

THE GERMAN PACKAGING ORDER

A Model for State-Induced Waste Avoidance?

The German Packing Order's objective to reduce and recycle packaging waste has implications well beyond the German border. The German government's efforts to articulate and implement the Order have in fact create de facto European Community policy, which in turn raises the very delicate issues of national sovereignty and the viability of the Internal Market. Should stringent "national" environmental policy take precedence over EC legislation?

On December 1, 1991, the German Packaging Order entered into effect.[1] The guiding objective of the Order is waste avoidance; waste which can not be avoided shall be recycled. It is seen as a breakthrough in regulating environmental protection - a starting point for putting an end to the waste orientated society.[2] One might wonder why packaging waste has attracted so much public attention, and whether other types of waste are not much more important to deal with. The answer has a lot to do with German society, and the active role the Green party and nongovernmental organizations have played in making "waste" a public concern.[3]

It is one thing to lay down objectives and it is quite another, to make them work. Here again the German Packaging Order paves the way for a new concept of environmental regulation.[4] Every three years beginning on August 31, 1992, the German government will publish the per capita amount of waste. These figures serve as a basis for the recycling quotas which each industry must achieve. The quotas will be steadily strengthened in order to achieve the objective of the Order.

The Order imposes a duty on industry and retailers to make them take the packaging material back. Under the German concept, industry would have to pay for waste disposal in local German communities. The new aspect of the German Packaging Order is that industry must establish legal means to organize the way in which packaging material is retrieved by the producer or retailer who used it first. If the Order succeeds in building up such a private system of waste collection and waste recycling, industry is released from the individual duty of retrieving packaging material.

The long and highly controversial debate surrounding the German Packaging Order has been over sharing responsibilities to reduce packaging waste through self-managed collection and recovery under government surveillance.

Since the revision of the German Waste Act in 1986, the German government has tried to motivate German industry to take appropriate steps to reduce packaging waste. The government chose at that time to publish non-binding guidelines in the official federal newsletter, Bundesanzeiger, which informed industry what the government expected it to do. At that time, the German government insisted on its official policy of no state intervention; however the total amount of packaging waste increased steadily, and even existing mechanisms of recycling, mainly in the beverage industry lost importance.[5] It is therefore fair to say that the Packaging Order is the result of industry's failure to tackle the issue without

governmental pressure.

But even when it became clear that the federal government was forced to use the regulatory power reserved for it in the Waste Act of 1986, it was never its intent to put the issue entirely in statutory hands. In fact, in a move quite unusual for a mere order in contrast to a law, the various drafts, pre-drafts and final drafts were widely and intensively discussed; in a parliamentary hearing more than 100 groups were afforded the opportunity to express their views.[6] Politically, the Order needed the consent of the Christian Democratic-compelled Bundesrat. Nonetheless, three Christian Democratic headed Lander governments voted against their own party's final draft, thereby making possible a consensual solution with the Social Democratic-headed Lander.[7] This was key, because the Order needs to be enforced at both the Lander and at the local, community level.[8]

The Order Laid Bare

The Order is more than a well-formulated policy with only political objectives. Rather, it translates into binding law, what has been the policy of the Federal Government since 1986. The Order is aimed at producers, suppliers and long-distance suppliers of packaging material.[9] According to Article 1, paragraph (1), packaging shall be produced out of material which is compatible with, and which does not lead to undue burdens to, the environment. Paragraph (2) spells out the overall objective of waste avoidance. Packaging shall be reduced to what is directly necessary for the protection of the product; this packaging must be recycled to the greatest extent technically possible. The Order provides no further illumination of what is meant by "directly necessary" or "technically possible." However, the objectives of Article 1 should be read in conjunction with quotas given in the Annex for the collection and sorting of the packaging material, and the requirements for its recycling. The quotas clearly indicate what government expects industry to do to realize the objectives under Article 1. Read in conjunction with the quotas, Article 1 imposes a legal obligation on industry.[10] This is all the more true as the quotas are bound to strict time limits.

