), which takes into account recital 7 of the WEEE Directive":

> "*The provisions of this Directive should apply to products and producers irrespective of selling technique, including distance and electronic selling. In this connection, the obligations of producers and distributors using distance and electronic selling channels should, as far as is practicable, take the same form, and should be enforced in the same way, as for other distribution channels, in order to avoid those other distribution channels having to bear the costs resulting from this Directive arising from WEEE for which the equipment was sold by distance or electronic selling.*"

[144] See also Oeko-Institute/Schomerus, "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, 2020, https://www.oeko.de/fileadmin/oekodoc/Inputpapier-Produktverantwortung-Onlinehandel-EN.pdf (7 July 2020).

"Article 12 (1) WEEE Directive requires Member States to ensure that producers of electrical and electronic equipment finance the collection, treatment, recovery and environmentally sound disposal of waste electrical and electronic equipment from private households. In implementation of this obligation, the German Electrical and Electronic Equipment Act stipulates notification, registration and labelling obligations in accordance with Sections 6 et seq. ElektroG, as well as numerous collection, return, treatment and recycling obligations in Sections 12 et seq. ElektroG. Pursuant to Section 3 no. 9 ElektroG, these obligations apply to all producers of electrical and electronic equipment, regardless of their location.

The regulation expressly covers producers who offer their products directly to end users in Germany via means of distance communication, but who are not established in Germany, Section 3 no. 9 lit. d ElektroG. In order to sell their products, such producers, who have no organisational or administrative structures whatsoever within Germany, resort to external sales channels. This is usually done through online marketplaces where producers can post their products, use the structures (digital applications/customer system, warehouse, packaging, shipping, etc.), and sell their products directly to end customers in Germany.

Nevertheless, since the ElektroG came into force in 2015, practice reveals numerous cases where precisely these producers find it difficult to meet their obligations under the ElektroG, and for a number of reasons. First, many distance sellers are simply unaware of the obligations incumbent on them within their selling markets. Language is often the main obstacle since basic information, such as legal requirements, is not readily available in English, let alone Chinese or other Asian languages. Moreover, many distance sellers simply do not have the financial or human resources to ensure compliance with the obligations for all markets in which they operate. The large number of distance sellers worldwide makes ensuring obligation enforcement an extremely resource-intensive and complex task. This explains why many distance sellers are unperturbed by potential obligation enforcement, and see no need to fulfil them. With regard to the collection, take-back, treatment and recovery obligations, their proper fulfilment is hindered by the often enormous distance of the producers from the German market – particularly for small producers.

Under the current legal situation, many producers as defined in Section 3 no. 9 lit. d ElektroG do not comply with the obligations laid down in the ElektroG. Moreover, there is neither a practical way of ensuring these obligations are respected nor of avoiding "other distribution channels having to bear the costs resulting from this Directive arising from WEEE for which the equipment was sold by distance or electronic selling", as quoted in Recital 7 of the WEEE Directive."[145]

3.2.3.1.2 Proposal to amend the ElektroG

3.2.3.1.2.1 Main features of the draft law

The draft law refers only to an **amendment to the ElektroG**, but not the BattG and the VerpackG. According to the draft, participation in the model should be **mandatory** for '*distance selling*':

"The draft law introduces - as an exception to the currently applicable registration, notification and disposal obligations - a simplified fulfilment of obligations in the form of a simplified producer responsibility model for distance sellers. The simplified producer responsibility model is a system whereby distance sellers using online marketplaces are obliged to pay a uniform fee in order to comply with registration, notification and disposal obligations with regard to a product placed on the market. Participation in the simplified producer responsibility model is mandatory for distance sellers. Only if they themselves are in a position to fulfil all regular producer obligations

[145] Quoted from a paper on the simplified producer responsibility model submitted by the lawyer Christian Alexander Mayer, Noerr Law Firm, Munich, on 13 March 2020 (original in German, author's translation; unpublished).

(registration, notification and disposal obligations under the ElektroG) can they refuse to participate by means of an 'opt-out'. This requires a declaration to the online marketplace, clearly stating that distance sellers are complying with their obligations independently. To avoid 'loopholes', distance sellers should transmit their registration numbers to the online marketplace."[146]

The charges (here referred to as '**fee**') shall be based on the quantity of EEE offered via the electronic marketplace:

"Under the simplified producer responsibility scheme, the actual fee depends on the quantity of electrical and electronic equipment sold via the online marketplace, whereby the online marketplace will ensure the recovery of waste equipment and the notification of corresponding quantities. This upholds the basic concept of polluter-pays product responsibility. In other words, by paying the fee, the distance sellers assume the costs for the actual disposal of waste electrical equipment instead of fulfilling their obligations independently."[147]

Negative effects on the **EPR-system** have not been shown:

"The simplified producer responsibility model will not have a negative impact on the important ecological aspects of product design. The direct levy in the form of a fee, measured in terms of quantity, will encourage distance selling traders to reduce the quantity of waste electrical equipment."[148]

One advantage is seen in the model's **efficacy**:

"The simplified producer responsibility model counteracts non-fulfilment of WEEE-obligations efficiently by selling via online marketplaces. At the same time, the variety of products for the German market is not restricted since distance seller access hereto is not blocked by the simplified producer responsibility model, but legally guaranteed by an effective system. Online marketplaces play the role of intermediaries between sellers and authorities, and in the same way - in some cases - they are also intermediaries between sellers and consumers. Online marketplaces will become interfaces for sellers and authorities, they are already in possession of the necessary information on the seller and all sales data, and will collect the fees required to secure the take-back and recovery of waste financially."

The reduction of the **administrative burden is described as another advantage**:

"The simplified producer responsibility model allows distance sellers to ensure the fulfilment of their obligations in a simplified and easy way, without being physically present on their sales markets. Since the respective online marketplace deals with fees and reporting, local registration and reporting need not be carried out by the distance sellers themselves or by their authorised representatives on their behalf. The simplified producer responsibility model thus contributes to a significant reduction of the administrative burden while offering a workable solution. Moreover, the payment of a flat fee for all electrical and electronic equipment sold on a given market makes it as easy as possible for distance sellers to ensure environmentally sound disposal and compliance with regulatory obligations. This ensures a wide reach at the same time as helping to create greater awareness of the distance seller compliance obligation with the ElektroG. Since the obligations regarding product design (Section 4 ElektroG), labelling (Section 8 ElektroG) and

[146] Ibidem.

[147] Ibidem.

[148] Ibidem.

information (Section 28 ElektroG) remain with the distance seller, their fulfilment will also improve." [149]

According to the authors, the model is in accordance with the **producer registration requirements** for EEE:

"Neither Directive 2002/96/EC nor the current WEEE Directive defines the term 'registration' or the necessary obligation to ensure registration in a Member State. According to Art. 16 (1) WEEE Directive, producers who distribute electrical and electronic equipment by means of distance communication technology must be 'registered' in the Member State which they supply. Nevertheless, according to recital 8 of the WEEE Directive, 'administrative burdens should be reduced by simplifying registration and reporting procedures and by ensuring that duplicate charges are not levied for registrations within individual Member States.' The simplified producer responsibility model, including notified online marketplaces in Member States and producers registered there, fulfils the registration requirements under the WEEE Directive. Each producer is registered in the pertinent Member State via the notified platform. The current reasoning behind the registration obligation remains unaltered, since the stiftung ear would maintain the ability to locate any producer with all relevant data in the national register. The proposed simplified producer responsibility model could even be introduced under the current WEEE Directive."[150]

Finally, an **environmentally friendly treatment** of EEE during the disposal phase would be achieved:

"Since online marketplaces are the (main) sales channels, especially for small foreign producers, payment bundling also ensures that the objective of the WEEE Directive to ensure environmentally sound treatment of electrical and electronic equipment at the end of its life is also achieved with regard to products sold via online marketplaces. The model would mean that it would no longer be compulsory for each producer/distance seller to carry out its own isolated registrations. Precisely this has proven ineffective in practice. It would not significantly reduce the number of distance sellers who fail to fulfil their obligations."[151]

3.2.3.1.2.2 The draft law for amending the ElektroG regarding a simplified producer responsibility model

The draft law regarding a simplified producer responsibility model (see also Annex A in this study) initially proposes providing a **definition for 'online marketplaces'** in a new Section 3 no. 11a ElektroG:

"'Online marketplaces' refers to digital services enabling consumers and/or entrepreneurs, within the meaning of point (a) or point (b) of Article 4 paragraph 1 of Directive 2013/11/EU of the European Parliament and of the Council, to conclude purchase or service contracts with entrepreneurs online, either via the website of an online marketplace or on the website of an entrepreneur, using computing services of the online marketplace".

A new Section 8a ElektroG is to be inserted as the **core regulation of the simplified responsibility model,** after the regulation on authorized representatives in Section 8:

"*(1) Notwithstanding the obligations under this Act, with the exception of the obligations under Sections 4, 9 and 28, notified online marketplaces shall carry out a simplified fulfilment of the producer obligations under Section 3 paragraph 9 (d). Furthermore, subject to the provisions in the following paragraphs, the simplified fulfilment of obligations shall only apply to producers who use*

[149] Ibidem.

[150] Ibidem.

[151] Ibidem.

the services of a notified online marketplace for the sale of their goods, and if the waste equipment from these producers is comparable in its nature and quantity to the waste equipment normally generated 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 Appendix 2a, points 1 and 2.

(3) Alternatively to the simplified fulfilment of obligations, producers within the meaning of Section 3 number 9 lit. (d) are free to fulfil their obligations under this Act themselves. If the producers decide to fulfil their obligations themselves, this must be communicated to the notified online marketplaces selling the producers´ goods by means of a declaration in automated electronic form.

(4) In order to simplify the fulfilment of their obligations, producers shall pay to notified online marketplaces which act on behalf of their mandating producers, pursuant to Section 3 paragraph 9 (d), an amount calculated per kilogram of electrical and electronic equipment made available on the market via the distribution channels of the online marketplace within a calendar year, to finance the collection, treatment, recovery and environmentally sound disposal of the electrical and electronic equipment provided by these producers. The competent authority shall be notified of the relevant sum per kilogram of electrical and electronic equipment at least 14 days before the first billing." [152]

Notification obligations shall be standardized in a new Section 29a ElektroG:

"Section 29a Notification obligations for simplified fulfilment of obligations

(1) In the case of Section 8a of this Act, online marketplaces shall, by 30 April of the following calendar year, inform the joint body of

1. the quantity of electrical and electronic equipment made available on the market within one calendar year via the distribution channels of the online marketplace, per equipment category

2. the quantity of electrical and electronic equipment [per equipment category] commissioned within one calendar year and returned on behalf of the producers.

(2) Has a joint body not been set up, the online marketplaces shall notify the competent authority of the data referred to in paragraph 1".[153]

A new Section 37a ElektroG is proposed, covering the **tasks required of the competent authority**:

"Section 37a Tasks of the competent authority in connection with notification in the case of simplified fulfilment of duties

Without prejudice to the provisions in Section 49 VwVfG, the competent authority can revoke a notification if a reported online marketplace does not pay the amount due pursuant to Section 8a paragraph 4 of this Act at the latest by April 30 of the following calendar year, or if a notified online marketplace repeatedly and verifiably reports that, according to Section 29a, sales figures are too low."[154]

After Section 45 no. 7, a new no. 7a should be added to the **regulations on fines,** if:

[152] Ibidem.

[153] Ibidem.

[154] Ibidem.

"*in contravention of Section 8a paragraph 2, an online marketplace does not make notification, or does not do so correctly, or does not ensure that producers who fulfil their obligations themselves in accordance with Section 8a paragraph 3 sentence 2 have notified the online marketplace of this by means of a declaration".*[155]

An appendix 2a to the ElektroG is planned to clarify the necessary information regarding the **producer declaration**:

"Information to be provided in the declaration:

1. Name and address of the online marketplace named in accordance with Section 8a paragraph 1 (postcode and town, street and house number, country, telephone and fax number, email address and details of an authorized representative),

2. National ID number of the online marketplace including the European or national tax number,

3. Device category of electrical or electronic devices according to Appendix 1,

4. Estimated quantities of products sold in a calendar year via the online marketplace, sorted by device category,

5. Contact details of the producers using the online marketplace for the simplified fulfilment of obligations according to Section 8a paragraph 1,

6. Verification declaration."[156]

The proposal only addresses **electronic marketplaces**, but not fulfilment service providers.

3.2.3.2 Discussion of the simplified producer responsibility model

3.2.3.2.1 On the legal implementation

As envisaged by the authors, the implementation of the presented model of simplified producer responsibility within the EPR system would require the **amendment of the current law**. On the whole, the proposal would not affect the producers' role and obligations:

"• Role as Producer: this is defined by the legislative landscape and is not affected by the flat fee model. For EEE and Batteries introduced on a national market directly by a marketplace, the marketplace itself is the producer and responsible in respect of EPR regulations. For products introduced by distance sellers through the marketplace, the seller is regarded as the producer. […]

• Compliance scheme role: under the flat fee model, legal obligations of joining a take-back scheme, or option to set up an individual system will remain valid and compliance scheme(s) will still play a pivotal role, organizing on behalf of their members (or clients) collection and recycling operations nation-wide."[157]

Since it is an **individual producer responsibility**, registration cannot be transferred to a collective system. A collective system cannot register on behalf of the individual producers represented therein.[158] However, an electronic marketplace operator could act as an authorised representative according to Section 8 (2) in conjunction with Section 6 (1) ElektroG. It would also be conceivable for the registration as a service to be performed by the electronic

[155] Ibidem.

[156] Ibidem.

[157] Magalini et al. (SOFIES – Solutions for Industrial Ecosystems), A Flat Fee model for EPR compliance in the context of online marketplaces, September 2019 (unpublished), p. 20 et seq.

[158] Hilf/Schleifenbaum, in Giesberts/Hilf, ElektroG, 3rd edition 2018, § 6 marginal no. 10; see also EWRN (2020), p. 4.

marketplace operator.[159] This is not the intention of the simplified producer responsibility model. Rather, the notification of an electronic marketplace and the consolidation of all producers and all quantities should not result in a producer-specific registration.

The simplified producer responsibility model would be incompatible with Section 6 (1) ElektroG if it required registration '***with the type of equipment and brand***'. This would mean the producer obligation to register is not merely a given, once and personally, but rather, poses itself anew as each new brand and type of equipment is placed on the market.[160] Under the simplified producer responsibility model, it would have to be ensured that registration is related to the type and brand of equipment, but not solely to the weight of EEE placed on the market via the electronic marketplace. This would potentially require an amendment in Section 6 ElektroG. The simplified producer responsibility model is also incompatible with Section 6 (3) ElektroG, according to which producers must state the registration number when offering products, and on invoices.

The model could also be classified as a **voluntary individual or collective take-back system** according to Section 16 (5) ElektroG. The explanatory memorandum stated that participation was obligatory for producers (referred to as 'distance sellers') which the draft law does not indicate. Section 8a (3) of the draft states that producers are free to fulfil their obligations themselves which would only need to be communicated to the notified online marketplaces. This would result in the **double voluntary nature** of the system:

On the one hand, electronic marketplaces can, but are not obliged to, register and perform the services associated with 'simplified compliance'.

On the other hand, producers offering their products via the electronic marketplace can participate in the simplified producer responsibility model, but they may also opt to fulfil the EPR obligations themselves.

Even were such distance seller obligation accepted, the question remains to what extent it would be enforceable and therefore how it could effectively prevent third-country free-riders.[161]

According to the draft, where producers fulfil obligations themselves, they must **inform** the electronic marketplace operator. The electronic marketplace operator should therefore always be informed whether the producers are fulfilling their obligations using the service of the marketplace, or on their own. The question arises as to its suitability for effectively preventing third-country free-riders. In view of the potential for abuse, simply stating a registration number without its verification by the electronic marketplace is insufficient. With regard to the comparable situation of the distributor, a higher court has already established that "*any assurances given by the producers [...] could have civil law effects at best, in relation to the secondary participants, [...] but they do not have the power to undermine the legally required market self-control via fictitious producers*".[162] This requirement of electronic marketplace operators being informed does not differ greatly from the **compulsory verification** discussed above.

The simplified producer responsibility model shows a lack of understanding of the ElektroG-provisions when proposing that it should be possible to withdraw a notification from an electronic marketplace if the latter is to pay the contributions received. The ElektroG includes an **individual producer responsibility**, holding the producer responsible for the collection and

[159] Cf. ibidem, marginal no. 11.

[160] Ibidem, marginal no. 13; see also BVerwG, Judgment of 15 April 2010 - 7 C 9/09 -, juris, key statement 1.

[161] For the legal issues, see below under 3.3.1.1.1.3.

[162] OLG Naumburg, Decision of 2 September 2010 - 1 Ss (B) 100/09 -, p. 14.

disposal of WEEE, collected at public waste disposal authorities. The stiftung ear assigns the producers the relevant collection orders. For this service, no money will be collected by stiftung ear. These structures would also have to be adapted, in order to implement the model, which would mean a renunciation of the ElektroG's basic approach.

Furthermore, **competition law restrictions** such as the prohibition of anticompetitive agreements under Art. 101 TFEU or Section 1 Competition Act (GWB)[163] must be observed.[164] Such restrictions could not be ruled out if an electronic marketplace operator, as service provider under a simplified producer responsibility model, were to achieve a dominant position within the meaning of Section 18 GWB.

Art. 16 WEEE Directive presupposes a producer-related registration obligation, which, according to Annex X Part A in conjunction with the Commission Implementing Regulation (EU) 2019/290,[165] requires information as to the category, type ('household or other than household equipment') and brand name of the EEE. Collective registration is not envisaged here. Implementing the model would also require **changing the registration system at Union level**. However, the implementing regulation should already provide for harmonisation.

The producer notification in accordance with Section 4 (1) **BattG** applies similarly. Pursuant to Section 2 BattGDV, the type of batteries must be indicated, i.e. whether they are vehicle batteries, industrial or portable batteries.[166] A purely collective notification would be insufficient. For registration according to Art. 17 Annex IV Batteries Directive, "*indication on the type of batteries and accumulators placed on the market by the producer*" is required.

Pursuant to Section 9 (2) no. 4 **VerpackG**, registration of packaging requires, inter alia, the indication of *"brand names under which the producer puts into circulation its packaging requiring system participation*". This would not be the intention of a collective registration, which aims to render such information superfluous. Furthermore, under Section 33 (2) VerpackG, registration may not be transferred to designated third parties.

The proposal to insert a separate provision on **fines** in a new Section 45 no. 7a ElektroG only applies to `notified online marketplaces´, allowing electronic marketplaces the ability to alter their status. Occupying the status of a "notified online marketplace" is however a prerequisite for applying the simplified producer responsibility model. In view of the voluntary nature of the instrument described above, sanctioning the notified online marketplace in accordance with the proposed Section 8a (2) ElektroG if it "*does not or not properly report*", cannot guarantee effective prevention of third-country free-riders. A further reason for this being insufficient is the unreliability of a producer´s own declaration which has not been verified externally. 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 pursuant to Section 8a (3) sent. 2 have notified the online marketplace of this by means of a declaration*".

Implementation of the model would therefore require substantial changes to the registration system and the system of producer responsibility under the ElektroG, the BattG and the VerpackG.

[163] Act against Restraints of Competition in the version published on 26 June 2013 (Federal Law Gazette I, 2013, p. 1750, 3245), as last amended by Article 10 of the Act of 12 July 2018 (Federal Law Gazette I, p. 1151).

[164] See Giesberts, in Giesberts/Hilf, ElektroG, 3rd edition 2018, § 16 marginal no. 23.

[165] Commission Implementing Regulation (EU) 2019/290 of 19 February 2019 establishing the format for registration and reporting of producers of electrical and electronic equipment to the register, Official Journal of the EU L 48 of 20 February 2019, p. 6.

[166] See Section 2 (4) and (6) BattG.

3.2.3.2.2 The model's suitability

Simplified compliance with the obligations offers **benefits** for producers trading via electronic marketplaces. First and foremost, as the name of the model suggests, the producer is `relieved´ of his individual registration and disposal obligations by transferring these to the electronic marketplace operator for a fee. Producers need only provide the electronic marketplace operator with the relevant information, then, having broken the reported quantities down according to the necessary categories, the operator would forward these to the stiftung ear.

This would not be without considerable **disadvantages**.[167] The model does not cover a registration allowing the identification of the individual producer with the brands and types of equipment intended for placement on the market. Competitors (not only those offering via the electronic marketplace, but also all others) and enforcement authorities would no longer be able to recognize in the register which brands and types of equipment could be assigned to which producer. Despite making the model simpler than the previous registration system, the **lack of transparency** incapacitates the publicly visible register, which is indispensable for market self-regulation and for sanctions against free-riders. According to Art. 16 (1) and (2) WEEE Directive, the main purpose of producer registration and the publication of the register or list of producers is market transparency, which serves not only the competent authorities, but explicitly also the market participants, in order to make market self-regulation possible and useful. A simplified producer responsibility model would not be used by all online sellers, and it would undermine this transparency to the extent that, instead of individual producers, the electronic marketplaces would be registered. In particular it would no longer be possible to attribute brands and types of equipment to the respective producers, nor could it be determined whether the producers had met their obligations to the necessary extent.

Furthermore, the simplified producer responsibility model with a proposed annual quantity notification contradicts the previous **collection coordination system**, which is based on a monthly quantity notification.

Other than with compulsory verification, the model does not fully comply with the **extended producer responsibility concept based on the polluter-pays-principle**. The costs of the actual disposal of WEEE would not be borne directly by the party with an influence on the ecologically important product design, and the electronic marketplace operator would distribute the total disposal costs on a flat-rate basis according to its own key.

The problems outlined above could be circumvented if the electronic marketplace operator were to register under the existing law as an **authorized representative**, instead of implementing the simplified producer responsibility model. The legal figure of the authorised representative offers third-country producers sufficient support, as they are only obliged to appoint an authorised representative, without the mandatory requirement of being seated in the country of destination for the electrical or electronic equipment. The role of the authorised representative also means that command of the German language is not a prerequisite for the producer seated in a third-country.[168]

Due to its voluntary nature, both in terms of whether the market place offers the simplified producer responsibility model, and the producer chooses the model when drafting the contract, or the lack of an obligation to exclude producers from the market place, the model is **not suitable for preventing third-country free-riders**. The registration obligations would still not

[167] Regarding the following see EWRN (2020), p. 4 et seq.

[168] Cf. EWRN (2020), p. 4: "*Online platforms deny the authorised representative solution as defined in the WEEE2 because they do not want to register and report according to the WEEE2 like any other compliant producer and authorised representative in the EU today has to.*"

be complied with by those responsible in third countries, nor would the model solve the problem of discrimination against nationals. The aim of encouraging foreign producers to act in conformity with the law would therefore not be achieved.

The model aims solely at electronic marketplace operators and not at **fulfilment service providers**. Nor are the **BattG** and the **VerpackG** with their notification and registration obligations, including further disposal obligations, covered by the proposal.

The author of the simplified producer responsibility model further argues that this could reduce registration costs. This would also apply regarding **bureaucratic costs** arising from the previously discussed compulsory verification. However, were all electronic marketplace operators to fall under compulsory verification, the larger volume of registration processes and data to be processed would lead to cost-reducing **economies of scale**. If all producers complied with registration obligations based on electronic marketplace operators´ compulsory verification, registration costs would fall overall. The authorities responsible for registration and notification – stiftung ear, ZSVR and the German Environment Agency - have prepared for such procedures.

The simplified producer responsibility model would also involve some technical, organisational, personnel and, ultimately, financial **effort** on the part of the electronic marketplace operators. Were the model accepted by the producers, this expenditure could be compensated for by levying a fee, and a return on investment might also be conceivable. First, however, the electronic marketplace operator would have to make an advance payment, the model would have to be advertised and the customers – i.e. the producers – would have to be convinced. In addition to which, a take-back system for WEEE, spent batteries and accumulators and packaging waste would need to be established. Since the system would be voluntary for producers, it would have to prevail in competition, and there is both a risk of failure and of considerable losses. The simplified producer responsibility model could only be offered by very **large market players** able to cope with such risks. This would pose a disadvantage to smaller suppliers and lead to distortions of competition – with the above-mentioned consequences for competition law.

