The German Drinks Can Deposit: Complete Harmonisation or a Trade Barrier Justified by Environmental Protection?

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The recent drinks can deposit litigation before the German courts1 and the European Court of Justice2 addressed three interesting issues of EC law. The first question was whether the EC Packaging Directive 94/62/EC3 provided for complete and exhaustive harmonisation. If this had been the case, the current German Regulations on the Avoidance and Recovery of Packaging Waste4 arguably only needed to be compatible with the Directive, but would not have needed to be scrutinised for compatibility with primary EC law, namely Article 28 EC. However, since Article 28 EC was held to be applicable, the courts had, secondly, to proceed to the issue of whether the relevant provisions of the said German Packaging Regulation (GPR) constituted a trade barrier contrary to that Article. Finding that this was the case, the courts had, thirdly, to decide whether this was justified in the interests of environmental protection.

I. The legal background of the drinks can deposit

The litigation centred on the obligation upon drinks manufacturers and distributors to charge a deposit on non-reusable drinks containers, and to collect them separately from other waste, under the GPR. Until 1991, household waste disposal in Germany comprised a single public service to the citizen, usually provided by the municipalities. However, for decades this has been complemented by a tradition of selling certain drinks in reusable glass bottles, such as mineral waters, beer and carbonated soft drinks (Coca-Cola and the like). The return of these bottles has been encouraged by charging a deposit, which is reimbursed upon the bottle’s return. This is facilitated by the use of standardised bottles which can be returned to any outlet selling drinks in the same type of bottle. The manufacturers and distributors are in turn reimbursed by a business association in charge of the standardisation of reusable bottles.

The 1991 GPR was designed to achieve a reduction in packaging waste by separating its disposal from that of other waste. This works on a “voluntary” basis, i.e. based on incentives and the self-organisation of the economic operators, rather than prohibitions. Individual households can reduce the ever-increasing waste disposal fee charged by municipal services by disposing of their packaging waste separately, and free of charge (albeit at some inconvenience, as the number of bins for different wastes has multiplied). The management of packaging waste was made a matter for the manufacturers and distributors of packaged products; pursuant to section 6 GPR they could choose either to cooperate in setting up and financing a joint Germany-wide system for the separate collection and disposal of packaging waste, or – each individually – offer to collect the packaging waste emanating

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2 EC, Judgment in Cases C-463/01 – Commission v Germany [2004] and C-305/02 – Radberger et al. v Baden-Württemberg [2004].


from their products. Most of them went for the first option and set up the said Germany-wide system (Duales System Deutschland (DSD) or “the Green Dot” system). This was quite successful as the excessive use of packaging became costly for producers and the amount of packaging waste was considerably reduced.

However, at the same time a further complication was introduced into the system, although of a dormant nature. As reusable drinks containers were and are considered environmentally preferable over non-reusable ones, their use was to be encouraged: to this end, the GPR built on its “voluntary” approach and provided for a further, separate deposit and collection system, in respect of non-reusable drinks containers. The GPR made participation in the Green Dot system outlined above itself a conditional “reward” for manufacturers and distributors: entitlement to participate was made dependent on the overall share of reusable bottles in circulation, which they were required to maintain at above 72% of the total number of drinks containers sold in Germany. If this market share condition was not fulfilled during a certain period, the Green Dot system, as far as it related to drinks containers, would be displaced by a duty to charge a hefty deposit on non-reusable containers, and to collect them. Thus the waste management of drinks containers was made dependent on the producers’ and distributors’ collective ability to maintain the market share of reusable containers and not on the individual decisions of operators who are otherwise competitors. In addition, the organisation and management of this additional drinks packaging waste management system was imposed on them, and they were left in uncertainty as to whether and when their activity (and investments) would be required. To complicate things further, this punitive change was only to apply in relation to those categories of drinks for which the quota of reusable containers dropped below its 1991 share.

These provisions remained in place when the 1994 EC Packaging Waste Directive 94/62 was issued. In principle, the GPR provisions seemed to comply with the Directive, which authorises Member States to encourage reuse systems for packaging in conformity with the EC Treaty (Article 5). In addition, and in line with what already existed in Germany, the Member States are obliged to take the necessary measures to ensure that systems are set up to provide for the return and/or collection of used packaging waste, and its reuse or recovery. These systems must be open to participation by all economic operators, and apply to imported products under non-discriminatory conditions (Article 7 of the Directive).

II. Litigation regarding compatibility with EC law

At a closer glance, doubts may arise as to whether the GPR actually does provide for a non-discriminatory system, and whether it is compatible with EC law in general. Such doubts were shared not only by the drinks industry and trade, but also by the EU Commission, which brought a direct action under Article 226 EC against Germany, requesting the Court to declare that, by establishing the above system, Germany had violated its obligations under Directive 94/62, in conjunction with Article 28 EC. In addition, the matter was taken to the German courts by many members of the drinks industry and trade, including Austrian exporters of drinks in non-reusable containers, when the deposit charging duty (which remained dormant until 1 January 2003) became active. According to the German government, the share of reusable drinks containers fell below 72% for the first time in 1997, and even further in the following years. The Ministry for the Environment therefore triggered the legal consequences of sections 8(1) and 9(2) GPR by stating this face. On appeal by the claimants, this statement was reviewed by the administrative courts, one of which halted the proceedings to request a preliminary ruling under Article 234 EC on the compatibility of provisions such as the GPR with Directive 94/62 and Article 28 EC. The latter was handed down by the ECJ on the same day as the

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3 ECJ, judgment in C-463/01 - Commission v Germany [2004].
7 This statement is a legal prerequisite and has thus been held to constitute a formal administrative decision by the Federal Administrative Court, judgment of 16.1.2003 - 7 C 31/02, available at: www.bverwg.de. It can thus be subject to judicial review.