The key question of the Order, however, is just what is meant by packaging material. The Order distinguishes between transport packaging, sales packaging and re-packaging. Each of these categories has legal definitions. Drawing a line between transport and sales packaging seems to be relatively easy; the real problem is likely to result from the notion of re-packaging. This refers to all additional forms of packaging which facilitate self-service, protect the salesman against theft, or promote sales. But what is the difference between packaging for sale and packaging for advertising?[11] One form of packaging is clearly not affected - the Order does not cover contaminated packaging material. Here a special order is under consideration.

The differences between the three forms of packaging do not constitute mere intellectual hoop-jumping, for producers and suppliers are not obligated to take sales packaging material back. The individual duty to take back transport packaging and re-packaging remains unaffected, which is why retailers must provide ways for consumers to return the re-packaging material before leaving the shop. Transport packaging on the other hand has become a subject of individual negotiations in the chain of supply. Suppliers or producers who use transport packaging are obliged to take the material back. One of the issues which has not yet been resolved concerns the question as to what extent industry is free to organize responsibilities and share costs, and where the Order restricts private autonomy.[12] But for now the question is moot, as industry does not want to organize the collection, re-use or disposal of the packaging material. Seen in a broader context the problem is one of the relationship between public law and private law in the field of industrial relations.[13]

The Duales System Deutschland

When it became clear that the German government had definitely decided to regulate packaging, industry lobbied for the introduction of a private waste collection and recovery system.[14] The result was the Duales System Deutschland (DSD), a country-wide, local system for the collection of used sales packaging. The DSD is entitled to grant producers of packaging material the right to label their products with a "green-dot" signifying that they are participants in the collection system. Producers and suppliers who sign up will have to pay between two and 20 German Pfennige depending upon the size and weight of the packaging material. These fees will help finance the DSD which in turn will manage the establishment of a country-wide collection and recycling system.

However, the DSD is under a strict deadline to prove its effectiveness by the end of 1995. Yardsticks for determining its effectiveness are found in the Annex to the Order, which provides for exact figures on the percentages of collection, re-sort and recycling various raw-materials. If the DSD fails to meet these standards, the individual obligations of producers and suppliers will reassessed. In such a case, they will again have to take the sale packaging back individually and pay the statutory authorities for the collection and the recovery/recycling of the waste.

It is certainly too early to evaluate the effectiveness of the new rules. Right now, problems result mainly from plastic packaging, and it is not yet clear to what extent they can actually be recycled. There seems to be a strong inclination to export the plastic material to France and to Eastern Europe for land-filling rather than for recycling. This runs counter to the purpose of the Order, which tries instead to set incentives for the replacement of unrecyclable packaging material with recyclable alternatives.

Enforcement

Enforcement of the Order lies with the Lander authorities, mainly in the hands of the ministries of environment. However, the Order does not pay much attention to the enforcement level; the official documents to the Order refer to the general responsibilities of the Lander in enforcing the law, but do not specifically establish appropriate mechanisms for assuring compliance.

Only one instrument supervises and controls the dual system. The ministries have to determine whether the dual systems within their territories comply with the quotas in the Annex. This determination might be withdrawn if it becomes clear that the legal requirements are not being met. The mechanism established goes along with the German industrial code, and Lander authorities bear an overall responsibility to check compliance, at least in the form of test inspections. Daily control and supervision of the dual system, however, lies with the DSD which has to make sure that packaging waste is collected and recycled.

The recent export of falsely declared household waste to France revealed severe deficiencies in the control executed by the DSD. One possible way to alleviate this situation would be to introduce internal quality assessment procedures through a form of ecoauditing.[15] It is German tradition, however, to externalize the control and entrust Technische Überwachungsverein (TUV) with the necessary control and supervision. TUVs are private organizations that execute statutory testing. But, in the supervision of the DSD-system, they typically act as experts, not in a statutory function. One might therefore assume that the German Packaging Order leads to the "privatization" of enforcement under the auspices of the finally responsible Lander authorities. In any event, the DSD would have to pay for the control and supervision by the TUV.