3.2.3.3 Interim results

Regardless of potentially grave (constitutional) legal problems requiring more than simple amendments,[169] the simplified producer responsibility model would **not be expedient to solving the third-country free-rider problem.** It would not only render the register non-transparent but would also exert a negative impact on the polluter-pays collection coordination of waste electrical and electronic equipment. It could only be offered by very **large market players** and would in all likelihood increase their market power.

3.2.4 Standardisation of definitions and registration procedures

In practice, one and the same delivery in e-commerce falls regularly under all **three listed regulatory regimes**. For example, a commercially available laptop is made up of not only the device as such (electronic equipment, Section 3 no. 1 ElektroG), but also contains an

[169] See also the evaluation of the model by Hogg et al. (2020), p. 156: "• Some sellers will already be registered and may therefore pay two sets of fees, once accurately through their own registration and once as an approximation through a flat rate platform charge; • The flat rate charge will result in cross-subsidy between categories and no proper representation of eco-modulation factors; • It doesn't allow for a Visible Fee to be shown for EEE; and • It does nothing towards take back, unless part of the flat fee helps to subsidise municipality collection or bricks and mortar take back. • Proving this service to its operators, something probably only large platforms with specific knowledge could design, would risk creating an advantage for certain platforms compared to others and contribute to tying the customer to that platform for convenience."; similar EWRN (2020), p. 4, calling the model a "Lex-online platforms".

accumulator (rechargeable secondary cell) – Section 2 (2) BattG –, and the device is finally packaged for transport and delivery (e.g. sales and shipping packaging - Section 3 (1) VerpackG). Producers must register with or notify three different bodies: stiftung ear for EEE, ZSVR for packaging, and the German Environment Agency under Section 4 (1) BattG for batteries.

3.2.4.1 Definitions of terms

Bringing all three areas under a single legal framework has already been proposed, as far as the **producer definition** is concerned:

"Policymakers should consider making batteries, packaging and WEEE subject to the same legislative framework as far as the definition of 'producer' is concerned and amend the Blue Guide. Many businesses are subject to all three laws, and divergence in legal definitions creates unnecessary and costly confusion."[170]

As shown above, although the producer definitions in the ElektroG, the BattG and the VerpackG are largely identical,[171] the definition in Section 3 (9) ElektroG is far more detailed, for example, than either that in Section 2 (15) BattG or in Section 3 (14) VerpackG. It would therefore be appropriate to **harmonise** the producer definitions. It should however be noted that the requirements for a producer definition vary according to the product's provenance. For instance, under the VerpackG, a distinction must be made between packaging, subject to system participation, and other packaging – only producers of the former are subject to registration obligations under Section 9 (1) VerpackG.[172] There are also specific requirements with regard to the term 'producer' in relation to batteries in the BattG, e.g. the legal fiction of import as 'placing on the market'. These differences clearly demonstrate that an identical definition of the term 'producer' for all areas would not be practicable. Nevertheless, Section 3 no. 9 ElektroG for example contains precise differentiation between producers of EEE in its referral to producers from other EU countries or from third countries, or even to the use of distance communication. Such differentiations cannot be found in the BattG. According to Section 3 (14) sent. 2 VerpackG, whoever imports packaging into Germany on a commercial basis is deemed to be a producer. In the light of these differentiation criteria it is clear that a more detailed examination into potential harmonisation is required, thereby preserving specific features of the individual areas of the law. The definitions within the three laws are based on EU directives which is why standardisation should also be addressed at **EU level**.

It has already been explained above that separate definitions for electronic marketplace operators and fulfilment service providers should be included in the three laws.[173]

3.2.4.2 Procedural requirements

Procedural requirements for **registration (or notification)** could also be harmonised. So far, these requirements differ on several points. According to Section 8 (1) ElektroG, producers from abroad – including non-EU countries – must designate an authorised representative. No distinction is made between producers from other EU and non-EU countries. By contrast, Section 4 BattG does not provide for an authorisation, nor does the rule on registration under Section 9 VerpackG contain any such authorisation. Under Section 33 VerpackG, producers may appoint third parties to fulfil a few of their obligations, but expressly not for registration under Section 9 VerpackG. The terms of the draft amendment to the BattG, submitted by the Federal Ministry for

[170] WEEE-Forum, Successfully countering online free-riders, April 2019, p. 5.

[171] See also above under 2.2.

[172] See above under 2.2.

[173] See above under 3.2.1.1.3.

the Environment, Nature Conservation and Nuclear Safety (BMU), allow in Section 24 (2) producers without an office registered in Germany to appoint an authorized representative to carry out their producer obligations. This is similar to Section 8 ElektroG which requires them to do so.

Although a trend towards harmonisation is discernible with regard to the participation of authorised representatives, a synchronisation of procedures is not yet in sight.

In place of the previous notification requirement, according to this draft bill, the **BattG** will contain a registration requirement, the implementation of which can be handed over to stiftung ear (Section 21 of the draft bill). A synchronization with the ElektroG would thereby be achieved, not only in terms of procedure, but also in terms of responsibility. Under both ElektroG and BattG, the direct contact for producers would then be stiftung ear. ZSVR would not be included here but would remain solely responsible for the registration of packaging requiring system participation. Supervision for all three areas would remain with the German Environment Agency as the competent authority (Sections 29 (1) VerpackG, 22 BattG-draft, 41 ElektroG). A joint registration body for all three areas would hardly be practicable since the VerpackG's broad scope of application, under Section 2 (1), covers '*all packaging*' and thus goes far beyond packaging for EEE and batteries.

3.2.4.3 European Union law level

The division into the sectors of EEE, batteries and packaging is already stipulated in EU-secondary legislation. Partly owing to the asynchronous nature of the directives concerned, there are no uniform definitions or procedural rules. First, the Packaging Directive was issued in 1994, then the first WEEE Directive in 2002,[174] the Batteries Directive in 2006, and, in 2012 the amended WEEE Directive. The directives were then transposed into national law in the same asynchronous manner. In Germany, the political principle of 1:1 implementation applies.[175] This has also hampered efforts to unify the three areas.

On the one hand, harmonisation is desirable between the WEEE Directive, Batteries Directive and Packaging Directive, and implementation by the EU Member States on the other. At Union level, the approach of a **single electronic producer registry** goes furthest. The idea of a central register for EE-equipment was mentioned by Hilton et al (2019):

"Governments could require the development of a single electronic register of producers for each jurisdiction, to be published on the competent authority's website".[176]

With the above-described harmonisation at EU level, these requirements were partially met. They should:

"Require a single electronic register of producers for each jurisdiction and publish it on the competent authority's website along with a form to report unregistered producers. The trading name of the website should be required for registration, as well as the legal entity's name. The aim would be to simplify the checking of registrations for enforcement authorities and to enable checking by legitimate producers."[177]

[174] Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE) - Joint declaration of the European Parliament, the Council and the Commission relating to Article 9, Official Journal of the EU L 03 of 13 February 2003, p. 24.

[175] See for example coalition agreement between CDU, CSU and SPD, 19th legislative period, 2018, p. 56, available at https://www.bundesregierung.de/resource/blob/975226/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1 (7 July 2020).

[176] Hilton et al. (2019), p. 9.

[177] Hilton et al. (2019), p. 47 et seq.

A more far-reaching proposal for a **single registration platform** at European level would have the advantage that producers would only need to turn to one body for registration throughout the Union. To this purpose, a new authority could be created at EU level. To-date, producers are required to register separately with each Member State and for each of the three sectors –EEE, batteries and packaging. Effort and costs could be reduced significantly by creating a 'one-stop-agency'. This could have the knock-on effect of reducing the free rider problem.

A European centralisation of registrations for all three sectors – EEE, batteries and packaging – would also have **disadvantages** however. Collections and their burden-sharing, together with quantity declarations, would remain under national remit. The resulting intensive cooperation between the European registration agency and the national authorities could lead to communication and enforcement problems. A slackening of enforcement could also have the opposite effect and encourage rather than reduce the free-rider problem. These problems make it doubtful, also in view of the subsidiarity principle of Article 5 (3) TEU, whether in fact a uniform, EU-wide registration with a central bureaucracy would be preferable to the existing Member State competence.

Within the framework of EWEN, efforts are being made to achieve **uniformity in administrative execution**.[178] Proposals for harmonising the regulations on registration internationally, or at least at European level, go further. They should:

"Establish a harmonised framework for registration across a wide range of countries/territories. At present, several hundreds of diverging national EEE categories exist which add unnecessary layers of complexity and administrative burden. Harmonising the format and product coding used would simplify compliance procedures and hence reduce the administrative burden for producers."[179]

This proposal was explicitly referred to by Hilton et al (2019) as a possible short term measure. It only covers the registration of EEE, but not batteries and packaging. For EEE, Art. 16 (3) WEEE Directive provides for the adoption of implementing acts, "*establishing the format for registration and reporting and the frequency of reporting to the register*." Such implementing regulation was adopted in 2019, providing a common format for registration.[180] The recitals refer to the necessity of, "a *harmonised data structure and format for the registration and reporting of producers of electrical and electronic equipment (EEE) for all Member States*" to "*reduce the administrative burden for producers operating at Union level or at the level of several Member States*".[181]

"To harmonise the practices applied by the Member States for registration and reporting, the format for registration and reporting should be used by all producers, including producers supplying EEE by means of distance communication or, where appointed, by authorised representatives, and by all registers drawn up in the Member States pursuant to Article 16(1) of Directive 2012/19/EU."[182]

Appendix I specifies the "*format for registration in a Member State*". Among other things, it requires information on '*distance selling*':

[178] See https://www.umweltbundesamt.de/sites/default/files/medien/3521/dokumente/weee_complaint_form.pdf, but also the website of European WEEE Registers Network (EWRN), under https://www.ewrn.org/ (7 July 2020).

[179] Hilton et al. (2019), p. 48.

[180] Commission Implementing Regulation (EU) 2019/290 of 19 February 2019 establishing the format for registration and reporting of producers of electrical and electronic equipment to the register, Official Journal of the EU L 48 of 20 February 2019, p. 6.

[181] Recital 1 of the Implementing Regulation.

[182] Recital 2 of the Implementing Regulation.

"The producer established in the Member State shall indicate if, at the time of registration, it also sells EEE by means of distance communication directly to private households or to users other than private households in another Member State."

Further, information is required regarding a

"List of Member State(s) in which the producer sells EEE by distance selling",

as well as the

"Name of the authorised representative in the Member State(s) in which the producer sells EEE by distance selling".

Germany welcomed the draft in general, but made some suggestions for improvement:

"Germany welcomes the revised Draft Implementing Regulation establishing a format for registration and reporting of producers of electrical and electronic equipment and the frequency of reporting to the register in general. Nevertheless, we have some comments on the revised Draft we would like to address to the European Commission".[183]

The Commission however, rejected the **German proposal** to delete the registration format of a list of the Member States in which producers offer distance selling:

"3.2 The rows 'List of Member State(s) in which the producer sells EEE by distance selling technique' and 'Name of the authorized representative in the Member State(s) in which the producer sells EEE by distance selling' under the point 'Distance selling' should be deleted.

Art. 16 (1) (2) clearly states that producers supplying EEE by means of distance communication shall be registered in the Member State that they sell to. The information request relating to sold EEE in another Member State cannot form part of the information to be submitted in the Member State. This information request would also discriminate those producers that need to be registered in the Member State that they sell from (for placing EEE on the market of that Member State) against those producers that sell EEE to another Member State only and thus do not need to be registered in the Member State that they sell from at all.

Furthermore, such an information request to those producers would double the administrative burden by obliging the producers to register in the Member State that they sell to and keeping up to date the register in the Member State that they sell from. Such provision would not be in line with Recital 1."[184]

Electronic marketplaces are not provided for in this registration format, nor are fulfilment service providers.

A **uniform EU-wide registration format** would be equally important for the Batteries Directive or the BattG, and the electrical and electronic equipment. Recital 8 of the Batteries Directive suggests a harmonisation with the registration format pursuant to the WEEE Directive:

"Wherever appropriate, the producer registration requirements and format should be coherent with regard to the registration rules and format established pursuant to Article 16(3) of, and Part A of Annex X to Directive 2012/19/EU of the European Parliament and of the Council".

According to Art. 27 (4) WFD, amended in 2018, provision is made for the harmonisation of registration in accordance with Art. 38a through delegated acts. With reference to Art. 26 a and b WFD, this only applies to the commercial transport of waste and to dealers and brokers of

[183] Dasenbrock, Feedback from: Federal Government of Germany, 7 March 2018, under: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-754618/feedback/F9666_pt?p_id=170243 (7 July 2020).

[184] Ibidem.

waste, but not to registration under extended producer responsibility. No comparable harmonisation is envisaged for packaging according to the Packaging Directive either.

3.2.4.4 Interim results

Standardisation of definitions in the ElektroG, BattG and VerpackG is possible, but the specifics of the individual items must be considered. **Harmonisation of procedural law** has already begun, e.g. through the option of appointing authorised representatives under the draft amendment to the BattG, but further harmonisation is conceivable. At EU-level, a **European central register** could facilitate the registration of producers or authorised representatives concerned, but it could also create friction and might not solve the free-rider problem. **Uniform registration requirements** in all Member States, as already established by the Commission Implementing Regulation for the EEE sector, could be transferred to other sectors where appropriate.

3.2.5 Import ban on products of unregistered/non-notified producers

3.2.5.1 Order of an import ban

As a **regulatory, repressive measure**, an import ban on non-registration/notification of products under the ElektroG, the BattG and the VerpackG could be considered. An import ban would go beyond the **ban on placing products on the market**. This ban on placing products without or with incorrect registration/notification already exists under, for example, Section 6 (2) ElektroG, Section 9 (5) VerpackG and Section 3 (3) BattG. Import bans are not expressly provided for in the **ElektroG, VerpackG and BattG**. According to Section 3 No. 9c ElektroG, a producer is also whoever "*offers on the market, within the scope of this Act, electrical and electronic equipment originating from another Member State of the European Union or from a third-country for the first time*". Under Section 3 (14) (2) VerpackG, a producer is deemed to be anyone who imports packaging commercially into the area covered by the Act. Further, according to Section 2 (16) sent. 2 BattG, commercial import constitutes placing on the market. The importer falls hereby under the term 'producer'. On the other hand, the combination of Section 2 (16) sent. 2 and Section 3 (3) BattG suggests the existence of an import ban, whereby placing any product on the market renders imposing a levy irrelevant. An import ban can only be implemented in conjunction with an individual order. The existing regulations alone do not suffice.

Regarding the **ElektroG**, an import ban could be imposed on the basis of Section 62 KrWG. This provision must be applied pursuant to Section 2 (3) sent. 2 ElektroG. Section 62 KrWG states that

"the competent authority [...][can] in individual cases order necessary measures for the implementation of this Act and the ordinances issued on the basis of this Act."

The orders must serve the implementation of the ElektroG and only contain requirements already present in the ElektroG.[185] As described above, the ElektroG does not contain a legal ban on the import of EEE from non-registered producers. It is therefore doubtful whether an import ban can be imposed if producers are not or are not properly registered.

According to Section 2 (2) sent. 2 **VerpackG**, Section 62 KrWG applies to administrative orders. As in the case of the ElektroG, it is doubtful whether such an order would be lawful in view of the import ban not being stipulated in the VerpackG expressly. Under Section 21 (2) **BattG,** enforcement is stipulated via application of Section 62 KrWG. The provisions of Section 2 (16)

[185] Hilf/Schleifenbaum, in Giesberts/Hilf, ElektroG, 3rd edition 2018, § 2 marginal no. 64.

sent. 2 in conjunction with Section 3 (3) BattG already provide a legal basis for the application of Section 62 KrWG.

For legal import bans to be established explicitly, the ElektroG and VerpackG would need to be altered. The BattG could also be amended to clarify any admissibility of an import ban. The three Acts could therefore each include an import ban for the eventuality of failure to register or improper registration and give the **competent authority special power** to order such an import ban.

However, unlike the previous proposals, the import ban discussed here would not be directed at the new players. i.e. 'electronic marketplace operator' and 'fulfilment service provider', but at **third-country producers**. To date, it is not yet possible to enforce existing traffic bans against producers established in third countries. Recourse to an administrative order would not solve this problem. The suitability of legal import bans in the ElektroG, VerpackG and BattG is therefore questionable. It should also be examined whether the introduction of statutory import bans, in combination with the provisions of the Market Surveillance Regulation, could solve the third-country free-rider problem. It would for instance be conceivable to base import bans on the intervention powers under Article 14 et seq. of the future Market Surveillance Regulation. As a glance at the catalogue of "*corrective actions*" in Article 16 (3) Market Surveillance Regulation reveals, these are mainly preventive measures. They would not constitute an import ban. Where necessary, an import ban could be considered via sanctions to be determined by the Member States under Article 41 Market Surveillance Regulation. The previously described route via the ElektroG, BattG and VerpackG would however be more appropriate.

Import bans could possibly be based on Article 26 **Market Surveillance Regulation** (suspension of release for free circulation). This allows the competent authorities to suspend the release of a product for free circulation where the accompanying documentation has been found to be incorrect or incomplete, where a CE-marking has been affixed in a misleading manner, or contact details are incorrect or "*for any other reason, when there is cause to believe that the product does not comply with the Union law applicable to it*". Were Article 26 here relevant, the products in question could already be stopped by customs at the border, the market surveillance authorities would be informed, who would then decide whether the products should be released for free circulation, returned or destroyed. The legal opinion represented in this report holds that Art. 26 Market Surveillance Regulation is not applicable since it deals with the products, whereas product responsibility regulations focus on the producer.

3.2.5.2 Improving cooperation with customs authorities through expanding and employing the ATLAS system

A potential import ban for products not registered in accordance with ElektroG, BattG or VerpackG, and cooperation with customs offices stand in close connection. This would apply in particular were contrary to the view expressed above, [186] Art. 26 Market Surveillance Regulation considered the relevant norm for an import ban.

To this end, the customs authorities would need to be informed of the import bans described above. The **ATLAS system** (Automatisiertes Tarif- und Lokales Zollabwicklungssystem – Automated Tariff and Local Customs Clearance System), an IT procedure ensuring automated

[186] See above under 3.2.5.1.

clearance and monitoring of cross-border goods traffic, should be used for this purpose.[187] According to Art. 6 (1) Union Customs Code (UCC) [188]

"all exchanges of information, such as declarations, applications or decisions, between customs authorities and between economic operators and customs authorities, and the storage of such information, as required under the customs legislation, shall be made using electronic data-processing techniques".

Art. 278 et seq. UCC requires the electronic systems to be developed and defined by the end of 2020. The formats and codes for the common data requirements result from Art. 2 of the Implementing Regulation (EU) 2015/2447.[189] The Union Customs Code (UCC) provides the larger framework here.

ATLAS provides a system for "*electronically processing declarations for the movement of goods and their subsequent placing under a customs procedure and administrative acts*". Participants can register declarations etc. electronically and send them to the customs office.[190] The ATLAS-import IT procedure, with the summary declaration (SumA) used at all sea and airport customs offices as well as inland and border customs offices, enables monitoring, seizure and securing of goods.[191]

Such a customs monitoring system would need to be linked to controlling EPR-obligations. Whether and to what extent this would be feasible in practice, or what possible technical, organisational or other obstacles might present themselves, cannot be further examined here. From a legal perspective, WTO conformity and compatibility with EU requirements, such as the fundamental freedoms of the internal market and fundamental rights need to be examined.[192]

3.2.5.3 Interim results

The ElektroG and the VerpackG would have to be amended if a legal establishment of import bans is to be achieved. Clarification is also recommended for the BattG, since an import ban can only be reached via the norm chain in Sections 3 (3), 2 (16) sent. 2 BattG. To be enforceable, such a ban would require an individual order through a state-authority administrative act. Import bans would be inadequate for an effective prevention of third-country free-riders since administrative acts cannot be enforced in the third countries. As a legal basis, Section 62 KrWG would be appropriate.

Relying on Art. 26 **Market Surveillance Regulation** would be unsuitable because it is linked to the products but not, as in the EPR-context, to the producers. Were Article 26 Market Surveillance Regulation considered applicable, the **customs monitoring system ATLAS** could be employed, although this system is so far only designed to monitor customs payments, without dealing with registration obligations.

[187] See: https://www.zoll.de/DE/Fachthemen/Zoelle/ATLAS/atlas_node.html (7 July 2020).

[188] Regulation (EU) No 952/2013 of 9 October 2013 laying down the Union Customs Code (recast), Official Journal of the EU L 269 of 10 October 2013, p. 1.

[189] Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, Official Journal of the EU L 343 of 29 December 2015, p. 558.

[190] See https://www.zoll.de/DE/Fachthemen/Zoelle/ATLAS/ATLAS-Allgemein/Grundlegende-Informationen/grundlegende-informationen_node.html (7 July 2020).

[191] See https://www.zoll.de/DE/Fachthemen/Zoelle/ATLAS/ATLAS-Einfuhr/IT-Verfahren-ATLAS-Einfuhr/it_verfahren_atlas_einfuhr_node.html (7 July 2020).

[192] See below in Chapter 3.3.

3.2.6 Stronger and uniform involvement of authorised representatives in the registration procedure

3.2.6.1 Current legal situation

As explained above, authorised representatives (AR) play a central role in the **registration process** for EEE.[193] Hilton et al (2019) stress their importance, especially with regard to third countries like China:

"An AR can be helpful, however, in terms of supporting overseas sellers to do the right thing, particularly where they can act across several countries, and it has been pointed out that some ARs have been proactive in seeking clients in other countries including China. In this sense the ARs are taking on an awareness-raising role, for business reasons, that may otherwise fall to regulators. It is also pointed out, however, that some EU Member States have few if any ARs as the role can involve taking on liabilities, which can be risky if overseas sellers do not comply in providing data."[194]

A distinction must be made between authorization and the **commissioning of third parties**. Commissioning only concerns the representative implementation of the producer's obligations, which remain with the producer for the most part. The commissioning of third parties is essentially the same for the three relevant laws. Section 43 ElektroG refers to the corresponding basic norm in Section 22 sent. 2 and 3 KrWG. The same applies for Sections 19 BattG and Section 33 VerpackG. Under Section 33 sent. 2 VerpackG, however, this does not apply to registration and data notification according to Section 9 VerpackG. This duty lies with the producer personally. The reasons given are as follows:

"Pursuant to Sentence 2, the registration in accordance with Section 9 and the data reports in accordance with Section 10 are excluded from the possibility of commissioning third parties. These declarations are to be made in person so that the obliged parties are made aware of the significance of such legal requirements, thereby avoiding the risk that involved third parties might make incorrect statements carelessly."[195]

Authorisation, on the other hand, would **replace the producer's obligations**, which no longer apply when duly fulfilled by an authorised representative. Section 3 no. 10 ElektroG defines the authorised representative as the person authorised to carry out, on their own behalf, all tasks incumbent on the producer. They are therefore neither comparable to a simple representative, acting on behalf of a third party, nor with the third-party representative, pursuant to Section 43 ElektroG, but are themselves personally obliged.[196]

It must be noted that the legal situations under the ElektroG, the BattG and the VerpackG are not consistent with each other. The **ElektroG** goes furthest. Section 8 (2) ElektroG, for example, requires producers within the meaning of Section 3 no. 9d (i.e. those who offer EEE directly to end-users via means of distance communication and are established outside Germany) to appoint an authorised representative. Pursuant to Section 6 (1) ElektroG, the authorised representative must then register with the responsible authority and name the type of equipment and brand. With this step, they take the place of the producer. To date, the **BattG**

[193] See above under 2.2.

[194] Hilton et al. (2019), p. 33.

[195] Draft law of the Federal Government, draft of a law for the further development of the near-household separate collection of waste containing valuable substances, Bundestag Document 18/11274 of 22 February 2017, p. 135.

[196] Hilf/Schleifenbaum, in Giesberts/Hilf, ElektroG, 3rd edition 2018, § 2 marginal no. 67.

does not provide for authorization at all. The working draft for the BattG-amendment,[197] implementing European law requirements from Art. 1 no. 9 Directive (EU) 2018/851, contains an addition to the previous authorisation regulation in Section 19 (new: Section 24) in paragraph 2, allowing authorisation for producers not established in Germany. Each producer may appoint one authorised representative only. Authorisation is not envisaged in the **VerpackG**. The current draft bill to amend the VerpackG does not provide such authorisation either.[198]

The creation of authorised representatives has been **criticised**. Hilton et al (2019) refer mainly to the additional costs involved:

"Some stakeholders view the Authorised Representatives (ARs) as an unnecessary additional layer of administration where there is one or several existing and strong PROs (which can also take on the role of AR). In many countries the risk of taking over responsibilities not only for WEEE registration and reporting, but also for complying with technical standards (e.g. ROHS), marking and information requirements, is relatively high as the AR has to bear any fines for non-compliance in the first instance. This leads to relatively high service fees for the AR and is therefore especially a hindrance for smaller online sellers."[199]

As yet, no study has been made concerning the **achievement of objectives**. It cannot therefore be decided whether the establishment of authorised representatives in the WEEE directive has actually improved foreign producer registration or not.

It remains to be noted that the regulations on authorised representatives differ greatly.

3.2.6.2 Considerations for changing the applicable law

Standardization seems advisable for reasons of practicability and transparency. This is also supported by legal reasons. According to the minimum requirements for extended producer responsibility in the new Art. 8a (5) subparagraphs 3 and 4 WFD, in future, Member States must enable producers abroad to appoint domestic representatives who will fulfil the producers' obligations:

"Each Member State shall allow the producers of products established in another Member State and placing products on its territory to appoint a legal or natural person established on its territory as an authorised representative for the purposes of fulfilling the obligations of a producer related to extended producer responsibility schemes on its territory.

For the purposes of monitoring and verifying compliance with the obligations of the producer of the product in relation to extended producer responsibility schemes, Member States may lay down requirements, such as registration, information and reporting requirements, to be met by a legal or natural person to be appointed as an authorised representative on their territory."

Since the VerpackG comes under the Waste Framework Directive regime, in future, appointing an **authorised representative** must also be enabled there.

Art. 8a (5) subpara. 4 WFD declares it sufficient for the commissioning of an authorised representative to be an option for producers; the national legislature is not responsible for

[197] Working draft of the Federal Ministry for the Environment of a new BattG, available at https://www.batteriegesetz.de/bmu-stellt-arbeitsentwurf-eines-neuen-battg-vor/ (7 July 2020).

[198] This only concerns the ban on light plastic carrier bags, see the draft bill of the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, draft of a first law amending the Packaging Act, status: 05 September 2019, https://www.bmu.de/gesetz/referentenentwurf-eines-ersten-gesetzes-zur-aenderung-des-verpackungsgesetzes/ (7 July 2020).

[199] Hilton et al. (2019), p. 33.

imposing an obligation. This corresponds to the above-mentioned draft amendment to the BattG. An alignment of the guidelines was welcomed by the German Environment Agency:

"Harmonisation of all guidelines regarding the mandatory requirement to allow an authorised representative to fulfill producer responsibility in other Member States, is a step in the right direction with regard to cross-border goods traffic and associated producer responsibility."[200]

The German Environment Agency was right to criticize the non-provision of a **definition of the authorised representative** in the amended Waste Framework Directive, and the lack of "*requirements to be enforced in practice regarding authorised representatives and financial security for ensuring producer responsibility obligations*".[201] Such regulations applying to the whole area of extended producer responsibility, could encourage harmonisation of the varying Member State laws and decrees and greatly facilitate the appointment of authorised representatives.

An **obligation to appoint an authorised representative** applying to all sectors throughout the Union, where a producer is established either in another Member State or in a third-country, should be considered as an extension to the Waste Framework Directive requirements. The ElektroG authorisation system laid down in Art. 17 WEEE Directive,[202] could be used as a model. This instrument´s effectiveness would require examination in greater detail prior to any pertinent amendment.

The European WEEE-sanctioning bodies are currently finishing a **guidance document** in English as part of an IMPEL project,[203] concerning the authorisation requirements applicable in the Member States. The report is expected to be published in summer 2020.

3.2.6.3 Interim results

The legal situation so far, regarding the **appointment of authorised representatives**, differs between the ElektroG (where this is obligatory in cases of foreign producers), the BattG (where its introduction as an option is still a draft amendment) and the VerpackG (where it is not yet possible). On the other hand, the new Art. 8a (5) subparas. 3 and 4 **Waste Framework Directive** requires Member States to allow producers established abroad to appoint an authorised representative established in Germany. This will also apply to the BattG and the VerpackG. A definition of an authorised representative would also be helpful in the Waste Framework Directive.

3.2.7 Information tools

Informational instruments can be used as 'soft' measures to support effective EPR-obligations enforcement. These should be employed in addition to the regulatory requirements discussed above rather than as an alternative. Garnering appropriate, transparent and comprehensible information for producers, especially those from third countries, is an essential tool for **curbing the free-rider problem**. A distinction must be made between information provided by the competent authorities and that provided by electronic marketplace operators, or where appropriate, fulfilment service providers.

[200] German Environment Agency, European Closed Substance Cycle Waste Management Package - Revision of the Legislative Proposal, as of 18 April 2018, p. 4, https://www.umweltbundesamt.de/sites/default/files/medien/479/dokumente/bewertung_eu-richtlinien_abfall_stand_18.4.18.pdf (7 July 2020).

[201] Ibidem.

[202] See above under 2.4.

[203] IMPEL – Implementation and Enforcement of Environmental Law, see under https://www.impel.eu/projects/implementation-of-the-weee-directive/ (7 July 2020).

3.2.7.1 Information obligations of the responsible bodies

Current laws already cover information requirements for the various competent authorities. For example, under Section 31 (1) sent. 3 ElektroG, the joint body must inform "*in a suitable manner, the [...] producers or in the case of authorisation under Section 8 their authorised representatives, distributors, owners subject to waste disposal, [...] and end users, of the tasks and obligations arising from this Act*". This **obligation to inform** addresses stiftung ear as the joint body, which can charge the competent authority for the costs of this task (in the current situation itself, as the competent authority) in accordance with Section 33 (3) sent. 1 ElektroG.[204] Section 26 (2) no. 7 VerpackG lays down information ZSVR obligations which "*in its area of responsibility, must inform those obliged under this Act and the public in a relevant and appropriate manner*". No comparable requirements for the competent German Environment Agency can be found in the BattG, or even in the draft bill to amend it.

It must therefore be asked whether such information obligations vis-à-vis producers, particularly with regard to registration obligations, should be enshrined in law and further specified. It would at least make sense to standardise a **general information obligation**, as has been done in the ElektroG. In view of the fact that these regulations often relate to one and the same product consisting for example of a laptop, battery and packaging, it would be appropriate to harmonise these accordingly, making it clear that information obligations exist vis-à-vis producers in particular. A more detailed legally mandatory specification cannot and should not be recommended as the diversity of possible information channels and media would make it difficult to achieve this uniformly.

3.2.7.2 Information obligations for electronic marketplaces and fulfilment service providers

No information obligations towards producers have been stipulated in the EPR-context for electronic marketplace operators and fulfilment service providers. Nor does the new Art. 8a Waste Framework Directive, which provides information obligations for producers in paragraph 3e, contain any such obligations. Art. 8a (5) subpara. 4 WFD provides information obligations only regarding authorised representatives. According to this "*Member States may lay down requirements, such as registration, information and reporting requirements, to be met by a legal or natural person to be appointed as an authorised representative on their territory.*"

Underlying information obligations being created for electronic marketplace operators and fulfilment service providers, should be the legal provision that they comply with good practice. **Good practice** is a frequently used instrument for relieving legal regulations and achieving generally accepted and dynamic guidelines adapted to practice requirements.

Hilton et al (2019) proposed standardizing requirements for producer information via a **Code of Practice**, especially to define standards for websites. Companies complying with these standards can set an example for others:

"E-commerce codes of practice would involve a voluntary standard for websites that includes the showing of Producer Responsibility Organisation registration details, the legal entity address and contact information, and potentially a logo. This could build on the SafeShops.be model and other similar e-commerce quality labels. It would provide a benchmark for all legitimate online sellers (who will be the ones informed of the requirements) so as to provide a simple checking mechanism for enforcement authorities and informed consumers. The OECD could potentially play a role in the development of such a standard."[205]

[204] Hilf/Schleifenbaum, in Giesberts/Hilf, ElektroG, 3rd edition 2018, § 31 marginal no. 28.

[205] Hilton et al. (2019), p. 46.

A Code of Practice can be used as a sub-legal information instrument to establish certain desired behaviours, and thus contribute to standard setting. **Addressees** are information website operators, in particular online platforms. Standards could be mandatory, or they could simply encourage voluntary compliance. The main aim here is to establish a uniform framework for websites on which stakeholders provide information about their obligations, in particular registration.

Part of such a Code of Practice could be to require online platforms used by several sellers to **inform sellers proactively** of their obligations regarding extended producer responsibility:

"Multi-seller online platforms could proactively inform sellers about their obligations with regard to EPR, as well as potentially removing those that are non-compliant."[206]

This Code of Practice could be linked to the above-described compulsory verification of electronic marketplaces and fulfilment service providers:

"Multi-seller 'marketplace' platforms could undertake efforts to proactively inform sellers on their sites of their obligations in regard to EPR. They could also remove those firms that do not have an appropriate PRO registration. This could be a requirement under the code of practice noted above. At present, some sites are only reactive; sellers are only removed when the website is notified of non-compliant listings (e.g. where a seller has not registered with the relevant authority)."[207]

Such a code of practice could improve the quality, i.e. it would increase transparency and comprehensibility of the electronic marketplace and fulfilment service providers websites.[208] The Code of Practice could also include a **quality label** to guarantee conformity and better inform customers and other stakeholders about compliance with their obligations. This was proposed by Hilton et al (2019):

"Alongside the EPR registration number it would therefore also be useful to have a symbol that reflects compliance in a particular territory."[209]

The Belgian logo of the **organisation safeshops.be** which operates jointly with the Flemish authorities is an example. It is a non-commercial body set up by Belgian distributors to guarantee product quality and safety as well as compliance with other relevant product regulations.[210]

According to Hilton et al (2019), this label can be extended to comply with registration and other regulations:

"This type of scheme could potentially be extended to also cover EPR related regulations. SafeShops.be is working with the Flemish regulator and PRO to do just that. This approach would, of course, need to be combined with raising consumer awareness of what they need to look for in a legitimate online seller's website."[211]

Problems with potential counterfeiting are considered unlikely:

"Some stakeholders noted that it would be easy to fake the logo and provide a false registration number. However, this assumes that these companies are even aware of the EPR schemes and the

[206] Hilton et al. (2019), p. 9.

[207] Hilton et al. (2019), p. 46 et seq.

[208] Cf. with corresponding examples Hilton et al. (2019), p. 42 et seq.

[209] Hilton et al. (2019), p. 40.

[210] E.g. there is a "*label de qualité*" logo which guarantees conformity with the applicable law, see https://www.safeshops.be/fr/ (7 July 2020).

[211] Hilton et al. (2019), p. 41.

related obligations. This seems unlikely (given the discussion on awareness above) for at least the smaller sellers and those in geographically distant jurisdictions. Some sites for importers provide very clear guidance and support (Box 6.6), but it is often notable that there is no mention of EPR fees or the need to register if importing EEE."[212]

The label should only be issued by a **recognised, trustworthy body**. The criteria for awarding the certificate entitling the holder to use the label must be transparent, uniform, relevant, and respect the principle of equality. Only then would there be a guarantee that the label would be recognised by customers and other stakeholders and that it would fulfil the information purpose pursued:

"Certification of online operators that do verify the compliance of the product they sell could help consumers to exercise an informed choice."[213]

Provision by the competent authorities of the highest possible quality of information would include its being offered in **English**. As the 'lingua franca', English is understood worldwide, while German is only spoken by a comparatively small number of people. For third-country producers, wide-reaching information in simple, clear English would be helpful. This is highlighted in the literature:

"For example, governments could focus on the continued simplification and harmonisation of Extended Producer Responsibility regulations, ensuring that the obligations of online sellers are clear and available in plain language."[214]

The **ZVSR**-website has now been fully translated.[215] The VerpackG, however, is not yet available in English. The **stiftung ear**-website is also available in English. The **German Environment Agency** provides helpful information on the ElektroG in English,[216] while currently no official English version of the ElektroG exists.[217] Information concerning the BattG register in English can be found on the German Environment Agency website.[218] Further important parts of the webpage are only available in German. The BattG is currently not available in English either. Comprehensive information for producers in English would promote transparency and perhaps also the understanding of complex registration and other regulations.

3.2.7.3 Obligation of electronic marketplace operators to notify producer and registration number

Electronic marketplaces operators could be required to notify producer and registration number of the products offered via their marketplace. Under 6 (3) ElektroG, only the producer is "*obliged to communicate his registration number when offering products and on invoices*." On the other hand, pursuant to Section 18 (3) BattG, producers and distributors are obliged to provide a range of information to customers, but not to notify of the BattG registration number. Under

[212] Hilton et al. (2019), p. 41.

[213] WEEE-Forum, Successfully countering online free-riders, April 2019, p. 6.

[214] Hilton et al. (2019), p. 9; 1 2016/C 272/01 – Commission Notice: The 'Blue Guide' on the implementation of EU Product Rules 2016.

[215] See https://www.verpackungsregister.org/en (7 July 2020).

[216] See: https://www.umweltbundesamt.de/en/topics/waste-resources/product-stewardship-waste-management/electrical-electronic-waste/electrical-electronic-equipment-act (7 July 2020).

[217] An unofficial translation of the old version of the ElektroG can be found at http://www.elektrogesetz.com/elektrog.shtml#01 (7 July 2020).

[218] See: https://www.umweltbundesamt.de/en/topics/waste-resources/product-stewardship-waste-management/batteries/the-battg-melderegister (7 July 2020).

Section 7 (1) sent. 2 VerpackG, producers of packaging obliged to participate in the system must communicate the registration number pursuant to Section 9 (3) sent. 2 VerpackG.

The above-mentioned compulsory verification[219] and, where applicable, the legal fiction according to which electronic marketplace operators are deemed producers, could be supplemented by specifying **producer and registration number**. Compulsory verification would require electronic marketplace operators to verify their contractual partners anyway, as far as due registration of the upstream chain is concerned. Prior to products being offered on the marketplace, future contractual partners or their authorised representatives would be obliged to inform electronic marketplace operators of the WEEE-Reg. no. DE, brand and type of equipment for all goods with electronic components, so that an automated comparison of these parameters with the official registers could take place via an IT interface. Disclosure of relevant data on the website could then be realized without any major effort. This information would also have to include registration numbers under the BattG and the VerpackG.

A more far-reaching proposal was made by Hilton et al (2019) to oblige all **online suppliers** offering EEE under their own name to notify the producer and registration number on the website:

"From a consumer perspective, and indeed for a PRO or regulator investigating noncompliance, it is often not clear whether a distance seller is or is not meeting its obligations with respect to EPR. As noted earlier, Ireland requires that any website selling EEE must show the EEE producer (or AR) registration number."[220]

"Web sites that sell EEE under their own name could be required to show the Producer Responsibility Organisations registration details (or the Authorised Representatives acting on their behalf in the case of EU countries) on their respective websites."[221]

This is intended to improve **transparency** for customers and promote fulfilment of registration and other possible obligations. Such transparency obligation could be extended to other information such as import duties and VAT details, and

"require all web sites that sell Electrical and Electronic Equipment under their own name to show the Producer Responsibility Organisations registration details (or the Authorised Representatives acting on their behalf in the case of EU countries) for themselves, to clearly display a logo to indicate their own EPR compliance and to provide the address and contact information for the legal entity behind the site. This could potentially be combined with a requirement to show import duty and Value Added Tax details related to a purchase." [222]

On the other hand, reference is made to the considerable **additional expense** for electronic marketplaces and providers:

"It is appreciated that this would add a significant administrative burden for the platforms and their sellers[…]. However software can potentially be developed to deal with this type of issue efficiently."[223]

In the EU, 28 authorised representatives would have had to be designated for the WEEE-sector alone (post-Brexit 27):

[219] See above under 3.2.1.1.

[220] Hilton et al. (2019), p. 40.

[221] Hilton et al. (2019), p. 9.

[222] Hilton et al. (2019), p. 49.

[223] Hilton et al. (2019), p. 49.

"In the EU, for instance, sellers would be required to display 28 different Authorised Representatives, or most likely 84 if all three classic EPR waste streams are included (i.e. WEEE, batteries, packaging)." [224]

Limiting the information obligation to notifying of producer and registration number, would decrease the required effort. It remains questionable though, whether this would lead to effective prevention of third-country free-riders, because despite being already available with regard to producers under the ElektroG, this instrument has not yet had the desired effect. Unchecked disclosure of the registration number by electronic marketplaces would have no effect.

3.2.7.4 Interim results

As 'soft' measures, **informational instruments** can support the effectiveness of the enforcement of EPR-obligations, but they cannot replace command and control instruments. Up to now, **information obligations** of the competent bodies such as stiftung ear or ZSVR vis-à-vis producers have been inconsistent, making harmonisation necessary. As far as information provided by electronic marketplace operators and fulfilment service providers is concerned, **good practice** with corresponding standards should be considered, which could also include the use of a privately awarded quality label. Websites, and the relevant laws, should be available in **English**. It would not be expedient to oblige electronic marketplace operators to communicate producers and registration numbers for the products offered via their marketplace.

3.2.8 Cooperation with other authorities

3.2.8.1 General cooperation between authorities

Cooperation between the competent authorities and, where appropriate, other bodies, is of considerable importance in the enforcement of producer responsibility regulations. This is stressed by Hilton et al (2019):

"At the same time, governments could consider building the ability to prosecute a company for illegal action in another country or territory into EPR legislation in order to facilitate enforcement."[225]

"The development of mechanisms allowing customs, tax and trading standards officials to work in a joined-up fashion with the environmental authorities would also help.

At the supra- and international level, better co-ordination of enforcement action would improve the cost effectiveness of enforcement by minimising the duplication of effort."[226]

Art. 18 WEEE Directive specifies requirements for electrical and electronic equipment. This requires Member States to cooperate in the application of the WEEE Directive, "*in particular to establish an adequate flow of information to ensure that producers comply with the provisions of this Directive and, where appropriate, provide each other and the Commission with information in order to facilitate the proper implementation of this Directive.*" Cooperation includes allowing "*access to the relevant documents and information including the results of any inspections, […]*"

This cooperation would be needed at national, European and international level. EWEN is particularly noteworthy in this respect:

[224] Hilton et al. (2019), p. 49, fn. 84.

[225] Hilton et al. (2019), p. 9.

[226] Hilton et al. (2019), p. 9.

"Co-ordinate enforcement action at the supra-national/national level, e.g. across the European Union, across the United States of America, across Canada, to make enforcement less daunting for individual territories and more cost-effective overall. In the EU, the European Commission publishes lists of competent bodies on its web pages to facilitate this and the German Environment Agency has set up a network to share information on free-riders and action being taken (The European WEEE Enforcement Network)."[227]

On the initiative of the German Environment Agency, bodies responsible for the implementation of the WEEE Directive from 22 countries have come together to strengthen cooperation and mutual support. The network aims to reduce translation, service and enforcement costs, thereby reducing the number of EU free-riders.[228] Since 2019, EWEN members have been working on an English-language guidance document in an IMPEL project[229] on preparing the appointment of an authorised representative under the WEEE Directive in the respective Member States. The aim of the document is to smooth the way for third-country suppliers and remove hurdles which hinder compliance with the legislation in different countries.[230] It is due to be completed and published in 2020.

Extending and promoting existing cooperation between European authorities on the basis of Art. 18 WEEE Directive would be a **solution** to the free-rider problem regarding EEE. There is no provision in the Batteries Directive for administrative cooperation and information exchange comparable to Art. 18 WEEE Directive. Neither the Packaging Directive nor the Amending Directive 2018/852 contain any such specification either. An **overarching European cooperation is recommended in the three areas** of EEE, batteries and packaging, that display similar problems in the Member States, regarding registration, due disposal and other EPR-obligations. This should be provided in all three directives, not solely in the WEEE Directive.

3.2.8.2 Collection of a customs import duty

In cooperation with the authorities responsible for imports, an **up-front levy** can also be considered, i.e. a deposit payment to ensure compliance with waste-law producer responsibility. Such a proposal can be found at Hilton et al. (2019):

"A number of stakeholders suggested that it may be possible to simplify the EPR funding arrangements by using an up-front levy (as used in Switzerland and Australia for example) on each item imported into a country, potentially even rolling the EPR fee into Import Duty. In the EU the Single Administrative Document (SAD) is used to declare goods that are moved from one part of the EU to another and must accompany goods throughout the EU.

This would then make it a customs issue from an enforcement point of view. This may be something that could be done just for certain classes of small EEE that are known to be more problematic from a free-rider perspective."[231]

The guarantee under Section 7 ElektroG could be used as an example, obliging the producer or authorised representative "*to provide evidence of an insolvency-proof guarantee for financing the return and disposal of electrical and electronic equipment for each calendar year*." The import duty would function in the same way as a guarantee and be levied on producers to ensure registration and disposal obligations. Section 25 (6) VerpackG also requires security deposits.

[227] Hilton et al. (2019), p. 48.

[228] See: https://www.umweltbundesamt.de/en/topics/weee-eu-wide-enforcement-of-producer-responsibility (7 July 2020).

[229] IMPEL stands for European Union Network for the Implementation and Enforcement of Environmental Law.

[230] More details under: https://www.impel.eu/wp-content/uploads/2016/12/ToR-2019_08-WEEE-Directive-article-17_v14August2019.pdf (7 July 2020).

[231] Hilton et al. (2019), p. 42; see also on the model of an environmental levy in France above under 2.5.1.

These are intended to secure payments from the systems to the ZVSR, to guarantee due performance. The import duty could be levied on producers as a **security deposit until registration has taken place**.

Attention is rightly drawn though, to **problems** associated with such a levy, such as the need for an international agreement and the possible overburdening of customs authorities:

"Many of the stakeholders interviewed felt that using customs to enforce EPR schemes would be too complex on a number of grounds:

It would require international agreement

Products are often inaccurately coded – it would not be obvious that they are EEE unless x-rayed

Millions of products cross borders every day. Some are containerised which makes inspection difficult (although spot checks are made)

Customs officials are already overstretched dealing with other issues such as drugs and counterfeit goods."[232]

Financing the body that collects and manages the guarantee and returning it after registration, poses a high administrative burden. These are understandable **concerns**. The instrument of a deposit is basically unknown in waste law. International implementation would be highly complex and costly in terms of enforcement. Legal consequences of non-payment would also be unclear. Without registration, payment to stiftung ear or one of the other registries might be due. It would then be considered an environmental levy.

In the face of these concerns and further legal issues such as the scheme´s proportionality, no import duty of this kind should be introduced.

3.2.8.3 Interim results

On the subject of EEE, Art. 18 WEEE Directive provides procedural rules for Member States **competent authorities' cooperation**, i.e. regarding mutual access to information. EWEN deserves recognition in this respect and should be further consolidated. This also applies to cooperation between authorities with regard to both **BattG** and **VerpackG**. An **up-front levy** to secure registration obligations is not recommended owing to the effort it would involve.