Privatization vs. Environmental Protection and Social Policy

It goes without saying that questions surrounding such aspects of the Order as enforcement have environmental groups very critical of the concept and the possible outcome. They fear the privatization of a genuinely statutory task, the protection of the environment, could lead to waste-dumping.[16] Endless notes and reports on the Order's deficiencies indicate that environmental groups were not completely wrong in their predictions.[17]

The background here is not so much environmental protection alone, but social policy. So far, much of the recycling work done in Germany has been accomplished at the grass-root level by nongovernmental organizations. Local working initiatives, as they are called, engage unemployed workers and retrain them for recycling jobs to make them fit for the labor market. A portion of the work is funded by the sale of recycled products, most of the time heavy metals. If industry would take over the recycling of heavy metal, it would challenge the basics of the local worker initiatives, thereby leaving only those areas of recycling which are too cost-intensive for private management to the social sector.

European and International Disturbance

The objective of waste "avoidance," instead of mere disposal, and the way in which it shall be achieved has attracted the attention of lawyers. Articles on the philosophy of the Order as well as on practical problems document the interest beyond the German borders.[18] And the Commission of the European Community has accepted the challenge. A directive on packaging and packaging waste is in the offing dedicated to fulfill a twofold objective: removing possible barriers to trade which result from national packaging regulations of individual member states by developing a European pattern for confronting household waste in the Internal Market.[19]

At this point, the German Directive comes under pressure from the Internal Market philosophy. This is true for environmental protection but it is all the more true for the social policy dimension inherent in the organization of the recycling process. Although the Directive is not yet adopted, the European discussion could help to understand the international implications of a "national" solution in the overall area of waste regulation.

National Packaging Rules as Barriers to Trade in the Internal Market

The recent conflict between France and Germany over illegal waste disposal sheds light on the difficulties in coming to grips with regulating packaging waste nationally. Germany has raised its standards thereby increasing the costs for industry. One of the possible reactions is dumping the waste in countries with lower standards at lower costs.[20] France is considering prohibiting the import of German packaging waste in order to stop the illegal trafficking. The classical response of the European Community in such a situation is to harmonize legislation in the member states, so as to remove possible barriers to trade and to define a common European level of environmental protection.

The Commission has already been challenged by Denmark in 1988, when Denmark introduced packaging regulation in the field of beverage containers aimed at the re-use of bottles instead of disposable one-way bottles. The Commission brought the case to court and lost, because Denmark was seen to be free to make use of environmental protection measures in a field where there was no community legislation at that time.[21] When Germany adopted the Packaging Order the Commission again stressed its effects on trade, as only those products could be circulated in Germany which bear the DSD green dot. The Commission did not go to the ECR again, but instead set into motion the legislative machinery.

The public attention given to the Commission's initiative is striking. The first pre-draft of the Environmental Directorate has already been translated and published.[22] The second draft, again from the Environmental Directorate, is to be published soon after an agreement has been reached among all Directorates.[23] The Commission intends total harmonization under Article 100a. This means that the German Packaging Order as it stands could not survive. Although it is not yet clear what will happen to the draft, one might easily predict conflicts between countries like Germany, the Netherlands and Denmark who will defend their national legislation which is seemingly more strict than the present European draft.[24] Environmental groups have already blamed the Commission for re-legislating environmental protection to the lowest common denominator.

The objectives of the Directive are: 1) to approximate measures to be undertaken by member states to contribute to the competition of the Internal Market and to avoid obstacles to trade, and to prevent the distortion and restriction of competition within the Community; and 2) to reduce the overall impact of packaging on the environment by quantitative prevention and qualitative improvement, by maximizing the recovery of packaging waste, and by minimizing the final disposal of packaging waste. The twofold orientation of the draft, the removal of barriers to trade and improvement of environmental protection, reflect the typical bias of Community legislation to complete the Internal Market. That is why the Directive is less specific and less distinct in its perspectives than the German Order. It is not so much waste avoidance but waste recovery that the Commission has in mind.[25] This becomes clear in the terminology: the Commission does not even mention waste avoidance explicitly, it formulates waste reduction as the overall objective of the Directive. Waste reduction shall be achieved by way of recovery, but recovery is not clearly defined. It may cover the extremes from recycling to burning, which is a somewhat misleading definition.[26]