3.2.9 International agreements for preventing third-country free-riders

International instruments are also conceivable as an addition or an alternative to introducing/amending national or European regulations for achieving producer compliance with waste-law registration and disposal obligations. With an internationally harmonised legal framework, an international agreement could close remaining gaps in the implementation and enforcement of these legal obligations in the dynamic transnational e-commerce.

Such an international agreement could aim to establish a level playing field and create the basis for the enforcement.[233] It would not only define essential elements of registration and disposal obligations and their implementation by Member States' institutions, but could also establish information exchange mechanisms. Harmonising the format for registration or product coding would for example reduce the administrative burden on producers.[234] Registration requirements could be integrated into a comprehensive set of rules on extended producer

[232] Hilton et al. (2019), p. 42.

[233] Cf. also UNEP (2018) on this objective, p. 6.

[234] Hilton et al. (2019), p. 48.

responsibility. This should include harmonising deposit and guarantee systems as well as cooperation as to the carrying of disposal costs.

An international agreement of this nature could be concluded on the basis of the **United Nations Environment Assembly (UNEA)**, the main decision-making body of the United Nations Environment Programme (UNEP). UNEP already maintains secretariats for nine global environmental agreements.[235] An international agreement to reinforce waste-law producer responsibility and to prevent third-country free-riders could also be managed through UNEA.

A**greements on intergovernmental legal and enforcement assistance** could help remove obstacles hindering the implementation of measures[236] which sanction third-country free-riders. As explained above,[237] currently available procedural steps for obtaining legal assistance from key third countries are complex and often have little prospect of success. International enforcement agreements could improve the legal situation. International agreements on the enforcement of foreign judgments could also be sought, in order to remove existing obstacles to the enforcement of claims under **fair-trading law**. Similarly to the enforcement of administrative offences in another EU Member State or in a third-country,[238] obstacles exist in the enforcement of injunctions and claims for damages under the UWG against free-riders. Clauses regarding administrative and legal assistance and on the enforcement of foreign judgements could be included in a specific agreement on EPR, thus improving conditions for enforcing legal action against free-riders under the ElektroG, BattG and VerpackG. Overall solutions spanning different areas of law are also conceivable. In the light of its inherent complexity, identifying and evaluating possibilities for the implementation and design of such an agreement must be reserved for further review.

Implementing international regulations on EPR could include a variety of institutions. **UNEP** could be a suitable forum for the development of regulatory options in international environmental law. The **Basel Convention** on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989 should also be considered an appropriate institutional starting point for an international regime. Since it focuses primarily on the handling of hazardous waste, general EPR-obligations would not fall within the scope of its binding regulations. All the same, the open-ended Basel Convention Working Group is seeking non-binding proposals for solving the free-rider problem and emphasising harmonisation of producer definition and registration.[239] International coordination of rules and their enforcement could also be placed in the context of **free-trade agreements**.

An in-depth focus on international solutions should take into account that, in comparison with regulations at national or European level ultimately aiming at extraterritorial effects, the former are potentially more difficult and lengthy to implement. Third-country producers profit currently from gaps in implementation and enforcement of EPR-obligations, which could lead to an aggravated conflict of interests between states. Where individual states profit economically from a lack of environmental policy cooperation and coordination, this deficit puts third-country producers at an advantage, and, under international law, a **free-rider problem** arises: Countries exporting goods within the ElektroG-scope of application, whose economy thus profits from the

[235] See: https://www.bmu.de/themen/nachhaltigkeit-internationales/int-umweltpolitik/unep/ and https://sustainabledevelopment.un.org/partnerships/unea (7 July 2020).

[236] In Germany, for example, the enforcement of administrative offences.

[237] See above under 2.4.

[238] See above under 2.4.

[239] UNEP (2018).

'uneven playing field' in importing countries, understandably show little interest in contributing to an international harmonisation of rules.[240]

As an alternative to an approach based on international law, non-state regulation could be further investigated in an international and transnational context. Technical standards, within the framework of the International Organisation for Standardisation (ISO) for example, could contribute to an international harmonisation of EPR regulations. Private, international or transnational standards could also expand the scope provided by international economic law[241] for national law-measures.[242] The scope of this project does not allow such considerations to be taken further.

3.2.10 Interim conclusions

A comparison of the various registration obligations at **EU level** i.e. under the WEEE Directive, the Packaging Directive and the Batteries Directive reveals a mixed picture. While the WEEE Directive provides relatively differentiated regulations, including registration forms, neither of the other two directives is as far reaching. This makes it difficult to create uniform, clear and transparent registration requirements for stakeholders in EU Member States, which results in the fragmentation of EU Member States' regulations.

At **national level,** the picture hardly looks any different. Based on Union law requirements, here, registration regulations in the ElektroG, VerpackG and BattG also differ greatly.

It is worth remembering that the product in question is usually one and the same, consisting, for example, of a laptop, its battery and packaging. A '**big solution**' which harmonises registration requirements (as well as further EPR-regulations) would be preferable, starting at Union level and continuing by implementing the requirements at Member State level. This would however go far beyond the scope of this report.

The proposed **solutions** regarding electronic marketplace operators and fulfilment service providers can therefore only be seen as a first step towards optimal integration of both market players within the applicable law, including registration and waste disposal obligations. Inconsistencies can easily result from such retroactive integration since the new actors are not yet envisaged here and the system of obligations has not yet been adapted to include them. Fragmentation of registration standards within the multi-level system of Union and national law, and the division into the three areas i.e. EEE, packaging and battery law, can lead to enforcement problems.

3.3 Legal review of the proposed solutions

The various possible solutions will be examined in the following as to their compatibility with national **constitutional law**, **EU primary and secondary law** and **international economic law**.

The legal analysis of **compulsory verification** should not only be based on a 'duty to verify' in the strict sense but should be understood in a wider sense. A standardization of compulsory verification should be carried out by means of a conditional traffic ban (since it is linked to no- or not proper registration). From a legal point of view, particularly t under the aspect of

[240] Cf. Bodansky et al. (2008), 10 et seq.

[241] See below under 3.3.3.

[242] Glinski (2014) argues that the Appellate Body's decision in the Tuna Dolphin II case demonstrates that a private standard may be considered an international standard within the meaning of Article 2.5 TBT. National measures in accordance with this standard could then be justified under WTO law.

proportionality, the decisive factor is not compulsory verification alone, but the ban on supporting the placing on the market of products from non-registered producers. The following legal analysis therefore always refers to this '**implied compulsory verification**'.[243]

3.3.1 Questions of national constitutional law

The following examines whether the discussed solutions would be compatible with German national constitutional law, in particular with the fundamental rights under Article 14, Article 12, Article 2 (1) and Article 3 (1) Basic Law, and whether the Federal Parliament has legislative competence in this respect.

3.3.1.1 Compatibility with fundamental rights

The study begins with compulsory verification, followed by further discussed solutions.

3.3.1.1.1 Occupational Freedom, Article 12 (1) Basic Law

First and foremost, a possible encroachment on occupational freedom under Article 12 (1) Basic Law comes to mind, effected by introducing compulsory verification for electronic marketplace operators/fulfilment service providers. Freedom to choose and freedom to exercise an occupation are combined here to one basic right.[244] Together they correspond to entrepreneurial freedom under Art. 16 European Charter of Fundamental Rights (CFR), which protects all activities of self-employed persons.[245]

3.3.1.1.1.1 Scope of protection

The proposed compulsory verification would affect the **protective scope** of occupational freedom. In a broad interpretation, the term 'profession' is defined as "*any permanent activity intended to create and maintain a livelihood*".[246] The activities of electronic marketplace operators and fulfilment service providers fall within this scope of protection. According to Article 12 (1) Basic Law, the personal scope of protection extends only to German nationals. It is controversial whether, or to what extent, non-German nationals are also covered. The prohibition of discrimination in Article 18 TFEU, which prohibits any discrimination on grounds of nationality, means that at least citizens of the European Union must be granted the right to invoke Article 12 Basic Law.[247]. Applying the general freedom to act under Article 2 (1) Basic Law, or the fundamental freedoms of the TFEU alone, would violate this discrimination ban.[248]

By its very nature, according to Article 19 (3) Basic Law, the fundamental right of occupational freedom is also applicable to **legal persons**.[249] However, this only applies to domestic legal entities, i.e. those with their actual focus in Germany. Legal persons seated abroad are not covered by Article 12 Basic Law. If, on the other hand, the legal entity was founded by foreigners in Germany under German law, or is a subsidiary of a foreign parent company, it can invoke Article 12 Basic Law.[250] Electronic marketplace operators and fulfilment service providers as German companies or (German) subsidiaries of a foreign company are therefore covered by

[243] See also above under 3.2.1.

[244] BeckOK Grundgesetz/Ruffert, 41st edition 15 May 2019, GG Preamble Art. 12.

[245] BeckOK Grundgesetz/Ruffert, 41st edition 15 May 2019, GG Art. 12 marginal no. 4.

[246] Of most importance is the Federal Constitutional Court "Pharmacy Judgment", Judgment of 11 June 1958 - 1 BvR 596/56, NJW 1958, 1035.

[247] BeckOK Grundgesetz/Ruffert, 41st edition 15 May 2019, GG Art. 12 marginal no. 37.

[248] But so for instance by Mangoldt/Klein/Starck, GG Art. 12 marginal nos. 266, 267.

[249] See inter alia BVerfG, Decision of 26 June 2002 - 1 BvR 558/91, NJW 2002, 2621 (glycol wine).

[250] Maunz/Dürig/Scholz, 87th edition March 2019, GG Article 12 marginal no. 107.

Article 12 Basic Law. In the case of foreign companies, including those from other EU Member States, mere reference to the general freedom to act under Article 2 (1) Basic Law is permissible. In this way, the scope of protection of Article 12 Basic Law is affected, at least for domestic electronic marketplace operators and fulfilment service providers.

3.3.1.1.1.2 Intervention

Article 12 Basic Law protects against direct or indirect interference, whereby it is not necessary that "*the activity protected by the Basic Law be completely or partially forbidden. It is sufficient if the activity is not allowed to be carried out in the desired manner*."[251] The proposed compulsory verification would therefore **interfere with** Article 12 Basic Law's **scope of protection**.

3.3.1.1.1.3 Justification

To conform with the constitution, this intervention must be **justifiable**. Article 12 Basic Law is subject to legal barriers according to paragraph 1 sentence 2, whereby restriction is possible by or on the basis of a law.[252] With compulsory verification this would be the case, as it would be introduced by statutory provisions of the ElektroG, the VerpackG and the BattG.

Justification of an encroachment on fundamental rights must be measured against the **principle of proportionality**. The legislator has a wide **scope for assessment and design**, especially with regard to rules for the exercise of a profession.[253] The individual elements of a proportionality assessment are the legitimate purpose, the suitability of the legislative measure, the necessity and appropriateness (also referred to as proportionality in the strict sense).[254] As a manifestation of the proportionality principle, the Federal Constitutional Court has developed the so-called **three-step approach** for occupational freedom. Regarding professional practice rules, only a minor impairment of occupational freedom is assumed initially; restrictions are permissible if they appear appropriate on the basis of reasonable public-interest considerations.[255] As an interim step, where, for instance, personal qualities and abilities are involved, subjective rules for choosing an occupation lead to more intensive interference with occupational freedom; these are only permissible when it comes to protecting a particularly important common good.[256] And thirdly, objective rules for choosing an occupation constitute the strongest encroachment, whereby criteria are applied that have no connection with the person concerned. These are only permitted if it is necessary to avert a proven or highly probable danger to a public good of outstanding importance.[257]

If applying these principles to compulsory verification for electronic marketplace operators and fulfilment service providers, the first task is to classify them under the three-step system. Here, the first stage is relevant, the rules of professional practice. Compulsory verification does not interfere in any way with the concerned actors´ choice of profession, since it is assumed that they will continue to exercise their profession. Reasonable general interest considerations are therefore sufficient to justify the intervention. Since their very purpose is promoting EPR, the objective of compulsory verification serves the public good and must be regarded as **legitimate**.

[251] BVerfG, Decision of 12 June 1990 - 1 BvR 355/86 NJW 1990, 2306; Maunz/Dürig/Scholz, 87th edition March 2019, GG Article 12 marginal no. 301.

[252] BeckOK Grundgesetz/Ruffert, 41st edition 15 May 2019, GG Art. 12 marginal no. 75.

[253] BeckOK Grundgesetz/Ruffert, 41st edition 15 May 2019, GG Art. 12 marginal no. 88.

[254] See for example BVerfG, Decision of 29 October 2002 - 1 BvR 525/99, NJW 2003, 879.

[255] See already BVerfG, Judgment of 11 June 1958 - 1 BvR 596/56, NJW 1958, 1035 (freedom of establishment for pharmacists).

[256] Ibidem.

[257] Ibidem.

The **suitability** of the measure for achieving the objectives must also be examined. The legislator must be allowed a wide margin of discretion.[258] It goes without saying that the examination of due producer registration on the part of electronic marketplace operators and fulfilment service providers, generally leads to better EPR-implementation and to EU-secondary law enforcement. Doubts could arise as to its suitability because, as discussed above, the proposed verification requirements are confronted with a fragmented legal landscape at both Union and Member State level. This could hinder the intended efficacy of compulsory verification. Appropriate practical measures can be provided to counteract potential difficulties in its implementation. Suitability in line with the Federal Constitutional Court jurisdiction can therefore be assumed for compulsory verification.

The question remains whether the intervention could be considered **necessary**. Here, too, the legislator has scope for assessment.[259] It should not be possible for the overall target of compulsory verification being met by other less burdensome means for electronic marketplace operators and fulfilment service providers, i.e. no **milder means** should be evident. The inclusion of the above under the term 'producer' does not represent a milder means taking into account the many other associated obligations (such as reporting quantities, collecting/installing old equipment containers or taking back old electrical equipment under Section 16 ElektroG, taking back and recycling packaging under Section 15 VerpackG, or taking back batteries under Section 5 BattG). The Federal Administrative Court ruled in 2010 on the former Section 3 (12) ElektroG 2005[260] regarding the far more drastic legal fiction under which distributors are deemed to be producers: "*The legal fiction according to Section 3 (12) sent. 2 ElektroG does not violate the increased accuracy requirements of Article 103 (2) Basic Law or Article 12 (1) Basic Law*".[261] The court clarified: "*It is obvious that an effective market self-control would not be possible to the same extent, by other means than the legal fiction under Section 3 (12) sent. 2 ElektroG*".[262] Despite there being no existing model in the WEEE Directive, according to the Federal Administrative Court, there can be no alternative to legal fiction for distributors as under Section 3 no. 9 2nd half sent. ElektroG. The even less restrictive compulsory verification for electronic marketplaces and fulfilment service providers therefore does not violate the principle of proportionality.

The simplified producer responsibility model as a milder means?

The **simplified producer responsibility model**[263] could be considered a milder remedy as far as national fundamental rights infringements are concerned. At first glance, possible **advantages** could make the model appear a milder means. For instance, it could reduce the necessary financial, organisational and bureaucratic burden.

If, instead of an individual producer registration/notification, quantity reports were required covering the respective product groups and the respective area (ElektroG, BattG, VerpackG), the simplified producer responsibility model could possibly reduce costs and effort. Compulsory verification as proposed here could however be more cost-intensive due to the necessary

[258] S. for example BVerfGE 110, 141 (157) = NVwZ 2004, 597; BeckOK GG/Ruffert, 42nd edition 1 December 2019, GG Art. 12 marginal no. 88.

[259] See for example BVerfG, Decision of 16 March 1971 - 1 BvR 52, 665, 667, 754/66, NJW 1971, 1255 (stockholding obligation for petroleum products).

[260] "*The distributor shall be deemed a producer within the meaning of this Act if he culpably offers for sale new electrical and electronic equipment of non-registered producers".*

[261] BVerwG, Judgment of 15 April 2010 - 7 C 9/09 -, juris, marginal no. 52.

[262] Ibidem, marginal no. 56.

[263] Magalini et al. (SOFIES - Solutions for Industrial Ecosystems), A Flat Fee model for EPR compliance in the context of online marketplaces, September 2019 (unpublished).

verification of due registration/notification of each individual producer offering via the electronic marketplace. This could apply similarly to fulfilment service providers.

On the other hand, the simplified producer responsibility model has considerable **disadvantages**. The authors of this proposal see no major obstacles in terms of legal requirements:

"From a legislative perspective there are no major obstacles for the implementation of the flat fee model: (i) definition and role as producer, defined by legislative landscape is not affected by the model; (ii) legal obligations/opportunities to join a compliance scheme will remain valid but simply intermediated, on behalf of sellers, by the marketplace."[264]

"Compliance scheme role: under the flat fee model, legal obligations of joining a take back scheme, or option to set-up an individual system will remain valid and compliance scheme(s) will still play a pivotal role, organizing on behalf of their members (or clients) collection and recycling operations nation-wide."[265]

In the following, the question of assessing the model´s legality is not addressed, but solely the question of whether this would be **an equally suitable, milder means** in relation to compulsory verification of electronic marketplace operators. The simplified producer responsibility model might be considered a milder means regarding producers offering their goods via electronic marketplaces, as it would relieve them of their registration obligations by transferring these to the marketplace operators. At least for electronic marketplace operators with numerous providers (large market share), this could be seen as a milder means in relation to compulsory verification, because only the marketplace would have to register.

The model cannot, however, be regarded as equally suitable to compulsory verification. According to the simplified producer responsibility model, payment of a fee would **continue to be optional**, i.e. it would be up to producers to decide to pay the fee to the electronic marketplace operator and transfer the execution of producer responsibility obligations, including required registration, or not. Although the model has been altered and in the preliminary remarks to the proposed legal text described as mandatory, this is not the case according to the wording of the submitted draft law,[266] under which responsibility would remain with the producers. By choosing the latter option, marketplace operators would have no power to prevent the placing on the market of products from unregistered/unnotified producers. This would only solve the problem of third-country free-riders to a certain extent, but not across the board, as would be the case with compulsory verification. The model is tailored to operators of large electronic marketplaces who, with large provider and product portfolios, are able to take advantage of economies of scale and thus offer more favourable tariffs. The latter would be impossible for smaller marketplace operators whose fees would need to be higher, and who could suffer considerable competitive disadvantages. In summary, the simplified producer responsibility model is not equally suitable, being based on a voluntary approach in two respects:

- Marketplaces are not obliged to offer the model.
- Producers are not obliged to participate.

[264] Ibidem, p. 6.

[265] Ibidem, p. 21.

[266] See in detail on this question above under 3.2.3.

Accordingly, the model cannot be regarded as an equally suitable alternative to compulsory verification.

From the German point of view, the model's implementation would place an additional burden on the differentiated German WEEE-system within the ElektroG, which is based on producer responsibility according to the polluter-pays principle. A collective producer responsibility system, as envisaged by the simplified producer responsibility model, would be fundamentally at odds with this. Establishing this system would require a comprehensive systematic realignment. Due to the effort involved for such alignment, the model could not be regarded as equally suitable in relation to the proposed compulsory verification. **Market transparency** would also suffer considerably since it would no longer be possible to see if a producer is actually registered or not. A further argument against the comparable suitability of the model is that certain large electronic marketplace operators, possibly also large fulfilment service providers, could thereby acquire a dominant market position, as they could offer their services at lower prices than smaller competitors. The latter could then be forced out of the market. Under German registration provision, the simplified producer responsibility model cannot therefore be considered a milder, or at least equally suitable means for fulfilling the EPR-registration obligations.

Regarding the **appropriateness** of compulsory verification, sensible public welfare reasons can be given for its justification. Compulsory verification cannot be considered disproportionate with regard to the objective pursued. Additional obligations of electronic marketplace operators and fulfilment service providers must be compared with improved enforcement of registration obligations under the ElektroG, VerpackG and BattG. The significance of these registration obligations in the EPR-system must be regarded as particularly high, as they make an essential contribution to ensuring compliance with the producers' or their authorised representatives' obligations regarding the notification of quantities, the collection/installation of waste equipment containers, the return and disposal of waste electrical equipment, packaging or batteries etc. These obligations cannot be implemented and enforced without registration, i.e. without knowing which producers have placed which products on the market, and a high number of third-country free-riders would give rise to **distortions of competition**. For electronic marketplace operators and fulfilment service providers, the additional workload involved with compulsory verification would be comparatively low, especially as they could employ automated and digitised methods.

A Federal Court of Justice (Bundesgerichtshof) decision can be used as a comparison, dealing with the internet-sale of **children's high-chairs**. The Court decided that an internet trading platform operator can be sued for injunction to cease and desist from infringing property rights if they place ad-word advertisements. With this behaviour, the operator would leave their position as neutral mediator of offers and lose the liability privilege of service providers. It would then be reasonable to expect increased control obligations to be complied with, and for the operator to check those offers accessible via the links in the advertisements regarding easily and unequivocally recognisable infringements of property rights. "*Has the defendant booked search terms for the advertisements, it would be reasonable to expect the defendant to review the result lists, accessed by the user via the electronic references in said advertisements, to the extent set out by the court of appeal, if the owner of the property right has informed the defendant of clear infringements. Such restrictions are effective and proportionate.*"[267] The Federal Court of Justice expressly regards such inspection obligations as proportionate.

[267] BGH, Judgment of 16 May 2013 - I ZR 216/11 -, juris, marginal no. 52 (Children's high-chairs on the Internet II).

3.3.1.1.1.4 Interim results

A possible infringement of occupational freedom under Article 12 Basic Law seems justified.

3.3.1.1.2 Freedom of property, Art. 14 Basic Law

3.3.1.1.2.1 Compulsory verification of electronic marketplace operators/fulfilment service providers

A further consideration would be the infringement of freedom of property according to Article 14 (1) Basic Law. Freedom of occupation and freedom of property are understood as complementary: While, according to the common definition, Article 12 Basic Law protects the acquisition, Article 14 Basic Law focuses on the protection of the acquired.[268] One infringement of the freedom of property could lie in the requirement for electronic marketplace operators and fulfilment service providers to take certain measures as a result of compulsory verification.

The **personal scope** of protection under Article 14 Basic Law covers natural persons, both domestic and foreign and, through Article 19 (3) Basic Law, also covers domestic legal persons under private law.[269] This does not apply to foreign legals whose actual centre of activity lies abroad. Jurisdiction has extended the protection of property, as conveyed by the recognition of an expropriating and expropriation-like encroachment, to include foreign legals.[270] Shareholders of a foreign legal entity may also be covered in their role as natural persons.[271]

Concerning the **material scope of protection**, electronic marketplace operators and fulfilment service providers could be affected by an encroachment on the "*right to an established and exercised commercial enterprise*". Objects of protection under Article 14 Basic Law are mainly real estate and certain rights of individuals under private law. Controversial is whether protection of the established and practiced commercial enterprise is given under Article 14 Basic Law, which goes beyond the basics of property protection such as land ownership.[272] The Federal Constitutional Court has stated that "*even were such basic legal protection assumed, [...] it would only extend to the concrete stock of rights and goods as structured within the legal system*". "*It is constitutionally unobjectionable that [...] such an infringement of a commercial enterprise only exists if the substance of the enterprise is interfered with, but not if the individual product design is merely influenced, and without this leading to a strangulation of the enterprise. […] The manufacture of a product under more favourable terms"* can only be seen as an opportunity *"which is not considered by the legal system to constitute the protected existence of the individual enterprise, as long as the core area of ownership remains unaffected."* This correlates to "*the Federal Constitutional Court jurisdiction, according to which mere (sales and profit) opportunities or earning possibilities do not belong to the individual company´s protected existence"*.[273]

With regard to the Federal Constitutional Court's narrow interpretation of the concept of ownership, the imposition of compulsory verification does not constitute an **encroachment** on Article 14 Basic Law in the form of the right to the established and exercised commercial enterprise. These obligations would only affect turnover and earning opportunities and would not interfere with the substance of the businesses of electronic marketplaces and fulfilment

[268] See for example BVerfG, Decision of 8 June 2010 - 1 BvR 2011/07 -, BVerfGE 126, 112, marginal no. 84; BeckOK Grundgesetz/Axer, 41st edition 15 February 2019, GG Art. 14 marginal no. 27.