Regulation that the Commission intends to implement for "waste reduction" is similar to the German Packaging Order. Article 4 formulates targets which give shape to the objectives of the Directive. These "targets" are the equivalent to the German quotas in the Annex to the Order although they are less stringent and leave more leeway for the member states than the German regulation.[27] Member states are free to decide by which means they intend to achieve the targets in Article 6. It may either be a private system or a statutory one -- all forms will be allowed, including the private collection and recovery in the DSD provided that the different national systems do not function as barriers to trade. They must be open for producers, suppliers and importers of the 12 Member States so as to guarantee mutual access to the national markets.

Such thinking requires that the different systems are compatible. The Commission tries to guarantee compatibility in breaking down the targets into "essential requirements" -- Article 8 in combination with Annex II. Here three types of requirements are formulated: requirements specific to the manufacture and composition of packaging, requirements specific to the reusable nature of packaging, requirements specific to the recoverable nature of packaging. These requirements which are binding in nature shall be specified by the European standardization institutions, CEN and CENELEC. The Commission transplants the "new approach thinking," developed in the area of technical standards into the field of environmental protection.[28] This new-approach thinking comes near to the German proposal, the joint approach of industry and state, the working in tandem of the private and the public sector.

The policy and the instruments proposed under the Directive may be operable only if a European-wide marking system can document compliance with the essential requirements, enable industry to participate in the different national systems and provide the consumer with the necessary

information on what will happen to the packaging material. The final draft mentions the necessity of a marking system, but does not come up with proposals. It goes along with the new-approach thinking that the green dot as well as other national symbols would have to be replaced by one European mark. Consumer organizations, however, want more than a mere symbol which shows compliance with the "essential requirements." They plead for a mark which clearly indicates the differences between re-usable and non-reusable packaging. Consumers would then be given at least a chance to influence the policy of industry.[29]

Notes

[1] Article 13 of the Verordnung über die Vermeidung von Verpackungsabfällen (Verpackungsverordnung-Verpack V), 12.6.1991, Bundesgesetzblatt I 1991, No. 36, 1234. Parts of the Order will enter into force not before January 1, 1993.

[2] L. A. Versteyl, Die Verpackungsverordnung-Anfang vom Ende der Wegwerfgesellschaft, NVwZ 1991, 848.

[3] For the philosophical background cf. P. Sloterdijk, Kritik der zynischen Vernunft, Frankfurt a. Main, 1983.

[4] M. Kloepfer, Zu den umweltrechtlichen Handlungsformen des Staates, Juristenzeitung 1991, 737.

[5] For details see: Bundesministerium für Umweltschutz, Umweltbericht 1990, Bundestags-Drucksache 11/7168-Beilage Bundesanzeiger No. 145a, 7.8.1990, Chapter B 4.2.

[6] According to Article 16 of the German Waste Act. See for details: Versteyl, Die Verpackungsverordnung, 850.

[7] The Christian Democratic-headed Lander governments and the Social Democratic-headed Lander governments finally agreed to adopt the version of the Packaging Order.

[8] Federal law is enforced by the Lander administrations. This is called Vollzugs-Federalism enforcement-federalism. The implications for the European Community are explained in J.A.Frowein, "Integration and the Federal Experience in Germany and Switzerland," in M. Cappelletti, M. Seccombe and J. H. H. Weiler, eds. Integration Through Law, 1986, 586.

[9] See Articles 2 & 3 of the German Packaging Order.

[10] So we have to admit that such a reading of the Order is not yet confirmed by case-law and widely challenged by doctrine. See: L.-Ch.Wolff, Die Verpackungsverordnung - eine erste Bestandsaufnahme, and Flanderka and Winter, Die Rücknahmepflicht von Transportverpackungen. For much more in our direction, see: Strecker and Behrendt, Kommentar, Article 1, 33.

[11] Versteyl, Die Verpackungsverordnung, 850; Flanderka and Winter, Die Rücknahmepflicht von Transportverpackungen, 149.