[269] BeckOK Grundgesetz/Axer, 41st edition 15 February 2019, GG Art. 14 marginal no. 37.

[270] BGH, Judgment of 28 February 1980 - III ZR 165/78, NJW 1980, 1567, 1569.

[271] BeckOK Grundgesetz/Axer, 41st edition 15 February 2019, GG Art. 14 marginal no. 37.

[272] On the whole: BeckOK Grundgesetz/Axer, 41st edition 15.2.2019, GG Art. 14 marginal no. 52.

[273] BVerfG (Third Chamber of the First Senate), Decision of 29 July 1991 - 1 BvR 868/90, NJW 1992, 36 (Puffed-rice bar – Cocoa Regulation).

service providers. On the other hand, against the background of a broad constitutional concept of ownership, as coined by some of the literature, the enterprise could be seen "*in its entirety as a functional and organisational unit as a legal position worthy of assets*", and be placed under the protection of Article 14 Basic Law.[274]

Assuming the above to be an encroachment on Article 14 Basic Law, this would require justification to be constitutionally permissible. Compulsory verification would not lead to an expropriation, but merely to substance and boundary definitions of property within the meaning of Article 14 (1) sent. 2 Basic Law, since no withdrawal of a position of ownership for the fulfilment of sovereign duties would occur.[275] These definitions would also need constitutional **justification**. The requirement for **substance and boundary definitions** to be laid down by law[276] would here be fulfilled. The main limitation for statutory exceptions is the principle of proportionality.[277] As described above, compulsory verification pursues a legitimate objective. This can be substantiated by the state goal of environmental protection as put down by Article 20a Basic Law.[278]

As well as necessity,[279] appropriateness also plays a special role in the examination of substance and boundary definitions. The social relevance of the ownership position must be taken into account; the stronger this proves, the greater the scope for the legislator.[280] In this case, the social relevance of ownership of established and operated commercial enterprises, i.e. electronic marketplaces and fulfilment service providers, is not particularly great since these enterprises are not necessary for securing third party freedoms (i.e. customer freedoms). On the other hand, appropriateness can be affirmed in the light of limited encroachment on the rights of electronic marketplace operators and fulfilment service providers.[281] No aspects of legitimate expectation protection arise which might require a transitional or hardship clause.[282] Compulsory verification will require comparatively little effort on the part of those responsible – a result of the automated comparison with registers via electronic interfaces. Compulsory verification would not cause a blatant interruption of business management, but rather a moderate development in alignment with their contractual partners, the respective goods' producers. Financial compensation would not be necessary except, in the matter of substance and boundary definitions, in cases of intense hardship.[283] Compensation would not be due since the encroachment on the right to the established and operated business enterprise cannot be considered intensive. The principle would therefore remain, whereby the owner must accept a determination of property substance and boundary definitions without compensation.[284]

Encroachment on the freedom of property, here on the right of the established and exercised commercial enterprise, would therefore be **constitutionally justified**.

[274] BeckOK Grundgesetz/Axer, 41st edition 15 February 2019, GG Art. 14 marginal no. 52.

[275] See for example BVerfG, Decision of 15 July 1981 - 1 BvL 77/78, NJW 1982, 745 (wet sintering).

[276] BeckOK Grundgesetz/Axer, 41st edition 15 February 2019, GG Art. 14 marginal no. 82.

[277] See already under 3.3.1.1.1.3.

[278] See comprehensively BVerfG, Decision of 16 February 2000 - 1 BvR 242/91, NJW 2000, 2573, 2574 et seq. (contaminated sites).

[279] See above 3.3.1.1.1.3.

[280] BVerfG (First Chamber of the First Senate), Decision of 15 September 2011 - 1 BvR 2232/10, NVwZ 2012, 429, marginal no. 33 (planning damage).

[281] See above under 3.3.1.1.1.3.

[282] See BVerfG, Decision of 2 March 1999 - 1 BvL 7-91, NJW 1999, 2877 (monument protection).

[283] For example BVerfG, Judgment of 6 December 2016 - 1 BvR 2821/11 -, BVerfGE 143, 246, marginal no. 258 et seq. (nuclear phase-out).

[284] See BVerfG, Decision of 2 March 1999 - 1 BvL 7-91, NJW 1999, 2877, 2878 (monument protection).

3.3.1.1.2.2 Further proposed solutions

For further proposed solutions such as the above-described deeming provision, the simplified producer responsibility model, import bans or informational instruments, recourse can be taken to the considerations of **Article 12 Basic Law**. Also, with regard to Article 14 Basic Law, apart from the legal fiction, the proposals mentioned in the previous sentence do not represent an equally suitable instrument compared to compulsory verification; the deeming provision is not milder in comparison to compulsory verification.

3.3.1.1.3 Article 2 (1) Basic Law, General freedom to act

3.3.1.1.3.1 Compulsory verification of electronic marketplace operators/fulfilment service providers

As described above, **foreign companies** cannot invoke the freedom of occupation under Article 12 Basic Law, but only the general freedom to act under Article 2 (1) Basic Law.[285] The same applies to the freedom of ownership under Article 14 Basic Law. Understood as a catch-all fundamental right,[286] the general freedom to act under Article 2 (1) Basic Law must always also be examined when civil liberties are encroached upon. This applies equally to the compulsory verification of electronic marketplace operators and of fulfilment service providers.

To ensure complete protection of fundamental rights, the general freedom to act's **scope of material protection** must be interpreted broadly, covering private autonomy and contractual freedom,[287] thereby also activities of electronic marketplace operators and fulfilment service providers. The **scope of personal protection** covers natural persons but has been extended by Article 19 (3) Basic Law to include legal persons under private law, especially when state measures intervene in economic activities.[288]

It has already been explained that compulsory verification involves **state intervention** in the freedom rights of electronic marketplace operators and fulfilment service providers[289] In addition to the limits of constitutional order, of the rights of others and of moral law mentioned expressly in Article 2 (1) Basic Law, the proportionality principle must be observed for **justification.**[290] Reference can be made to the above statements, in particular to justification of an encroachment on the freedom of occupation under Article 12 (1) Basic Law.[291]

As a result, interference with or encroachment on the general freedom to act under Article 2 (1) Basic Law can be considered justified.

3.3.1.1.3.2 Further proposed solutions

Recourse can be taken to the considerations regarding Article 12 Basic Law for further proposed solutions,[292] such as deeming electronic marketplace operators and fulfilment service providers to be producers, the simplified producer responsibility model, import bans or informational instruments. Also, with regard to Article 2 Basic Law, with the exception of the deeming provision the proposals mentioned in the previous sentence do not represent an equally suitable

[285] See above under 3.3.1.1.1.1.

[286] Critical in this respect Maunz/Dürig/Di Fabio, 87th edition March 2019, GG Art. 2 (1) marginal no. 7.

[287] See for example BVerfG, Decision of 29 June 2016 - 1 BvR 1015/15, NJW-RR 2016, 1349 ("buyer principle" for broker commissions for residential property rental agreements).

[288] See already BVerfG, Decision of 17 November 1959 - 1 BvR 88/56, 59/57, 212/59, NJW 1960, 187.

[289] See above under 3.3.1.1.1.2.

[290] BeckOK Grundgesetz/Lang, 41st edition 15 February 2019, GG Art. 2 marginal no. 25.

[291] See above under 3.3.1.1.1.3.

[292] See above under 3.3.1.1.1 et seq.

instrument compared to compulsory verification. However, this deeming provision does not constitute a milder means in comparison to compulsory verification.

3.3.1.1.4 Art. 3 (1) Basic Law, Equality before the law

3.3.1.1.4.1 Compulsory verification of electronic marketplace operators/fulfilment service providers

A possible violation of the general principle of equality under Article 3 (1) Basic Law must be examined. This Article prohibits treating the **same facts unequally or treating different facts equally**. Deviations may be objectively justified.[293] It must therefore firstly be carefully examined whether the imposition of compulsory verification on electronic marketplace operators and fulfilment service providers could result in equal or unequal treatment in relation to other players. Following which, equal and unequal elements of the constellations of facts must be identified, and their justification must be examined.[294]

Characteristics must be collated to allow differentiation between the respective facts.[295] "*The principle of equality requires the decision regarding which similarity justifies a common legal consequence, which difference prohibits a common legal consequence, which comparability allows the legislator to justify common or different legal consequences.*"[296]

Electronic marketplace operators compared to distributors

A comparison can be made between **distributors and electronic marketplace operators**. It must be asked whether their circumstances are identical or different. Electronic marketplaces operators do not themselves distribute but enable the offering and thus the distribution of products via their websites. Distributors, on the other hand, whether stationary or online, sell the products themselves. In this respect, their circumstances are unequal.

Against this background, the question arises whether, to a certain extent, these unequal circumstances may be treated equally, namely regarding the traffic ban and its associated compulsory verification. Equal treatment can be seen in the existing traffic ban for distributors under Section 6 (2) sent. 2 ElektroG. Distributors may not "*offer electrical or electronic equipment for sale if the producers of this equipment or [...] their authorised representatives [...] are not or are not duly registered*". This corresponds to electronic marketplace operators' compulsory verification combined with a traffic ban. Irrespective of the distribution channel, whether through an electronic marketplace or through direct trade (stationary or online), comparable obligations apply under the proposal made here for the instrument of compulsory verification. As far as proper registration is concerned, no unequal elements of these two constellations can be found. Violations of these obligations by distributors are subject to a fine under Section 45 (1) no. 4 ElektroG; a corresponding provision has been made for the electronic marketplaces.[297] The comparison pair 'stationary trade' or 'e-commerce', and 'electronic marketplace operators' are market participants involved in the sale of the same products, namely EEE, batteries and packaging. The mere provision of a platform is in no way equivalent to the actual distribution.

Since two **unequal situations** must be assumed, the justification for this equal treatment must be examined. Two fields of examination have been presented, **arbitrariness and the**

[293] BeckOK Grundgesetz/Kischel, 41st edition 15 May 2019, GG Art. 3 Preliminary remark.

[294] BeckOK Grundgesetz/Kischel, 41st edition 15 May 2019, GG Art. 3 marginal no. 14.

[295] BeckOK Grundgesetz/Kischel, 41st edition 15 May 2019, GG Art. 3 marginal no. 15.

[296] Maunz/Dürig/P. Kirchhof, 87th edition March 2019, GG Art. 3(1), marginal no. 73.

[297] See above under 2.3.

proportionality examination. The former considers the principle of equality to be violated only where a sensible/objectively plausible reason for unequal treatment/equal treatment is given. The proportionality test, on the other hand, focuses on the purpose of equal or unequal treatment, and uses only criteria justified by the objective of differentiation. With regard to the objective of differentiation, the distinguishing criterion must then be suitable, necessary and appropriate.[298] Both approaches must be seen as part of a uniform justification standard, consisting of examination as to the intensity of intervention, ranging from simple arbitrary control to proportionality, governed by criteria of suitability, necessity and appropriateness.[299]

Application of the so-called **arbitrary formula** is dependent on the existence of an objective reason.[300] In this respect the 7th recital of the WEEE Directive can be quoted, according to which no distinction should be made between distance selling and stationary trade: "…*the obligations of producers and distributors using distance and electronic selling channels should, as far as is practicable, take the same form, and should be enforced in the same way, as for other distribution channels,[…].*". An objective reason therefore exists for the equal treatment of distributors and electronic marketplace operators with regard to compulsory verification. Compulsory verification of electronic marketplace operators has the intention of ensuring compliance from producers abroad within the EPR-context.

The described equal treatment could also be justified when applying standards of the **proportionality test**. Equal treatment could be justified, irrespective of whether a 'classical' proportionality test is carried out,[301] or whether a so-called compliance test is preferred, in which "*it must be asked whether the weight of the impairment is outweighed by corresponding objective reasons, i.e. whether objective reasons can outweigh (in)equal treatment with regard* to the *same and unequal characteristics*".[302] The special position of electronic marketplaces must be taken into account, as they allow direct access to producers, in particular also to third-country free-riders who neglect the registration/notification regulations.

Equal treatment between electronic marketplace operators on the one hand and distributors on the other hand does not constitute a violation of the general principle of equality under Article 3 (1) Basic Law.

Fulfilment service providers compared to distributors

A further subject of comparison is the relationship between **distributors and fulfilment service providers**. Here too, the question arises whether the circumstances are the same or different. Similarly to electronic marketplace operators, fulfilment service providers do not distribute the products themselves, but support the distribution of the products with their services. Since distributors already fall under compulsory verification, and such imposition is intended on fulfilment service providers as a new instrument, these are **unequal circumstances** which - at least with regard to compulsory verification – are to be treated equally.

This equal treatment can be **justified** employing the same arguments as outlined above concerning electronic marketplace operators. An important objective reason is that fulfilment service providers are market players with direct access to the products, acting regularly as the last link in the e-commerce chain before delivery to the customer. Fulfilment service providers

[298] BeckOK Grundgesetz/Kischel, 41st edition. 15 May 2019, GG Art. 3 marginal no. 24.

[299] BeckOK Grundgesetz/Kischel, 41st edition 15 May 2019, GG Art. 3 marginal no. 26.

[300] BeckOK Grundgesetz/Kischel, 41st edition 15 May 2019, GG Art. 3 marginal no. 30.

[301] Declining to that extent BeckOK Grundgesetz/Kischel, 41st edition 15 May 2019, GG Art. 3 marginal no. 36.

[302] BeckOK Grundgesetz/Kischel, 41st edition 15 May 2019, GG Art. 3 marginal no. 37.

are in contractual relations with the producers and can also check their due registration.[303] The objective of the compulsory verification instrument to prevent third-country free-riders therefore justifies equal treatment of fulfilment service providers and distributors.

Electronic marketplace operators compared to fulfilment service providers

As a further point of comparison, it is necessary to examine whether the imposition of compulsory verification on **electronic marketplace operators and fulfilment service providers** might result in the equal treatment of unequal circumstances, in violation of Article 3 (1) Basic Law. While neither actor is directly involved in the sales business, but, through their commercial activities, both have decisive influence on the placing on the market of EEE, batteries and packaging, their circumstances remain **unequal**. Electronic marketplace operators open up a way for producers or distributors to offer or provide EEE, batteries and packaging, whereas fulfilment service providers offer warehousing, packaging, addressing or shipping of these products. Despite the disparity between the cases, compulsory verification imposes the same obligations on both players, the justification for which is examined below.

Applying the so-called **arbitrary formula** requires an objective reason. The 7th recital of the WEEE Directive can also be used here.[304] If different forms of distance selling are to fulfil the same obligations in comparison with other distribution channels, for example through stationary trading, the processing of one and the same distance selling transaction via different service providers is all the more necessary because all parties involved in the transaction must fulfil the same obligations. Electronic marketplace operators and fulfilment service providers generally provide their services for the conclusion and processing of distance selling transactions by means of successive actions, all of which are aimed at placing EEE, batteries and packaging on the market.

The equal treatment of electronic marketplace operators and fulfilment service providers could also be justified when applying the **proportionality test** standards. Recourse can be taken to the proportionality test carried out on freedom of ownership, Article 14 Basic Law[305]

Thus, equal treatment between electronic marketplace operators and fulfilment service providers does not constitute a violation of the general principle of equality under Article 3 (1) Basic Law.

3.3.1.1.4.2 Further proposed solutions

Regarding the other proposed solutions, i.e. electronic marketplace operators and fulfilment service providers deemed to be producers, import bans or informational instruments, a similar **equal treatment** between electronic marketplace operators or fulfilment service providers and distributors must be assumed. These solutions can be justified on the same grounds as those set out above for compulsory verification.

Regarding the simplified producer responsibility model, however, different circumstances would not be treated equally. Distributor and electronic marketplace operator obligations differ considerably. As described above, distributors must already fulfil inspection obligations.[306] Under the model, electronic marketplace operators are to be given the option of taking over all EPR obligations for a fee. This goes considerably beyond distributor obligations. It constitutes

[303] See above under 3.2.1.2.

[304] See above in this chapter.

[305] See above under 3.3.1.1.2.

[306] See above under 2.2.

different treatment of unequal situations, and therefore no intervention of Article 3 (1) Basic Law.

3.3.1.2 Legislative competence

The German legislator would need the necessary legislative powers to introduce compulsory verification and other proposed solutions. Compulsory verification would complement EPR and therefore fall under the generic term of waste management. Pursuant to Article 74 (1) no. 24 Basic Law, this falls under the concurrent legislative **competence of the Federal Government**.[307]

3.3.2 European Union law issues

3.3.2.1 Compatibility with the fundamental freedoms of the internal market

The proposed solutions should be compatible with the Union law requirements of the **internal market**.

3.3.2.1.1 Compatibility of compulsory verification with internal market requirements

In the following it will be examined whether or not compulsory verification for electronic marketplace operators and fulfilment service providers is compatible with the **fundamental freedoms of the internal market**.

3.3.2.1.1.1 Free movement of goods

First of all, the free movement of goods under Article 28 et seq. TFEU must be examined. Under Article 34 TFEU, **quantitative restrictions on imports, and all measures having equivalent effect,** shall be prohibited between Member States.

Scope of protection

The scope of protection for free movement of goods is affected here. All relevant objects – EEE, packaging and batteries – are goods, i.e. physical objects, with a monetary value and can therefore be the **subject of commercial transactions**.[308] They are also **Union goods**, since they are in free circulation in a Member State.[309] Art. 29 TFEU is of particular importance, according to which "*products coming from a third-country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges*". Import formalities refer not only to customs duties or charges with equivalent effect to customs duties, but also other external economic import provisions, both under Union law and those emanating from the Member States.[310] Furthermore, compulsory verification concerns a **cross-border situation**, since the goods are intended to be traded within the EU.[311]

Intervention

Since no quantitative restrictions can be envisaged in the form of quotas or the like, a measure with **equivalent effect** could exist within the meaning of Article 34 TFEU. According to the ECJ-

[307] Cf. on the area of the ElektroG Draft Act of the Federal Government on the Reorganisation of the Law on the Marketing, Return and Environmentally Sound Disposal of Electrical and Electronic Equipment, Bundestag Document 18/4901 of 13 May 2015, p. 56.

[308] See ECJ, Case 7/68 [1968] ECR 633, 642 (Commission vs Italy); Case C-65/05 [2006] ECR I-10 341, 10341, recital 23 (Commission vs Greece).

[309] Calliess/Ruffert/Waldhoff, 5th edition 2016, TFEU Art. 28 marginal no. 18.

[310] Calliess/Ruffert/Waldhoff, 5th edition 2016, TFEU Art. 28 marginal no. 3.

[311] Cf. Grabitz/Hilf/Nettesheim/Leible/T. Streinz, 67th edition June 2019, TFEU Art. 34 marginal no. 33.

Dassonville ruling, this refers to any measure which directly, indirectly, actually or potentially constitutes an obstacle to internal trade.[312] The state measure in this case would be the imposition of a compulsory verification on electronic marketplace operators and fulfilment service providers with regard to the registration obligations that generally apply to producers. Non-compliance would lead to a ban on the placing on the market of the products concerned. Such a ban is one of the most serious infringements on the free movement of goods. Since domestic and foreign products would be affected equally, no origin-based discrimination can be assumed.

Since the products themselves, including the respective packaging, are affected, compulsory verification cannot be regarded as representing non-discriminatory **sales modalities** in the sense of the ECJ's Keck decision. An encroachment on Art. 34 TFEU's scope of protection must therefore be affirmed.

Justification

This intervention could be justified if an **exception** under Article 36 TFEU were applicable. Art. 36 TFEU is not applicable where a final secondary legislation of the same content exists. In that case, the Member State would have to amend the secondary legislation.[313] To date, this is not the case, as compulsory verification has yet to be introduced by the German legislator. Even though at EU level, proposals for the implementation of such obligations have been made, these have not yet been standardised.

Article 34 TFEU lists order and security, the protection of health and life of humans, animals or plants as justification grounds. These exceptions to the free movement of goods must be interpreted strictly.[314] The proposed compulsory verification does not directly and specifically target the protection of life and health, it serves such aspects only remotely.[315] Its primary objective is environmental protection through implementing EPR, in particular regarding European legal requirements from the WEEE, Batteries and Packaging Directive. No justification is possible according to Art. 36 TFEU, but rather, in line with the ECJ-**Cassis jurisdiction**.[316] Barriers to trade must be accepted if they are necessary for meeting mandatory public interest requirements. One such requirement is environmental protection. Its great importance is reflected in the relevant primary law-provisions, such as the cross-section clause in Art. 11 TFEU, which requires integration of environmental protection into the definition and implementation of Union policies and activities. Art. 191 (1) 1st indent TFEU can also be mentioned, along with Art. 37 CFR, which both call for a high level of protection and improvement of the quality of the environment.[317] In its intention to improve EPR-enforcement, compulsory verification serves these environmental policy objectives. Compulsory verification also serves the effective enforcement of EU secondary legislation, as it is designed to ensure general producer compliance with WEEE Directive, Batteries Directive and Packaging Directive requirements.

Infringement of the free movement of goods by introducing compulsory verification would only be justifiable if it were proportionate. **Proportionality** is one of the general principles of Union

[312] ECJ, Case 8/74, Prosecutor v Benoit and Gustave Dassonville, Judgment of 11 July 1974, ECR 1974, p. 837.

[313] Grabitz/Hilf/Nettesheim/Leible/T. Streinz, 67th edition June 2019, TFEU Art. 36 marginal no. 14.

[314] See e.g. ECJ 7/61 [1961] ECR 695, 720 - Commission v Italy; 13/68 [1968] ECR 680, 694 - Salgoil; 46/76 [1977] ECR 5, paragraphs 12 and 15 - Bauhuis; 113/80 [1981] ECR 1625, paragraph 7 - Commission v Ireland.

[315] Cf. Grabitz/Hilf/Nettesheim/Leible/T. Streinz, 67th edition June 2019, TFEU Art. 36 marginal no. 24.

[316] ECJ 120/78 [1979] ECR 649, marginal no. 8 - Rewe.

[317] Grabitz/Hilf/Nettesheim/Leible/T. Streinz, 67th edition June 2019, TFEU Art. 36 marginal no. 117.

law and serves as a corrective for restrictions of fundamental freedoms.[318] As far as the measure's **suitability** for achieving the objectives is concerned, the broad scope always granted to the legislator must be considered.[319] A regulation is only then unsuitable if clearly inconsistent or even counterproductive.[320] This is not the case. In this respect, recourse can be taken to the above comments on Article 12 Basic Law.[321]

According to ECJ case law, the proportionality test is essentially based on **necessity**. From several equally suitable means, those least likely to impede the free movement of goods must be chosen. Nor may repetitions of tests carried out by other Member States be required without compelling reasons.[322] It also follows that a prohibition subject to authorisation can only be justified under very strict conditions.[323] Compulsory verification does not constitute such an authorisation requirement. Rather, it stipulates that electronic marketplace operators and fulfilment service providers must ensure that only goods from properly registered/notified producers are placed on the market. This does not imply a licensing requirement but extends the monitoring of these market players' activities, thereby improving the enforcement of EU secondary legislation.

Despite its not being as harsh an instrument as a ban subject to authorisation, compulsory verification must nevertheless be examined with regard to **milder means** at least equally suitable for ensuring better enforcement of the registration obligations. A possible milder means could be to deem electronic marketplace operators and fulfilment service providers 'producers'. Establishing solely such a deeming provision in the ElektroG, VerpackG and BattG could be simpler for the legislator. These actors would then be required to fulfill all producer obligations. However, this is not the point since the question of milder means must be examined with regard to the addressees and not the legislator. For the addressees, this deeming provision would not represent a milder means, as all follow-up obligations (e.g. to notify quantities, to collect/install WEEE containers or to take back WEEE) would fall to them. This would be much more drastic than compulsory verification.

For electronic marketplace operators and fulfilment service providers, checking the registration on a **voluntary basis** could be a milder means compared to compulsory verification. According to a 2018 EU Commission press release, four electronic marketplaces signed a declaration of commitment to withdraw dangerous products from circulation. It stated that electronic marketplaces "*react within two working days to authorities' notices made to the companies' contact points to remove listings offering unsafe products. Companies should follow-up and inform the authorities on the action taken. Provide a clear way for customers to notify dangerous product listings. Such notices are treated expeditiously and appropriate response is given within five working days*".[324]

The legal background is Art. 14 (1b) E**-Commerce Directive**, according to which providers must immediately remove offers of dangerous products or block access to them. In the absence of more precise implementation requirements, these are filled out in the declaration of

[318] Grabitz/Hilf/Nettesheim/Leible/T. Streinz, 67th edition June 2019, TFEU Art. 36 marginal no. 123.

[319] See for instance ECJ C-434/04 [2006] ECR I-9171, marginal no. 32 - Akohainen v Leppik.

[320] See ECJ C-358/01 [2003] ECR I-13 145 - Commission v Spain (minimum chlorine content in detergents).

[321] See above under 3.3.1.1.1.

[322] See, for example, Case C-293/94 Brandsma [199] ECR I-3159, paragraph 12; Case C-105/94 Brandsma [1997] ECR I-2971, paragraphs 27 et seq. Celestini; Case C-400/96 Harpegnies [1998] ECR I-5121, paragraph 35.

[323] See Grabitz/Hilf/Nettesheim/Leible/T. Streinz, 67th edition June 2019, TFEU Art. 36 marginal no. 126.

[324] European Commission - Press release, European Commission and four online marketplaces sign a Product Safety Pledge to remove dangerous products Brussels, 25 June 2018, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4247 (7 July 2020).

commitment. Furthermore, Art. 22 (3a) Packaging Directive expressly provides for the possibility of "*agreements between the competent authorities and the economic sectors concerned*". The conditions for such agreements are specified there:

"(a) agreements shall be enforceable;

(b) agreements shall specify objectives with the corresponding deadlines;

(c) agreements shall be published in the national official journal or an official document equally accessible to the public, and transmitted to the Commission;

(d) the results achieved shall be monitored regularly, reported to the competent authorities and the Commission and made available to the public under the conditions set out in the agreement;

(e) the competent authorities shall ensure that the progress achieved under the agreement is examined;

(f) in the event of non-compliance with the agreement, Member States shall implement the relevant provisions of this Directive by legislative, regulatory or administrative measures."

The question of whether voluntary commitments by industry can or should replace regulatory requirements has long been discussed in the environmental law literature [325] Such voluntary commitments can be promising if, by keeping their promises, trade and industry do not fear significant disadvantages, such as high costs, competitive pressure or loss of sales. Companies involved must display a high degree of organisation and a certain homogeneity.[326] These prerequisites are missing in the case of compulsory verification for electronic marketplace operators and fulfilment service providers. The market in which these players operate is extremely diverse and varied. There is no evidence to show for electronic marketplace operators and fulfilment service providers having formed a uniform organisation capable of issuing and guaranteeing such voluntary commitments for their entire industry. The agreement's enforceability, as referred to in Article 22 (3a) Packaging Directive, would also be called into question. Checking conformity with EPR registration/notification obligations – albeit with merely minimal effort – could lead to competitive disadvantages for the actors participating in the voluntary commitment system. Rather than solve, it could quite possibly exacerbate the **problem of third-country free-riders**. A voluntary commitment to verify compliance with the above registration obligations would therefore not be an equally suitable and less stringent means.

Neither can the **simplified producer responsibility model** be regarded an equally suitable milder means.

According to the proposal submitted, the model is based on voluntary action in two respects: marketplaces can but do not have to offer the model, and producers can, but do not have to participate. For further arguments, reference can be found in the remarks on Article 12 Basic Law.[327]

For the ECJ, the **appropriateness** of the Member State's intervention measures does not constitute an independent criterion that goes beyond its necessity, making further discussion redundant.

[325] See, for example, approvingly Schendel, NVwZ 2001, 494 and critically Schrader, NVwZ 1997, 943.

[326] Rehbinder, in Rehbinder/Schink (eds.), Grundzüge des Umweltrechts, 5th edition, 2018, marginal no. 347.

[327] See above under 3.3.1.1.1.

3.3.2.1.1.2 Freedom to provide services

Compulsory verification could also constitute a restriction of the freedom to provide services under Article 56 TFEU. Pursuant to Art. 57 sent. 1 TFEU, this freedom comprises services "*normally provided for remuneration*", whereby in sentence 2, industrial and commercial activities are listed. The **scope of protection** includes non-physical, independent, remunerated services which, unlike freedom of establishment, are not integrated into the economy of another Member State other than the State of origin,[328] e.g. postal services, [329] motor vehicle road safety testing (MOT), [330] insurance services[331] or inspection bodies for organic farming. [332] E-commerce is also generally covered, even if distinction with regard to the free movement of goods is sometimes difficult. Given the longstanding convergence of fundamental freedoms, this is ultimately irrelevant for the internal market review.[333] Trading via electronic marketplaces can also be classified as a service. This applies all the more to the activities of fulfilment service providers, which include various services, some of which are similar to postal services.

There is also a **cross-border dimension** since the activities of electronic marketplace operators and fulfilment service providers are not limited by national borders. The ECJ has also stated on various occasions that a ban on mail-order trade – this also includes e-commerce – deprives economic operators from other Member States of an efficient distribution method hindering market access to the Member State concerned.[334] Introduction of compulsory verification by the German legislator would therefore constitute an infringement in the scope of protection.

Written grounds for **justification** such as Art. 62 in conjunction with Art. 52 TFEU ('special provisions for foreigners') would not be applicable. However, justification grounds of mandatory requirements within the meaning of the ECJ-Cassis decision can be held.[335] Similar considerations to those set out above on the free movement of goods apply to the justification.

A possible encroachment on the freedom to provide services could therefore be justified.

3.3.2.1.2 Compatibility of deeming electronic marketplace operators and fulfilment service providers to be producers with internal market requirements

The proposal discussed above to include electronic marketplace operators and fulfilment service providers under the term 'producer', thereby making them subject to the registration/notification and disposal rules,[336] should also be compatible with internal market requirements, in particular **free movement of goods and freedom to provide services.**

The **scope of protection** of the free movement of goods and the freedom to provide services under Art. 28 et seq. TFEU, particularly Art. 34 TFEU, would be affected. In this regard, reference can be made to the above statements concerning compulsory verification.[337]

[328] Grabitz/Hilf/Nettesheim/Randelzhofer/Forsthoff, 67th edition June 2019, TFEU Art. 56, 57 marginal no. 41.

[329] ECJ, Case C-220/06 Asociación Profesional [2007] ECR I-12 175.

[330] ECJ, Case C-220/06 Asociación Profesional [2007] ECR I-12 175.

[331] ECJ, Case 220/83, Commission v France, [1986] ECR 3663; Case 252/83, Commission v Denmark, [1986] ECR 3713; Case 205/84, Commission v Germany, [1986] ECR 3755; Case 206/84, Commission v Ireland, [1986] ECR 3817; and Case C-373/98, Commission v Ireland, [1986] ECR 3817. C-204/90, Bachmann, ECR 1992, I-249; C-300/90, Commission v Belgium, ECR 1992, I-305; C-118/96, Safir, ECR 1998, I-1897; C-355/00, Freskot, ECR 2003, I-5263; C-518/06, Commission v Italy, ECR 2009, I-3491.

[332] ECJ, Case C-404/05, Commission v Germany, [2007] ECR I-10 239; Case C-393/05, Commission v Austria, [2007] ECR I-10 195.

[333] Thyri, EuZW 2017, 424, 426.

[334] ECJ, Case C-108/09, EuZW 2011, 112 para 54 - Ker-Optika; Case C-322/012004, EuZW, 21 para 74 – Deutscher Apothekerverband.

[335] See Grabitz/Hilf/Nettesheim/Randelzhofer/Forsthoff, 67th edition June 2019, TFEU, Art. 56, 57, marginal no. 173.

[336] See above under 3.2.2 et seq.

[337] See above under 3.2.2 et seq.

This deeming provision can be regarded as government **intervention**, as this would impose new obligations on electronic marketplace operators and fulfilment service providers. Failure to comply with registration/notification requirements would prohibit cross-border trading of the goods in question. The same would apply to the freedom to provide services.

Fulfilment service providers would be prevented from transactions if the persons responsible for the goods were not (properly) registered/notified. Their cross-border service would no longer be allowed.

As far as **justification** is concerned, infringement of the freedoms of goods and services can be seen to have a legitimate purpose, i.e. EPR-enforcement under EU-law. Electronic marketplace operators and fulfilment service providers deemed to be producers would be equally suitable for achieving this goal. The question remains whether the above-mentioned compulsory verification would constitute a **milder remedy**. A limited deeming provision, in the event that the original producer does not behave as intended, would, with regard to the depth of intervention, not differ significantly from compulsory verification. On the other hand, it should be kept in mind that this deeming provision would affect all producer obligations, including take-back, disposal etc. Legally, it would have far greater repercussions for the persons concerned than mere compulsory verification. A legal fiction whereby electronic marketplace operators and fulfilment service providers are deemed to be producers would lead to a change in legal status, while compulsory verification would not further affect the legal status of electronic marketplace operators and fulfilment service providers.

3.3.2.1.3 Compatibility of the simplified producer responsibility model with internal market requirements

The simplified producer responsibility model requires, as described above,[338] a change to the current system of producer registration. Its implementation is based on **voluntary action**. The electronic marketplace operator may offer it as an option. The operator has the choice of whether to offer it, and the producer of whether to use it. It is not envisaged that marketplace operators be legally required to make such an offer. The model therefore does not involve a state intervention in the freedoms of goods' and services' scope of protection.

3.3.2.1.4 Compatibility of import bans with internal market requirements

Import bans on products from non-registered producers directly affect the scope of protection of the **free movement of goods** under Articles 28 et seq. and 34 TFEU. In the sense of the so-called ECJ-Dassonville formula, these are measures which directly impede trade between EU Member States, in their most severe form. Nor are they mere sales regulations which would be irrelevant according to the ECJ-Keck judgment.[339] The freedom to provide services under Article 56 et seq. TFEU would also be affected.

The ban would also be considered a state **intervention**, here in the form of an administrative act on the basis of Section 62 KrWG in conjunction with ElektroG, BattG and VerpackG. To the extent that Art. 26 Market Surveillance Regulation is deemed applicable, regarding the suspension of release for free circulation, an import ban could also, in combination with Section 62 KrWG, be imposed on this basis. As has already been explained above, Art. 26 Market Surveillance Regulation refers to the product; under EPR, not the products but their producers are registered.[340] With regard to **justification**, there is no doubt as to the legitimacy of the

[338] See above under 3.2.3.1.

[339] ECJ, Judgment of 24 November 1993, Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097 et seq.

[340] See above under 3.2.5.1.

objective.[341] The measure would be **suitable** if the import ban prevented the import of products into the EU from unregistered producers, thus curbing third-country free-riders' access to the market. However, administrative offences and compliance with orders under Section 62 KrWG would then still have to be pursued abroad, leaving the status quo unchanged. Import bans would therefore not be an equally suitable means compared to compulsory verification. Their **necessity** would also be highly doubtful. Other proposed solutions, such as compulsory verification or the deeming provision, have been discussed above. The introduction of compulsory verification would be an adequate and effective way of preventing the problem of third-country free-riders. Compulsory verification can therefore be regarded as a milder means in relation to import bans. The same applies to the legal fiction.

The imposition of import bans under Section 62 KrWG or, where applicable, Art. 26 Market Surveillance Regulation, would **not be compatible with either the freedoms of movement of goods or the freedom to provide services**.

3.3.2.1.5 Compatibility of a greater involvement of authorised representatives with internal market requirements

Greater and standardised involvement of authorised representatives, for example in addition to compulsory verification for electronic marketplace operators and fulfilment service providers, could be regarded as an additional restriction on cross-border trade, by imposing more stringent requirements on foreign than on domestic producers. This would be particularly problematic if a producer is established in another Member State and would have to appoint an authorised representative, unlike those established in Germany. This would constitute a state intervention in the **free movement of goods** pursuant to Art. 28 et seq., 34 TFEU.

An intervention of this nature could be **justified** pursuant to the ECJ Cassis jurisdiction. The first question is whether the measure would contribute to achieving the objective of preventing free-riders. An obligation to appoint authorised representatives for non-domestic producers would not stand alone but would have to be seen in the context of compulsory verification and other measures proposed above.

Appointing an authorised representative alone cannot deter free-riders from third countries, as enforcement problems remain the same as those concerning registration or notification obligations. Non-compliance with these regulations on the part of the producer would render enforcement difficult. All the same, the system of authorisation according to Section 8 ElektroG, which is laid down in Art. 17 WEEE Directive, already provides for such mandatory authorisation should a producer not have an office or be otherwise established in Germany. To complete the existing registration/notification system, extending authorisation can therefore be useful and suitable for fulfilling EPR-obligations.

The **necessity** (if flanked by other measures) can be considered a given, since nomination of an authorised representative for non-resident producers would be a milder means compared with registration in their home country.

3.3.2.1.6 Compatibility of further proposed solutions with internal market requirements

The proposed solutions discussed further raise fewer problems concerning internal market freedoms, such as the free movement of goods. From a single market perspective, **improving information** and **co-operation between authorities** are irrelevant. Information obligations of electronic marketplace operators and fulfilment service providers are also unlikely to have an impact on cross-border movement of goods.

[341] See above under 3.3.1.1.1.3.

3.3.2.1.7 Interim results

Compulsory verification would be compatible with **internal market** requirements, in particular the **free movement of goods and services**. A deeming provision would be a stronger encroachment on the rights of the persons concerned; compulsory verification would be preferable as a milder means. Due to its two-fold voluntary nature, the **simplified producer responsibility model** cannot be regarded as state intervention in internal market freedoms. Isolated statutory **import bans** in the ElektroG and the VerpackG (on the BattG-example) for third-country producers cannot be considered an equally suitable milder means compared with compulsory verification. The mandatory inclusion of **authorised representatives** could constitute an interference with the free movement of goods but could be considered justified depending on the constellation of measures. Other solutions discussed, such as **information measures**, are irrelevant regarding the internal market.

3.3.2.2 The Charter of Fundamental Rights of the European Union (CFR)

3.3.2.2.1 Applicability

Whether or not the proposed solutions should be examined on the basis of fundamental rights according to the **EU Charter of Fundamental Rights (CFR)** is determined by Article 51 (1) CFR. According to sentence 1, the Charter is "*addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.*" Member States implement Union law when they act indirectly by transposing a directive or applying a regulation, or directly by implementing a decision of an EU institution. This is an "*important limitation which places clear limits on the application of fundamental rights in relation to the Member States*".[342] Where a provision is expressly placed within the discretion of the Member States, i.e. if the Member States are expressly granted a decision margin, the Federal Constitutional Court is competent to examine the provision in the light of the fundamental rights of the Basic Law: "*Nor is a provision of national law which transposes a directive into German law measured against the fundamental rights of the Basic Law in so far as Community law does not leave any decision scope in transposition but lays down mandatory requirements*".[343]

Introducing **compulsory verification** for electronic marketplace operators and fulfilment service providers on the basis of German law would therefore not make the CFR applicable. Were only the ElektroG, VerpackG and BattG amended, this would take place within the scope provided by the respective EU directives, since neither the WEEE Directive nor the Packaging Directive nor the Batteries Directive have so far provided for such compulsory verification. If this is clearly not a question of the implementation of Union law, measures taken by the Member State are, in the sense of a moreover-clause, not to be examined in alignment with the CFR. The situation is different when discussing the inclusion of compulsory verification in the relevant **directives**. The EU-institutions, i.e. Commission, Council and Parliament, would then act as legislators. Pursuant to Art. 51 (1) sent. 1 the CFR should then be applied, and the measures examined against the CFR-standard.[344]

The same applies to the discussed **legal fiction** for electronic marketplace operators and fulfilment service providers.[345] National fundamental rights are to be applied unless European Union law is binding for German law.

[342] Jarass GrCh, 3rd edition 2016, EU Charter of Fundamental Rights, Art. 51, marginal no.18.

[343] BVerfG, Decision of 13 March 2007 - 1 BvF 1/05 -, BVerfGE 118, 79-111, marginal no. 68.

[344] See below under 3.3.2.2.

[345] See above under 3.2.2.

For the further discussed solutions, it is important whether these would have to be implemented at Union level – in which case the CFR would apply – or at national level – in which case national fundamental rights would apply, unless implementation were prescribed by European Union law without granting leeway to Member States. With regard to the amendments to national law discussed above, fundamental rights were examined in the light of the **Basic Law**.[346] Since it was suggested above that compulsory verification and provision whereby electronic marketplace operators and fulfilment service providers are deemed to be producers should also be established at EU level, a CFR-assessment is also required. The same applies to the simplified producer responsibility model.

3.3.2.2.2 Compatibility of EU law-based compulsory verification and electronic marketplace operators and fulfilment service providers deemed to be producers with the EU Charter of Fundamental Rights

It has been suggested above that compulsory verification and, where applicable, the legal fiction deeming electronic marketplace operators and fulfilment service providers to be producers not only be established at national level by amendments to the ElektroG, BattG and VerpackG, but also at European **Union level**. This would require amendments to the WEEE Directive, the Batteries Directive and the Packaging Directive, and possibly also the WFD. These amendments would have to be compatible with the **CFR**.

Anchoring compulsory verification and the deeming provision in EU law would affect **basic freedoms** of electronic marketplace operators and fulfilment service providers, and particularly the **freedom to conduct a business** under Art. 16 CFR and the **right to property** under Art. 17 CFR. The **freedom to choose an occupation and right to engage in work** according to Art. 15 CFR largely addresses professional activity of employees,[347] and is therefore less relevant here.

The **scope of protection** of the **freedom to conduct a business** covers all entrepreneurial activities, including those of electronic marketplace operators and fulfilment service providers. This also applies to third-country nationals who, under other rules, have a right of access to the internal market.[348] Compulsory verification introduced by EU legislation would have a **direct impact** on electronic marketplace operators and fulfilment service providers, as it would impose additional obligations on them. Jurisdiction found import bans to be an intervention.[349] Regarding the intensity of the intervention, this would be comparable with traffic bans implied by compulsory verification.

With regard to **justification**, Art. 52 (1) CFR must be observed: "*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*" One such legitimate objective in the public interest would be to improve enforcement of EPR-obligations, i.e. environmental protection as an essential objective of the Union, e.g. in Art. 3 (3) TEU or Art. 191 TFEU.

As far as **proportionality** is concerned, the Union legislator must be given considerable leeway for regulation.[350] Even when so far merely a contribution to the objectives has been achieved,

[346] See above under 3.3.1.1.

[347] See Jarass, GrCh, 3rd edition 2016, EU Charter of Fundamental Rights Art. 15, marginal no. 2.

[348] Jarass, GrCh, 3rd edition 2016, EU Charter of Fundamental Rights Art. 15, marginal no. 10.

[349] ECJ, Case C-183/95 Affish [1997] ECR I-4315, marginal no. 42 et seq.

[350] See for example ECJ, C-283/11 - Sky Austria, 22.1.2013, marginal no. 46.

one can speak of **suitability**.[351] This would be the case if compulsory verification or deeming electronic marketplace operators and fulfilment service providers to be producers under EU law were designed according to practical implementation requirements. **Necessity** can be assumed if no less restrictive, equally effective means exist of reducing the burden on those concerned and on the general public.[352] Compulsory verification would be a relatively minor interference with entrepreneurial freedom, in particular because employing digital technologies reduces the effort involved. The reasoning is comparable to the necessity of an intervention on the basis of a national regulation.[353] The same applies to the intervention's **appropriateness**.[354] Here, protecting the European Union economy vis-à-vis third-country companies may be an important concern.[355] If designed accordingly, compulsory verification can be regarded as appropriate.

Of similar importance as the protection of freedom are CFR **equality rights**, specifically the general principle of equality before the law under Art. 20. The personal scope of protection includes legal persons, even those from third countries.[356] For economic operators this also applies, particularly when comparable goods are marketed, as in the case of EEE.[357] It could be argued that here different situations are being addressed, namely the activities of electronic marketplace operators and fulfilment service providers on the one hand, and distributors on the other. This matter has been dealt with above in detail with respect to Article 3 Basic Law.[358]

Where a disproportionate restriction of a fundamental **internal market freedom** is assumed, an intervention at Union-law level is no longer justifiable.[359] Regarding compulsory verification introduced at national level though, this is not the case.[360] This leads to the conclusion that a European solution would also be compatible with internal market freedoms.

As a **result**, a Union law enshrinement of compulsory verification, possibly also deeming electronic marketplace operators and fulfilment service providers to be producers, can be regarded as compatible with the CFR-fundamental rights and the internal market freedoms.

3.3.2.2.3 Compatibility of the simplified producer responsibility model with the EU Charter of Fundamental Rights

Since implementing the simplified producer responsibility model would require amendments to Union law, in particular to the WEEE Directive,[361] the CFR-fundamental rights would be applicable. It must be asked whether different treatment of producers offering goods via electronic marketplaces, and other producers, would constitute a violation of the general principle of equality under Art. 20 CFR.

In line with the simplified producer responsibility model, a separate registration system would have to be introduced for e-commerce within the EPR-framework. According to this model, instead of a registration based on the individual producer, a simplified fulfilment of obligations

[351] See for instance ECJ, Case C-280/93 Germany v Council [1994] ECR I-4973, marginal no. 86.

[352] Jarass, GrCh, 3rd edition 2016, EU Charter of Fundamental Rights Art. 16, marginal no. 23.

[353] See above under 3.3.1.1.1.3.

[354] See above under 3.3.1.1.1.3.

[355] Jarass, GrCh, 3rd edition 2016, EU Charter of Fundamental Rights Art. 16, marginal no. 24.

[356] Jarass, GrCh, 3rd edition 2016, EU Charter of Fundamental Rights Art. 20 marginal no. 6.

[357] ECJ, Case C-463/12 - Bandkopi, 5.3.2015, marginal no. 33.

[358] See above under 3.3.1.1.4. on the question of the compatibility of the simplified producer responsibility model with the principle of CFR equality, see above under 3.3.2.3.3.

[359] ECJ, Case C-390/12 – Pfleger, 30 April 2014, marginal no. 59.

[360] See above under 3.3.1.1.1.4.

[361] See above under 3.2.3.2.1.

would be implemented. This would place foreign producers selling via an electronic marketplace at an advantage before domestic producers, involved in either online or stationary selling. Compared to other producers or their authorised representatives who are obliged to register, it would benefit producers falling under Art. 3 (1) lit. f) iv) WEEE Directive,[362] who offer goods via electronic marketplaces. Via the simplified producer responsibility model, they could just 'buy their way out' of the EPR-obligations. In this way, the two cases would be treated **unequally,** despite their being comparable, consisting of one and the same transaction, i.e. the offering and placing of goods on the market.

This unequal treatment would require **justification** with an objective reason. The simplified producer responsibility model would favour one group of producers unilaterally, thereby granting them a better competitive position. This is what should be prevented according to the 7th recital of the WEEE Directive:

"The provisions of this Directive should apply to products and producers irrespective of selling technique, including distance and electronic selling. In this connection, the obligations of producers and distributors using distance and electronic selling channels should, as far as is practicable, take the same form, and should be enforced in the same way, as for other distribution channels, in order to avoid those other distribution channels having to bear the costs resulting from this Directive arising from WEEE for which the equipment was sold by distance or electronic selling."

The fear of a special right for distance selling **privileging e-commerce** over stationary trade could be exacerbated by the simplified producer responsibility model, from which only producers under Art. 3 (1) lit. f) iv) WEEE Directive[363] would benefit.