[12] Ibid. Flanderka and Winter discuss the related questions in detail.

[13] It is well known and widely discussed in the assessment of distribution systems. Competition law and private are clashing together be it in the traditional distribution systems or in the newly promoted franchising systems.

[14] Provided for in Article 6, Paragraph (3) of the Order.

[15] The Proposal of the Commission for a Regulation on Eco-Audit, JO No. C 76 27.3.1992, 2 et seq. See also: M. Fuhr, "Umweltbewusstes Management durch OKO-Audit?," Europäische Zeitschrift für Wirtschaftsrecht 1992, 468.

[16] R. R. Kerton, Double standards and worker protection in an unequal world, 1990 and E. R. du Vivier, Les vaisseaux du poison, la route des déchets toxiques, 1988.

[17] A real conflict seems to come up between Germany and France because a French importer has deposited household waste in France contrary to the German Order which foresees recycling and does not allow disposal. [18] M. Kloepfer, Zu den Umweltrechtlichen Handlungsformen des Staates.;

Lawyers feel mainly concerned by the way in which the responsibilities and the costs in the chain of supply could and should be shared. See: E Flanderka and B. Winter, Die Rücknahmepflicht von Transportverpackungen nach der Verpackungsverordnung, Betriebs-Berater 1992, 149 et seq. and L.-Ch.Wolff, Die Verpackungsverordnung - eine erste Bestandsaufnahme, DWIR 1991, 81;

Three so called "Kommentare" have been published: A. Strecker and B. Berndt, Kommentar zur Verpackungsverordnung, 1992; Rummier and Schutt, Verpackungsverordnung - Praxishandbuch mit Kommentar, 1991; W. Schmecken and W. Schwade Verpackungsverordnung, Verpack V, Kommentar 2. Auflage 1991. Here the authors present their view on the Order by following the articles by explaining and interpreting their possible meaning.

[19] The Single European Act which has amended the Treaty of Rome provides for the completion of the Internal Market by the 31.12.1992.

[20] For a general discussion, see references in footnote 8.

[21] ECR 20.9.1988, (1988), 4627.

[22] Strecker and Berndt. Kommentar, 170 et seq. Normally drafts are published in the Official Journal under two requirements: once the different directorates of the commission have expressed their view and at least the majority has approved the draft. It is not clear to what extent pre-drafts elaborated by the competent directorates are to be made public by whomever.

[23] The draft Directive is not yet published in the Official Journal of the EC.

[24] Concern has been raised by the Arbeitsgemeinschaft der Verbraucherbande in its position paper, May 1992.

[25] A key provision is Article 15 of the draft, which formulates criteria the member states have to comply with. It is a written form of the overall proportionality rule the Court has developed in the interpretation of Articles 30 & 36.

[26] See the very valuable position paper of the Arbeitsgemeinschaft der Verbraucherverbände, May 1992.

[27] "Regarding recovery of packaging waste no later than years after the Directive enters into force, 90% by weight of the packaging waste output is removed from the waste stream for purpose of recovery. Within this general recovery target, and with the same time limit, 60% by weight of each material of the packaging waste output shall be removed from the waste stream for the purpose for recovery."

What does the target exactly mean? It seems to be as if 40% of the waste cannot be disposed or burnt. The German Order provides that till July 1, 1995 80% of all packaging material must be collected, 80% to 90% must be sorted out and recycled. The time frame is much more stringent and the quotas differ from the European draft. Landfilling and burning is not seen as a form of "recovery."

[28] Charles Joerges, "The New Approach to Technical Harmonization and the Interest of Consumers: Reflections on the Requirements and Difficulties in the Europeanization of Product Safety Policy," in Bieber et al, *One European Market*, 1988, 175.

[29] Experience in the field of technical consumer goods raise some doubt on the Commission's willingness to introduce a marketing system which will do more than document compliance with the essential requirements. See the revised draft of a regulation for the CE-mark, OJ No. C 195, 1.8.1992, 11 et seq. Consumer organizations have advocated the introduction of a specific safety mark in order to show that the products are "safe." The specific safety label could enhance even competition in safety matters.

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