One **objective argument** for different treatment of stationary trade and cross-border distance selling could be the model's aim to reduce the third-country free-rider rate. A voluntary instrument, the model therefore seems unsuitable for solving this problem.[364] These simplified producer obligations would, to a certain extent, continue to reward non-compliant behaviour on the part of online suppliers. This cannot be considered an objective reason. Nor do any other aspects appear to substantiate an objective reason for the unequal treatment.

3.3.2.3 Compatibility with relevant EU secondary law

In the following, whether the solutions mentioned would be compatible with secondary EU law is discussed.

3.3.2.3.1 Compulsory verification

It must also be examined whether compulsory verification for electronic marketplace operators and fulfilment service providers would be compatible with secondary legal requirements. It has been explained above that anchoring compulsory verification at Union level by supplementing the WEEE Directive, Packaging Directive and Batteries Directive would make sense.[365] The following will examine whether establishing **compulsory verification in national law** would be compatible with the relevant directives. Remaining within the margin granted by the Directives to the Member States would be of particular importance. This is significant in view of the fact that so far none of the three directives mentions electronic marketplaces and fulfilment service providers. Despite this omission, the scope awarded the Member States for establishing

[362] It is assumed that the existing legal text of the ElektroG on the simplified producer responsibility model would be implemented 1:1 in the WEEE Directive.

[363] It is assumed that the existing legal text of the ElektroG on the simplified producer responsibility model would be implemented 1:1 in the WEEE Directive.

[364] See the comments above under 3.2.3.2.

[365] See above under 3.2.1.1.3 et seq.

compulsory verification is not unlimited. Member States may not create regulations which would impede or counteract an implementation of the objectives pursued by the Directive. This results from the **requirement to interpret national law in conformity with the respective Directive**.[366]

With regard to the **WEEE Directive**, compulsory verification would lie within the scope of the catalogue of objectives set by Art. 1. According to this, the "*directive lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste from electrical and electronic equipment (WEEE) and by reducing overall impacts of resource use and improving the efficiency of such use […], thereby contributing to sustainable development.*" This corresponds exactly to the intentions associated with compulsory verification. Art. 16 WEEE Directive concerns registration obligations of producers or their authorised representatives. Under Art. 16 (2) WEEE Directive, Member States must ensure that each producer is duly registered and provides the necessary information. The Directive does not specify exactly how Member States are to ensure this. Since 2019, throughout the Union a standard form must be used for registration. This would not hinder compulsory verification for electronic marketplace operators and fulfilment service providers. On the contrary, this would merely take advantage of the leeway given to the Member States for implementing the Directive to ensure enforcement of European law requirements. The intention of compulsory verification is to ensure each producer is actually registered in accordance with Art. 16 (2) WEEE Directive. This includes the enforcement of European legal requirements at national level.

Pursuant to Art. 1 (2), the **Packaging Directive** aims primarily "*at preventing the production of packaging waste and, as additional fundamental principles, at reusing packaging, at recycling and other forms of recovering packaging waste and, therefore, at reducing the final disposal of such waste in order to contribute to the transition towards a circular economy*." This correlates with the objectives of compulsory verification of electronic marketplace operators and fulfilment service providers. The Packaging Directive does not provide precise requirements regarding registration of responsible actors. According to Art. 4 (1) Packaging Directive, Member States shall ensure that "*other preventive measures are implemented in order to prevent generation of packaging waste and to minimise the environmental impact of packaging*." Art. 5 (1) Packaging Directive requires Member States to "*take measures to encourage the increase in the share of reusable packaging placed on the market and of systems to reuse packaging in an environmentally sound manner and in conformity with the Treaty",* and according to Art. 7 (1) Packaging Directive, Member States shall "*take the necessary measures to ensure that systems are set up to provide for […] the return and/or collection of used packaging and/or packaging waste from the consumer, other final user, or from the waste stream in order to channel it to the most appropriate waste management alternatives"* and *"the reuse or recovery including recycling of the packaging and/or packaging waste collected*." Art. 9 (1) Packaging Directive lays down essential requirements for Member States, according to which "*packaging may be placed on the market only if it complies with all essential requirements defined by this Directive.*" Compulsory verification for electronic marketplace operators and fulfilment service providers lie within the scope of this regulation. The Packaging Directive poses no barriers to the imposition of such obligations.

This is also the case for the **Batteries Directive** which under Art. 1 sent. 2 aims "*to improve the environmental performance of batteries and accumulators and of the activities of all economic operators involved in the life cycle of batteries and accumulators e.g. producers, distributors and end-users and, in particular, those operators directly involved in the treatment and recycling of*

[366] Cf. Grabitz/Hilf/Nettesheim/Nettesheim, 67th edition June 2019, TFEU, Art. 288, marginal no. 133.

waste batteries and accumulators." Establishing compulsory verification in national law would lie within the scope of these objectives. Art. 8 (1) Batteries Directive states that "*Member States shall ensure that appropriate collection schemes are in place for waste portable batteries and accumulators*." According to Art. 8 (2) Batteries Directive, Member States may oblige economic operators to participate in take-back systems. Art. 17 Batteries Directive requires the Member States to ensure "*that each producer is registered"*. The purpose of compulsory verification is to ensure enforcement of registration obligations, thereby serving enforcement of European law requirements. The Batteries Directive poses no barriers to the imposition of compulsory verification on electronic marketplace operators and fulfilment service providers.

For all three Directives discussed here, under Art. 193 TFEU, Member States are not prevented "*from maintaining or introducing more stringent protective measures"* provided they are compatible with the Treaties and notified by the Commission. Provided there is no blocking effect of a Union law standard, Member States are **not limited by the minimum standards** laid down in the directives.[367]The ECJ has considered it sufficient for a national measure to pursue the same objective as the directive in question, and for the instruments notified by the Member State to have the same environmental protection focus as the directive.[368] This is here the case. The measure must also be compatible with the Treaties. In this respect, the above comments on compatibility with the common market can be applied.[369] Art. 193 TFEU is applicable to the envisaged compulsory verification, and the German legislator is authorised to take more stringent protective measures.

It must be examined whether Art. 15 (1) **E-Commerce Directive**[370] would be in contradiction to a Member State introducing compulsory verification. According to this provision, Member States may not impose a general obligation on providers "*to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity".* This refers to service providers offering "*mere conduit*" in the sense of Art. 12 E-Commerce Directive who transmit „*in a communication network of information provided by a recipient of the service*" (Art. 13) or, in the sense of Art. 14, offer "*the storage of information provided by a recipient of the service*" (Hosting). Art. 2b) E-Commerce Directive defines the "*service provider*" as "*any natural or legal person providing an information society service*". Under Art. 2a), „*information society services*" include "*services within the meaning of Article 1 (2) of Directive 98/34/EC as amended by Directive 98/48/EC*". According to this, "*service*" means "*any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*."

The view taken here is that **services** provided by electronic marketplace operators and fulfilment service providers are not covered by Art. 15 E-Commerce Directive. On the one hand, these services are paid for and also concern distance selling. The explanatory memorandum to the draft law for the avoidance of losses of turnover tax on Section 22f UStG, which implements Art. 15 into national law, points out that the directive does not apply to taxation: "*Directive 2000/31/EC of 8 June 2000 of the European Parliament and of the Council (the 'E-Commerce Directive') does not apply to the field of taxation."*[371] Since compulsory verification for electronic

[367] Calliess/Ruffert/Calliess, 5th edition 2016, TFEU Art. 193 marginal no. 5.

[368] ECJ, Case C-6/03 [2005] ECR I-2753, recitals 38 and 41 (Deponiezweckverband Eiterköpfe).

[369] See Calliess/Ruffert/Calliess, 5th edition 2016, TFEU, Art. 193, marginal no. 11.

[370] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Official Journal of the EU L 178 of 17 July 2000 p. 1.

[371] Draft law of the Federal Government, draft of a law for the avoidance of loss of turnover tax when trading with goods on the Internet and for the amendment of other tax regulations, Bundestag Document 19/4455 of 24 September 2018, p. 60.

marketplaces is not a taxation matter, it could be assumed that they are covered by Art. 15 E-Commerce Directive.

On the other hand, the focus is **not distance selling itself**, but support for distance selling with regard to the producer/customer relationship, when involving an electronic marketplace or fulfilment service provider. There is no individual retrieval on the part of electronic marketplace or fulfilment service provider customers. Rather, the service (the support described above) is generally offered and provided to the producer or authorised representative under a contract. Pursuant to Art. 15 (2) E-Commerce Directive, providers can be required, "*promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements*." This does not apply to compulsory verification of electronic marketplaces and fulfilment service providers discussed here, as these are designed to be implemented without the competent authorities' direct involvement in the relationship between operators/service providers and producers/their authorised representatives. Art. 15 (2) E-Commerce Directive shows, however, that the legislator wishes to prevent the pursuit of illegal activities. The proposed compulsory verification is thus in line with the E-Commerce Directive and would not constitute an infringement.

The introduction of compulsory verification for electronic marketplace operators and fulfilment service providers would therefore be **compatible with EU secondary legislation**.

3.3.2.3.2 Electronic marketplace operators and fulfilment service providers deemed to be producers

In the same way as does the afore-mentioned compulsory verification, deeming electronic marketplace operators and fulfilment service providers to be producers serves the objectives of the relevant directives.[372] However, a redefinition of the **term 'producer'** as it stands in the secondary legislation would be necessary. Art. 8 (1) WFD defines the producer as whoever "*professionally develops, manufactures, processes, treats, sells or imports products*". Electronic marketplace operators are neither covered by this nor by the more specific producer definition under Art. 3 (1) lit. f) WEEE Directive.[373] An augmented definition of the deeming provision regarding electronic marketplace operators and fulfilment service providers will need to be given by the Member State.

This does not preclude Member States from going beyond these provisions. In principle, Art. 193 TFEU allows the national legislator to take **more stringent protective measures**. An extension of the producer definition to include electronic marketplace operators and fulfilment service providers could be seen as such an enhanced protection measure. This would aim at "*more stringent*" environmental protection by extending the EPR-registration/notification obligations. Such a national protection measure would therefore be permissible.

Regarding this legal fiction's compatibility with **Art. 15 E-Commerce Directive**, reference can be made to the comments above.

3.3.2.3.3 Simplified producer responsibility model

It has been stated above that moving from a producer-based registration/notification system to a simplified producer responsibility model would not be compatible with existing secondary legislation. Art. 16 WEEE Directive requires every producer or authorised representative to be

[372] See above under 3.3.2.1.1.

[373] See above under 2.2.

registered in accordance with the regulations. Similarly, Art. 17 Batteries Directive also refers to the producer.

The simplified producer responsibility model could be assessed differently were the electronic marketplace operator appointed by the producer as **authorised representative**. The authorised representative would then fully assume the producer´s obligations, including registration/notification. However, the model makes no provision for the electronic marketplace operator to act as authorised representative. On the contrary, the institution of the authorised representative is not seen as sensible:

"First, in the WEEE Recast the introduction of the 'Authorized Representative' was meant to simplify the burden of compliance for all those companies not having a legal entity established in every Member State and allow also SMEs and distance sellers (including those with registered office outside EU) to delegate part of the obligations to a third party. Due to its complexity and cost, the success of the Authorized Representative scheme has been fairly limited."[374]

Replacing producer-based registration with the simplified producer responsibility model would not be consistent with secondary legislation provisions. A fundamental **change in the system** for e-commerce would be needed. However, such **privileging** would not be compatible with, for example, the principle of equality.[375]

3.3.2.3.4 Import Bans

Import bans are not explicitly provided for in the secondary legislation relevant here (with the exception of Art. 3 No. 14 Batteries Directive, implemented by Section 2 (16) sent. 2 BattG). In the case of infringements of national implementing provisions, Art. 22 WEEE Directive obliges Member States to impose "*effective, proportionate and dissuasive*" sanctions. The effectiveness of import bans, and obviously their deterrent effect, is however open to considerable **doubt**. It has been explained above that, in view of the proposed compulsory verification, the suitability and necessity of import bans must be denied. Art. 25 Batteries Directive also requires sanctions to be suitable, and Art. 36 (2) WFD requires their **proportionality**. Import bans therefore do not fall within the scope of sanctions permitted under secondary legislation.

3.3.2.3.5 Further proposed solutions

The proposed standardisation of the regulations on **authorised representatives** in the ElektroG, BattG and VerpackG does not violate secondary legislation. The WEEE Directive provides for the designation of authorised representatives, and Art. 8a (5) subpara. 4 WFD makes this a general responsibility for Member States.

Art. 18 WEEE Directive, for example, envisages **information exchange** between competent authorities as an instrument for improving administrative cooperation. If information obligations proposed for electronic marketplace operators and fulfilment service providers go beyond the relevant directives' requirements, this is lawful according to Art. 193 TFEU, since the overall aim is *"more stringent protective measures."*

3.3.2.3.6 Interim results

Member State regulations on **compulsory verification** for electronic marketplace operators and fulfilment service providers would be compatible with European secondary legislation. At the very least, Art. 193 TFEU makes such a strengthening of protection possible. The same applies to **deeming electronic marketplace operators and fulfilment service providers to**

[374] Magalini et al. (SOFIES – Solutions for Industrial Ecosystems), A Flat Fee model for EPR compliance in the context of online marketplaces, September 2019 (unpublished), p. 9.

[375] See above under 3.3.1.1.4.

be producers. The **simplified producer responsibility model**, on the other hand, would require a fundamental change in the secondary-law EPR-registration regime. In view of the proportionality required by the relevant directives, **import bans** would not be permissible. Further proposals such as the extension of **information obligations** would not pose any problems under secondary law.

3.3.2.4 Interim results on European Union law issues

Compulsory verification, electronic marketplace operators and fulfilment service providers deemed to be producers, the simplified producer responsibility model and import bans have been examined as to their compatibility with primary and secondary EU-law. It has been found that **compulsory verification** for electronic marketplace operators and fulfilment service providers meets all these requirements. Soft instruments such as improvements in cooperation and information would also be unproblematic.

3.3.3 International Economic Law

The following will examine the proposed instruments' compatibility with international trade and economic law requirements, specifically WTO law, starting with compulsory verification.

3.3.3.1 Applicable legal regime

Firstly, the Agreement on Technical Barriers to Trade (TBT Agreement)[376] should be considered. Secondly, the measure's compatibility with the GATT 1994 provisions[377] should be examined. According to the Appellate Body, all WTO obligations apply cumulatively, i.e. they must be fulfilled by all members to the same extent.[378]

On the other hand, a general interpretation rule in Annex 1A of the WTO Agreement clarifies that, in the event of conflict, the provisions of the agreements contained within (and also those of the TBT Agreement) take precedence over the GATT.[379] In particular[380] in view of this interpretation rule – and in line with the WTO dispute settlement bodies' ruling practice -[381] it is predominantly assumed that the TBT Agreement is lex specialis vis-à-vis the GATT, as far as the assessment of technical regulations is concerned.[382] This explains to start with, that the TBT-agreement requirements should be examined. It must be asked whether compulsory verification falls within the material scope of the Agreement which covers technical regulations, standards and conformity assessment procedures.

According to Art. 1.2 in connection with Annexe 1 no. 1 TBT Agreement, technical regulations are a

[376] Agreement on Technical Barriers to Trade, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994), Official Journal of the EC 1994 Nr. L 336, p. 86; in The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1125 (1999) (quoted as TBT-Agreement).

[377] General Agreement on Tariffs and Trade 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994), in The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1125 (1999) (quoted as GATT 1994).

[378] On the question - not yet finally clarified in detail - of the relationship between GATT and the TBT-Agreement, for example, Klein (2011), p. 389 et seq.

[379] See https://www.wto.org/english/docs_e/legal_e/05-anx1a_e.htm (7 July 2020)

[380] For further aspects, see Klein (2011), p. 389 et seq. with further references, and Führ et al. (2015), p. 60.

[381] Panel Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, Rn 8.16; for the whole see also Keimeyer/Herrmann (2013)

[382] See van Calster/Prévost (2018); see also Führ et al. (2015), p. 60.

"Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."

The Appellate Body carries out a three-stage check regarding a technical regulation: The first step is to verify the existence of an identifiable product or group of products. Secondly, the application of the regulation to a product or related process/production methods ("*requirements, as they apply to a product, process or production method*") must be examined. Thirdly, a technical regulation can only be assumed if it is mandatory.[383] As explained above, the point of reference for compulsory verification is the producer obligation to register. Included under this obligation are electronic marketplace operators and fulfilment service providers who should be involved in its implementation and enforcement. Electronic marketplace operators and fulfilment service providers must ensure that producers comply with their registration obligations. Producer non-compliance results in a ban on their products being offered. Violations may be sanctioned as an administrative offence, and a fine may be imposed.

Compulsory verification can be assumed as a technical regulation. This is the case if an examination of the constituent elements of a technical standard shows that the conditions for a technical regulation are fulfilled. Compulsory verification would not be limited to a specific product but would apply to those products and product groups which fall within the scope of the three Acts (ElektroG, BattG and VerpackG). The products concerned are therefore identifiable. In accordance with the Appellate Body test programme, the obligation would also have to refer to a characteristic of the respective products or product groups, for which stipulation of product characteristics is binding. This requirement must be understood broadly in the sense that it also covers properties indirectly linked to a product (such as its presentation or specific elements or ingredients).[384]

This would include requirements for terminology, symbols, packaging, marking or labelling if these relate to a product, process or production method. The obligation to register/notify according to the three Acts does not directly refer to products and their properties or ingredients, but to their producers. Regulation of specific product properties, ingredients or processes and obligations aimed at ensuring these properties or ingredients are therefore not the subject matter. Rather, the registration obligation, as well as the related compulsory verification, are primarily concerned with ensuring the identifiability of the responsible producers, ultimately to ensure compliance with their EPR-obligations.

Were compulsory verification understood as a purely **procedural obligation**, it could nevertheless fall under the TBT-Agreement. The application of the Agreement (and other WTO law) to regulations dealing with "*non-product-related processes and production methods*" has long been the subject of controversy among both scientists and WTO members.[385] The ruling practice to-date does not provide a conclusive answer to the question of which purely

[383] "United States – Measures concerning the importation, marketing and sale of Tuna and Tuna Products", Appellate Body Report, May 2012, WT/DS381/AB/R, S. 72, recital 179, 183 et seq.; "European Communities – Trade description of Sardines", Appellate Body Report, September 2002, WT/DS231/AB/R, p. 44, Rn. 176; "European Communities – Measures affecting Asbestos and Asbestos-containing products", Appellate Body Report, March 2001, WT/DS135/AB/R, p. 24, marginal no. 61.

[384] Appellate Body, EC – Asbestos, recital 67, 171.

[385] For an overview of the views expressed see Glinski (2014); as Vranes (2009) explains, unequal treatment of non-product-related production and process requirements in comparison to product-related regulations under WTO law - despite the continuing differences of opinion, which are probably represented by a majority of the authors - is problematic, especially from an environmental policy perspective: Measures dealing with production requirements are important instruments of environmental policy. Thus, environmentally oriented production and process requirements in general and corresponding labelling systems in particular can be used to address local concerns in the country of regulation, cross-border environmental problems and global concerns such as climate change or the protection of the ozone layer. A readjustment of this dogma is therefore appropriate.

procedural trade restrictions can be considered technical regulations, so that they would then fall under the TBT Agreement application scope. Some scholars argue that, from the outset, purely process-related regulations would not be covered. Are they related to physical characteristics of the products concerned however, then the TBT-Agreement would be applicable.[386] With reference to sentence 2 of Annex 1.1 of the TBT Agreement, others emphasize that purely process-related trade restrictions also fall within the scope of the Agreement, since, in contrast to its sentence 1, the Agreement does not require the process to affect the end product's properties. Take-back obligations and requirements for the recovery of end-of-life products are also assessed in the literature as technical regulations within the meaning of the TBT Agreement.[387] It is also possible to consider product monitoring obligations and documentation rules, intended to ensure the enforcement of product monitoring obligations, as technical regulations.[388] Others differentiate further. Tietje (2005), for example, states that the general definition in the first sentence of Annex 1.1 TBT only includes processes and production methods relating to product characteristics, but that this restriction does not apply to the measures listed in the second sentence (including packaging and labelling). This could be used as an argument for the fact that purely procedural restrictions on trade, not linked to the characteristics of the final product, can only then be regarded as 'technical regulations' if they belong to the measures listed in the second sentence.[389] In the Tuna Dolphin II Decision, however, the Appellate Body affirmed an application of the TBT Agreement,[390] although the requirements in question (tuna fishing regulations) are in no way perceptibly reflected in properties of the final product.[391]

Whether or not compulsory verification can be assumed to be a **technical regulation** is difficult to say, since it is neither product-related nor can it be subsumed under the measures listed in the second sentence of Annexe 1.1. The question becomes irrelevant if compulsory verification were lawful either as a technical regulation - i.e. under the TBT Agreement – or as a further measure under the general GATT rules. As the following will explain, this is the case.

The regulation's non-binding nature is no barrier to its being classified a technical regulation within the meaning of the TBT Agreement. Compulsory verification would become law, and infringements would be sanctioned.

Compulsory verification could also be assessed as a **conformity assessment procedure**. Pursuant to Art. 1.2. in conjunction with Annex 1 No. 3 TBT Agreement, this covers any procedure intended to ensure, directly or indirectly, compliance with technical regulation or standard requirements. Conformity assessment procedures are thus subject to the TBT Agreement in as much as they relate to the assessment of TBT Agreement-technical regulations and standards. This may include sampling, testing and inspection, evaluation, verification and attestation of conformity, registration, accreditation and approval, and any combination thereof. Compulsory verification is intended to ensure compliance with the registration/notification obligations; therefore, its classification as a conformity assessment procedure seems initially obvious. On the one hand, the question arises whether the registration/notification requirements can be classified as technical regulations or standards, as they are neither product-

[386] Cf. for example Tietje/Wolf (2005), p. 12; see also Stökl (2003), p. 140, with further references.

[387] Beyer et al (2005), p. 80 et seq., with further references.

[388] See Stökl (2003), p. 141 et seq.

[389] Franken, ZUR 2010, p. 66.

[390] WTO/DS381/R, 7.71 et seq.

[391] See also Pauwelyn et al. (2012).

related[392] nor a measure within the meaning of sentence 2 of Annex 1.1 TBT. If the answer here is negative, in which case compulsory verification would not be geared to the assessment of a technical regulation, classification as a conformity assessment procedure would also be out of the question.

On the other hand, from an evaluation point of view, it seems debatable whether compulsory verification in its concrete form should be regarded as a conformity assessment procedure. A conformity assessment and corresponding certification should only be performed by either a public or private body, as long as they prove to be neutral. However, compulsory verification is not an assessment, control or verification of compliance with rules through a neutral third party. Rather, it creates a separate obligation for electronic marketplace operators and fulfilment service providers as part of a more comprehensive regulatory framework.

Compulsory verification is not to be understood as a standard within the meaning of the TBT-Agreement. A standard, according to Art. 1.2. in connection with Annex 1 No. 2 TBT-Agreement, corresponds to a technical regulation, differing insofar as the standard is not binding. In view of its binding nature, compulsory verification does not constitute a standard within the meaning of the TBT.

Personal scope of application: The addressees of the TBT-Agreement are the Federal Government, the Länder and also non-governmental bodies.

3.3.3.2 Compulsory verification not a violation of TBT-Agreement-regulations

Were compulsory verification classified a technical regulation, the existence of a potential violation of the TBT Agreement provisions would need to be clarified.

Examination scope

The most relevant requirements for the proposed measures can be found in Article 2.1 TBT, in particular the principles of national equal treatment and most-favoured nation, as well as in Article 2.2 TBT dealing with the prohibition of unjustified trade restrictions. The agreement also contains various requirements for the introduction and implementation of technical regulations, regarding, for example, TBT-Agreement transparency requirements when introducing technical regulations. Procedural transparency is affected by means of a notification procedure requiring all WTO Members to communicate their draft technical regulations or conformity assessment procedures to the other Members, through the WTO Secretariat. The "Code of Good Practice" in Annex 3 of the TBT-Agreement must also be complied with, containing guidelines for the development, adoption and use of standards.[393] Such requirements can only be examined once the measures have taken concrete form. The following review focuses on the obligations regulated in Articles 2.1 and 2.2 TBT.[394]

3.3.3.2.1 Art. 2.1. TBT – Most Favoured Nation and Equal Treatment

A possible violation of Article 2.1 of the TBT Agreement must be considered, which provides that *"Members shall ensure that in respect of technical regulations, products imported from the*

[392] If it is assumed that the EPR-registration obligations are used to establish that relevant requirements in technical regulations or standards are fulfilled, they would probably have to be assessed as registration within the meaning of Annex 1 No. 3 TBT. Even if this were the case, compulsory verification as an "assessment procedure of an assessment procedure" according to the wording of Annex 1 No. 3 would itself no longer be classified as a conformity assessment procedure within the meaning of the TBT-Agreement. Such procedures only serve to establish that relevant requirements in technical regulations or standards have been met, whereas the establishment of relevant requirements of conformity assessment procedures is not listed as the subject of such a procedure.

[393] See already Hermann/Keimeyer (2013), p. 54 et seq.

[394] Regarding the reconstruction of the standard of examination see Führ et al. (2015), p. 62.

territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."

A violation of Art. 2.1 TBT must be confirmed if products from third countries are treated less favourably than similar products from the EU. The first step is to examine whether the imported product is similar to domestic products and products from other sources ('like products'). In a second step, it must be clarified whether the imported product is treated less favourably than a comparable domestic product or products from other third countries ('treatment no less favourable'). Regarding the interpretation of Art. 2.1 TBT, reference can be made to the standards developed in the GATT ruling practice, with which recent Appellate Body decisions are in concurrence.[395]

3.3.3.2.2 Similarity analysis ('like products')

Compulsory verification would apply to all products subject to the BattG, VerpackG and ElektroG. A similarity ('likeness') examination is needed to clarify whether the legal definition of the circumstances, which are subject to compulsory verification, causes unequal treatment of essentially identical products. This would determine whether a comparative pair of products or product groups is to be understood as 'equal' or 'unequal'. The decisive criterion for determining comparability is their competitive relationship.[396] Such determination is achieved primarily on the basis of their physical characteristics, ultimate use in a given market, and the tastes and habits of the consumer, end-uses.[397]

Whether products are similar within the meaning of Article 2.1 TBT can ultimately only be examined using concrete examples, assessed on the basis of the individual case's circumstances.[398] Unequal treatment of essentially identical products through compulsory verification could only be identified on the basis of a hypothetical reconstruction of a comparative case. In the present case, products (EEE, batteries, packaging) for which the producer has properly registered/notified and comparable products for which the producer has not registered/notified should be chosen as comparison pairs.

With regard to the final use of a product in a certain market and differing consumer preferences, it can be argued that the products of registered/notified producers and those without such registration/notification constitute different goods because of the different EPR-related economic implications. Quality, safety and sustainability of products have a significant impact on consumer preferences.[399] The willingness of larger consumer circles to give preference to sustainable over non-sustainable products could therefore argue in favour of classifying the products as not comparable within the meaning of Art. 2.1 TBT. With regard to the principle of non-discrimination under Art. III.4 GATT, and to the regulation of non-product-related production and process methods, it is often argued that these should only be taken into account in determining similarity if they are reflected in the physical properties of products.[400] This

[395] Appellate Body, US – Clove Cigarettes, recital 99 et seq.; Appellate Body, US – Tuna II, marginal no. 214; see Führ et al. (2015), p. 63.

[396] *"[T]he determination of likeness under Article 2.1 of the TBT-Agreement, […], is a determination about the nature and extent of a competitive relationship between and among the products at issue", "United States – Measures affecting the production and sale of clove cigarettes",* Appellate Body Report, WT/DS406/AB/R, April 2012, 47.

[397] United States – Measures affecting the production and sale of clove cigarettes, Appellate Body Report, WT/DS406/AB/R, April 2012, 47-48.

[398] See also Führ et al (2015), p. 72.

[399] Cf. Hermann/Keimeyer (2013), p. 57.

[400] See Krajewski (2017), p. 112.

would apply, irrespective of whether these methods are relevant to a wide range of consumers.[401]

If, according to these standards, the goods are of different types, there is no infringement of Art. 2.1 TBT, as there is no unequal treatment of identical products. However, in the light of the foregoing, it cannot be ruled out that, in individual cases, certain products may be regarded as comparable in relation to their intended end-uses and the perceptions/habits of consumers.[402] The review must therefore deal with the question whether compulsory verification would lead to the assumption of 'less favourable treatment', and constitute a violation of Article 2.1 TBT.

3.3.3.2.3 'treatment no less favourable'

Merely a formal difference in treatment between the (foreign) product whose producer has not duly registered and a (domestic) product whose producer has registered is not sufficient for assuming violation of the most-favoured nation principle.[403] For this to be the case, the regulation would have to place a greater burden on an imported than on a domestic product, and thereby impede the creation of a level playing field for imported and domestic products (de facto discrimination),[404] or explicitly link the greater burden to foreign origin of the products (de iure discrimination).[405]

Compulsory verification would affect German and third-country products alike and would not consider the foreign origin of the products. Accordingly, no discrimination 'de iure' can be assumed. Since compulsory verification is intended to create a regulatory 'level playing field', a de facto discrimination of foreign products does not seem obvious either. Its intention is to ensure that, irrespective of their origin, all traders comply with the same requirements as far as registration and disposal obligations as laid down in the VerpackG, BattG and ElektroG are concerned.

Nevertheless, it remains a possibility that in individual cases, compulsory verification[406] could de facto lead to discrimination against imported products from third countries. Similarly to under Art. III.4 GATT, according to Art. 2.1 TBT, measures not linked to the product's origin can constitute discrimination under WTO law; this applies equally to pure adaptation costs, which can be higher for foreign products with regard to compliance with technical regulations.[407] This would be the case if the competitive conditions were changed to the detriment of third countries as a result of the compulsory verification.[408] De facto discrimination could, for example, be assumed if compulsory verification for fulfilment service providers mainly concerned products of dealers from third countries, creating additional burdens. Such additional costs would in practice mainly be passed on to third-country traders, because, unlike domestic traders, they

[401] Von Arnauld (2018), 177; in any case, the possibility of justifying such unequal treatment must be assumed, see also Vranes (2009).

[402] Cf. Führ et al. (2015), p. 65.

[403] Cf. the report of the Appellate Body Korea – Various Measures on Beef, marginal no. 135 et seq.; see also Keimeyer et.al., Rechtliche Rahmenbedingungen eines Allgemeinen Nachhaltigkeitssiegels, Expert opinion for the German Bundestag, p. 58.

[404] See the report of the GATT Panel, Canada - Provincial Liquor Boards (US), recitals 5.12-5.14 and 5.30-5.31; Report of the GATT Panel, US – Malt Beverages, recital 5.30.

[405] Cf. the report of the Appellate Body, Dominican Republic – Import and Sale of Cigarettes, recital 96; Panel Report, EC – Biotech Products, marginal no. 7.25.

[406] According to the Appelate Body, the examination of discriminatory unequal treatment must focus on the individual case and "*carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue*", US –COOL, marginal no. 271.

[407] Tietje/Wolff (2005), p. 17 et seq.

[408] *"United States – Measures affecting the production and sale of clove cigarettes",* Appellate Body Report, WT/DS406/AB/R, April 2012, p. 65-66, marginal no. 180.

would be dependent on the fulfilment service providers' offers.[409] It is also conceivable that, with regard to the offers made by third-country traders, compulsory verification would represent a greater burden for those subject to inspection and be reflected in higher service prices.

However, even were unequal treatment to be assumed, compulsory verification would not violate Art. 2.1 TBT, since it does not constitute arbitrary or unjustified unequal treatment.

There are various reasons for different compliance and unequal factual burdens for market participants, although this problem is not regulated explicitly in the TBT. Some of the literature and the Appellate Body ruling practice both agree, that unavoidable unequal treatment does not violate Article 2.1 TBT if it is suitable and necessary and pursues legitimate objectives in the sense of TBT.[410] Assuming, in individual cases, a discrimination against imported products from third countries, its justification would need to be examined. This will be shown to be the case with regard to Article 2.2 TBT.

3.3.3.2.4 Art. 2.2. TBT Agreement / Art. XX b) GATT: Unnecessary barrier to trade

There is no unnecessary trade barrier within the meaning of Article 2.2 TBT. Compulsory verification is justified and therefore does not constitute an unnecessary barrier to trade. The proportionality requirements of Art. XX GATT must also be observed when applying Art. 2.2 TBT.[411]

Justification requires clarification that there is no unnecessary obstacle to international trade.[412] To this end, compulsory verification would have to pursue a legitimate objective – such as the protection of human life or health, the protection of animals or the environment (cf. Art. 2.2. sent. 3 TBT). The list of permissible objectives in Article 2.2 sent. 3 TBT is not exhaustive. In particular, pursuing measures based on the precautionary principle, widely recognised in international environmental law, should also be considered a legitimate objective.[413] The registration/notification obligation in the VerpackG, BattG and ElektroG is intended to enable the application of legal waste requirements. Compulsory verification aimed at their enforcement should ensure an efficient, sustainable and environmentally sound use of resources.[414] These environmental protection-related regulatory objectives allow the instrument to be assumed legitimate within the meaning of the TBT Agreement.

As part of the process to determine if a measure is 'necessary', it must be clarified whether an alternative, less trade-restrictive measure exists.[415] A measure is considered necessary for achieving the objective only if there is no milder, equally suitable means that intervenes less in

[409] As outlined above, fulfilment service providers are likely to offer particular advantages for foreign traders, see chapter 3.2.1.2.

[410] Tietje/Wolf make a systematic interpretation of Article 2.1 TBT and Article 2.2 TBT and conclude that Article 2.1 TBT should be seen in the light of Article 2.2. With regard to compliance with technical regulations, a violation of Art. 2.1. can therefore only be assumed if the regulation is prepared, adopted or used with the intention or effect of creating unnecessary barriers to international trade, see ibidem (2005), p. 19. According to Führ et al. (2015), an extension of the scope of Art. 2.1 TBT is derived from the practice of the Appellate Body in US - COOL and US - TUNA II by introducing a kind of "necessity test" in the sense of Art. XX GATT, to determine the legitimacy of any unequal treatment. The indications of unequal treatment were also to be assessed in the light of the normative objective of a technical regulation and the degree to which the objective had been achieved, see p. 77.

[411] Cf. WTO-Analytical Index – TBT-Agreement – Article 2 (Jurisprudence), December 2018, pp. 13-14, recitals 34-35, with further details, available at: https://www.wto.org/english/res_e/publications_e/ai17_e/tbt_e.htm (5 November 2019.)

[412] It is not entirely clear whether the examination essentially corresponds to the provision under Art. XX b) GATT ("necessary to") and thus the Appellate Body's case law can be applied. It is considered that the TBT-Agreement does not impose the same (high) balancing requirements as the GATT Agreement at this point. A dispute decision is dispensable if justification is already possible under the "stricter" requirements of the GATT, see WTO Analytical Index - TBT-Agreement - Article 2 (Jurisprudence), December 2018, pp. 13-14, marginal no. 34-35, with further references, available at https://www.wto.org/english/res_e/publications_e/ai17_e/tbt_e.htm (5 November 2019); van den Bosche/Schrijvers, Unilateral measures adressing non-trade concerns, 150 f.; Tietje/Wolf (2005), p. 26 et seq.,with further references.

[413] Tietje/Wolf (2005), p. 36, with further references.

[414] See Chapter 3.2.1.

[415] Tietje/Wolf (2005), p. 27.

WTO law.[416] Merely providing information to online traders could be an alternative to EPR-enforcement through compulsory verification. It is highly unlikely that this measure would be suitable to promote the objective with equal effectiveness. Any additional administrative burden associated with compulsory verification should be manageable. Compulsory verification could therefore be deemed proportionate.

In summary, no evidence suggests that the technical regulation of compulsory verification would be incompatible with the TBT Agreement.

Compatibility with the General Agreement on Tariffs and Trade (GATT 1994)

Were the application of the TBT Agreement to compulsory verification to be rejected, assessment as to its legality on the basis of the General Agreement on Tariffs and Trade would be needed. Art. I.1. and Art. III.4 GATT prohibit WTO members from imposing discriminatory measures with adverse effects on like products. Irrespective of the relationship between GATT and TBT, which has not yet been clarified conclusively, it can be assumed that compulsory verification would also be justified on the basis of GATT standards. The conventions have an almost analogous catalogue of requirements.[417] In particular, the considerations regarding a justification based on Art. XX GATT also apply with regard to Art. I.1. and Art. III.4 GATT. Compulsory verification would thus be justified.

3.3.3.3 Assessment of further proposed measures

3.3.3.3.1 Simplified producer responsibility model

Implementation of simplified producer responsibility is based on a voluntary approach, i.e. to be offered by the electronic marketplace operator as an option vis-à-vis producers. A legal obligation for electronic marketplace operators to make such an offer is not envisaged. The simplified producer responsibility model could be considered a standard under the TBT Agreement.

Irrespective of whether the provisions of the TBT Agreement or GATT 1994 intervene, the simplified producer responsibility is likely to be regarded as unjustified de facto unequal treatment of products. Reference can be made to the findings with regard to the CFR-specifications:[418] Producers offering goods via electronic marketplaces – in contrast to other producers subject to registration, selling products by other means – could 'buy their way out' of EPR-obligations. This easy way out would lead to unequal treatment of comparable products, which are ultimately the same products but with different distribution channels. A group of products would be favoured, awarding their suppliers a better competitive position.

Justification pursuant to Art. 2.2 TBT in conjunction with Art. XX GATT must be denied in view of the simplified producer responsibility models´ lack of suitability in preventing third-country free-riders.

3.3.3.3.2 Import bans

According to the WTO Panel in the EC Asbestos case, a total marketing ban is not considered a technical regulation, as it would relate merely to the quality of products, without intending to exclude them from the market. In the same case, the Appellate Body did not uphold this view, deciding that a complete import ban on products not conforming with certain technical requirements can also be considered a technical regulation within the meaning of the TBT

[416] Cf. regarding the definition of necessity and the comparable result in the context of the REACH Regulation: Tietje/Wolf (2005), p. 26 et seq.

[417] See the comparison of the requirements in Führ et al (2015), p. 60 et seq.

[418] See 3.3.2.2.

Agreement.[419] Just as with regard to its classification under European law as unnecessary for achieving the regulatory objective,[420] an import ban is also likely to violate Article 2.2 TBT. As outlined above, the legislator has a number of possible solutions at their disposal. Compulsory verification as proposed here would be an effective way of preventing the third-country free-rider problem. These bans must therefore be regarded a milder means for achieving the objective than import bans.

3.3.3.3.3 Electronic marketplace operators and fulfilment service providers deemed to be producers

Its binding nature as a technical regulation means that such legal fiction could fall under the TBT Agreement or the GATT 1994. Where a milder, equally suitable means, with less intensive intervention in WTO rights exists, this deeming provision would not be necessary for achieving the desired objective.[421] Compulsory verification is just such a milder means. As explained above,[422] the instrument of a limited deeming provision[423] would also legally entail a greater depth of intervention for those concerned. Deeming electronic marketplace operators and fulfilment service providers to be producers constitutes a legal status change, while compulsory verification does not further affect the legal status of electronic marketplace operators and fulfilment service providers.

3.3.3.4 Interim results

Irrespective of whether it falls within the scope of the TBT Agreement or under general GATT rules, the proposed compulsory verification is compatible with WTO law requirements.

3.3.4 Interim results for the legal review

Compulsory verification of electronic marketplace operators and fulfilment service providers under the ElektroG, the VerpackG and the BattG would be compatible with national constitutional law, European primary and secondary law and with world trade law. This does not apply in the same way to the other proposed solutions. The **legal fiction** under which electronic marketplace operators and fulfilment service providers are deemed to be producers**,** represents a more intervention-intensive instrument in relation to compulsory verification, and through lack of necessity, would be compatible neither with the requirements of the internal market, in particular the freedom of movement of goods, nor with those of national constitutional law, specifically occupational freedom. In view of equally suitable and less burdensome regulatory options, international trade law provisions of the TBT Agreement and GATT 1994 also stand in the way of this legal fiction. The **simplified producer responsibility model**, insofar as it were implemented uniformly throughout the EU, must be measured against the CFR-principle of equality. Privileging foreign producers selling via an electronic marketplace can be seen as an objectively unjustifiable unequal treatment in relation to domestic producers (both online and stationary). Their almost impossible enforceability in third countries, makes **import bans** unsuitable for effective prevention of third-country free-riders, and must therefore be regarded an unjust interference in the internal market and fundamental rights; they are also unnecessary with regard to internal market rules and national constitutional law. The absence

[419] Appellate Body, EC-Asbestos, para 75; so also already Hermann et al. (2010), p. 16.

[420] See above 3.3.2.1.6.

[421] Cf. Tietje/Wolf (2005), p. 26 et seq., with further references.

[422] See 3.3.2.1.2.

[423] This is only the case should the original producer not behave properly .It could be argued that, with regard to the depth of intervention, electronic marketplace operators and fulfilment service providers deemed to be producers in this limited form does not differ significantly from compulsory verification, see 3.3.2.1.2.

or low level of intervention means that other proposed solutions, such as **information tools**, can be considered compatible with European Union law and constitutional requirements.

Bearing the **principle of subsidiarity** in mind, to ensure harmonised implementation the above proposals should preferably be implemented at Union level. In the legal review, however, the main focus has been placed on instruments that can be implemented by means of national law.

3.4 Results regarding the proposed solutions for the effective prevention of third-country free-riders

Examination of the discussed solutions shows that the instrument of **compulsory verification** for electronic marketplace operators and fulfilment service providers could be implemented with a minimum of both effort and depth of intervention for the parties concerned. Implementation would initially be conceivable at national level. It would be even more desirable to amend EU directives, to be then implemented by the Member States. This would promote further EU-wide harmonisation of registration/notification procedures.

3.5 Concept for the implementation of producer responsibility in e-commerce

The following describes two possible paths for measures already discussed in the report for **effective prevention of third-country free-riders,** i.e. the integration of electronic marketplaces and fulfilment service providers into an overarching EPR-concept.

- It would be conceivable to redesign the entire concept completely. This could occur at European Union level through a **uniform, EU-wide registration** with a European registration agency. Beside subsidiarity reasons, practical considerations also speak against such implementation at EU-level, since the actual execution would lie with the national authorities who have a greater proximity. This would obviously not solve the third-country free-rider problem, especially since the prosecution of infringements would have to be carried out by national authorities.

- A **harmonisation** of registration/notification procedures for EEE, batteries and packaging through coordinated specifications in the relevant EU directives would therefore be more appropriate. Such harmonisation would have to take place at two levels: On the one hand, directives such as the WEEE Directive, the Batteries Directive and the Packaging Directive, and possibly also the WFD, would have to be coordinated more closely. On the other hand, Member States would have to transpose the harmonised EU directives, improving the coordination of procedures among themselves.

Below European Union level, Member States could take a more incremental approach, even in the absence of binding provisions in the relevant EU directives. In Germany, for example, the ElektroG, BattG and VerpackG provisions could be supplemented by **sales bans with implied compulsory verification** for electronic marketplace operators and fulfilment service providers. These actors would therefore be better integrated into the canon of EPR-obligations.

The broader **EPR concept** in the e-commerce sector could be described (without ranking) as follows:

- The existing **EPR approach** is maintained. Producers are subject to the registration/notification obligations and the subsequent take back, disposal obligations, etc.
- Since in e-commerce the existing regulations do not generally apply to **electronic marketplace operators**, they are obliged to check the due registration/notification of the producers offering on their websites. The most pragmatic approach would be an automated data reconciliation with the respective registration or notification agency such as "stiftung ear", ZSVR and the German Environment Agency. Electronic marketplaces operators must ensure that only products from duly registered/notified producers are offered and placed on the market via their websites.
- **Fulfilment service providers** are not yet addressed by the existing regulations for e-commerce either. They should only be allowed to provide services in the future if the products come from duly registered/notified producers. Compulsory verification constitutes a common standardisation for both fulfilment service providers and electronic marketplace operators. The obligation of fulfilment service providers is particularly relevant if either electronic marketplace operators with a branch office in Germany do not fulfil their obligations, or if they have their headquarters abroad.

The following table merely provides an **overview on the discussed solutions**.

Table 8: Overview on the discussed solutions

	Discussed solutions	Addressee	Content	Standard-isation	Legal review	Recom-mendation
1	**Compul-sory verifica-tion**	Electronic marketplace operators	conditional ban for placing on the market with compulsory verification regarding proper registration/notification of producers offering via marketplace website	ElektroG and WEEE Directive/ VerpackG and Packaging Directive/ BattG and Batteries Directive	Compatibl e with European Union law, EU primary and secondary law and national constitu-tional law	**Strongly recom-mended; initially at national level, where possible at European Union level**
		Fulfilment service providers	conditional ban for placing on the market with compulsory verification regarding proper registration/notification of producers using fulment service providers´ services			
2	**Deeming Provision (legal fiction)**	Electronic mar-ketplace operators	Electronic marketplace operators and fulfilment service providers deemed to be producers; in the event that the original producer violates registration obligations; extended to all producer obligations	ElektroG and WEEE Directive/ VerpackG and Packaging Directive/B attG and Batteries Directive	Only for the intended purpose, if compul-sory verifica-tion alone not sufficient	**Conditional recommen dation only**
		Fulfilment Ser-vice Providers				

	Discussed solutions	Addressee	Content	Standard-isation	Legal review	Recom-mendation
3	**Simplified producer responsi-bility model**	Electronic mar-ketplace-operators	Fees for electronic marketplaces for the fulfilment of all obligations arising from EPR-obligations; optional for electronic marketplaces and local suppliers; calculated according to quantity; centralised reports to stiftung ear	ElektroG and WEEE Directive	Intrans-parent; can only be imple-mented by large market-places; unsuitable	**Not to be recommen ded**
4	**Definition of terms and registra-tion procedure**	Legislator, producer	Procedural harmonisation, European central register, uniform requirements for registration	ElektroG and WEEE Dir./VerpackG and Packaging Dir./BattG and Batte-ries-Dir.	Subsidia-rity, expe-diency partly question-nable	**Only partly recommen dable**
5	**Import ban**	Legislator, producer	For products of non-registered/notified producers; linked to the existing ban in the BattG; application of the customs surveillance system ATLAS	ElektroG, VerpackG, BattG	Not to be based on Market Surveil-lance Regu-lation; not propor-tionate	**Not to be recommen ded;** would require changes to ElektroG and Ver-packG
6	**Authori-sed represent-atives**	Legislator, pro-ducer	Stronger and harmonised inclusion in the registration process; harmonisation of regulations by linking to the ElektroG	BattG and VerpackG	No fundamen tal legal problems	**To be recommen ded after further examinatio n where necessary**
7	**Informa-tional instru-ments**	Legislator; stiftung ear, ZSVR, Federal Environmental Agency	Standardisation of information for producers and other market players; good professional practice; consistent information in English	No legislative changes required	No legal problems	**Recommen dable**
8	**Coopera-tion between authori-ties**	Competent authorities and registers	Establishing cooperation between authorities with regard to BattG/Batteries Directive and VerpackG/Packaging Directive	Adaptation of Batteries Directive and PackagingD irective to WEEE Directive	No legal problems	**Recom-mendable**

	Discussed solutions	Addressee	Content	Standard-isation	Legal review	Recom-mendation
9	**International agree-ments**	National governments, EU	Harmonisation of registration and disposal obligations based on the United Nations Environment Assembly - UNEA	Agreement on Mutual Legal Assistance and Enforcement Assistance between States	Political feasibility questionable	**Recommendable where possible**

Source: Oeko-Institute

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