

Producer Responsibility in E-Commerce

- regulatory options for the prevention of third country free-riders (electrical and electronic equipment, batteries and packaging)

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Version: 29.09.2020

Links to the entire study

English:

[https://www.umweltbundesamt.de/publikationen/
producer-responsibility-of-third-country-producers](https://www.umweltbundesamt.de/publikationen/producer-responsibility-of-third-country-producers)

German:

[https://www.umweltbundesamt.de/publikationen/
produktverantwortung-von-drittlandherstellern-im](https://www.umweltbundesamt.de/publikationen/produktverantwortung-von-drittlandherstellern-im)

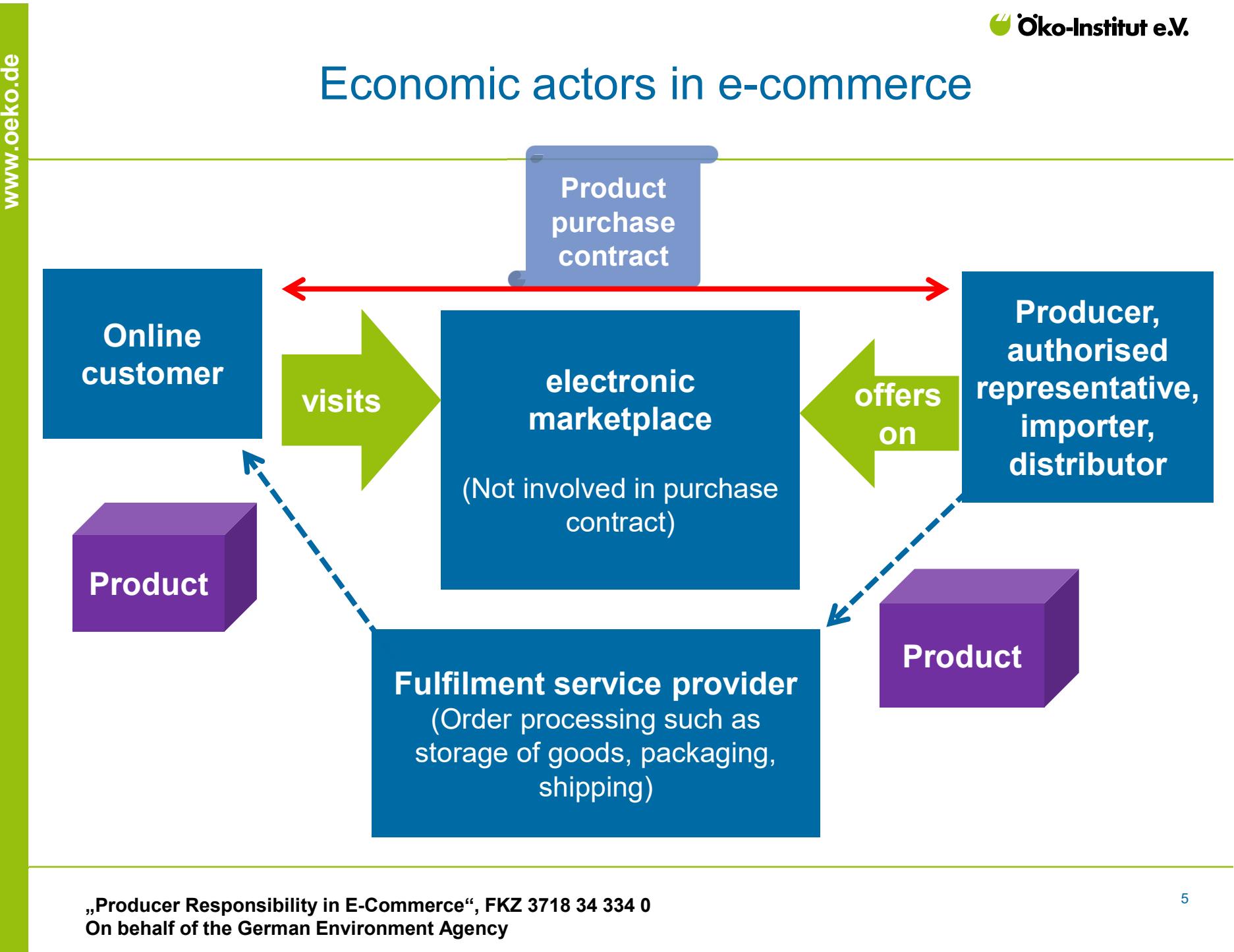
Overview

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

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

1) Status quo of the German legal situation regarding third-country free-riders (e.g. ElektroG, BattG and VerpackG)

Economic actors in e-commerce



Status quo of the legal situation in Germany (I)

- producer responsibility is linked to 'producer' and 'distributor'
- Before placing electrical and electronic equipment (EEE)/packaging/batteries on the market, producers **must first register with the competent authority**. Non-compliance results in the products being banned from distribution.
- If producers and distributors do not contribute to the **costs** incurred for collecting and disposing of their WEEE, spent batteries and packaging waste, sellers acting legally must then cover these costs in addition to the costs for their own compliance.
- Properly registered producers thereby find themselves at a competitive disadvantage compared to (third-country) free-riders.

Absence of effective legal protection

- **Producers and distributors** who fail to comply with their waste-management obligations face various legal consequences, including enforcement of fining notices (for the ElektroG, BattG up to 100.000 € / for the VerpackG up to 200.000 €), sanctions by the authorities, competition law action by competitors.
- 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 & enforce regulatory fining notices according to the Administrative Offences Act.
- As far as **third-country free-riders** are concerned (those registered outside the EU), the ElektroG, BattG und VerpackG consider them also to be responsible stakeholders. However, sanctions 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.

Absence of effective legal protection

- As **electronic marketplaces** are neither **producers** (do not place on the market) nor **distributors** (do not offer), **existing traffic bans** under
 - the ElektroG (Section 6 (2) sent. 1 and 2),
 - BattG (Section 3 (3), section 3 (4) sent. 2 and
 - VerpackG (Section 9 (5) sent. 1 and 2)**do not apply.**
- Since **fulfilment service providers** are neither producers nor distributors, existing traffic bans (see above) do not apply either! (Exception: fulfilment service providers are producers of the shipping packaging)

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

Compulsory verification for electronic marketplaces and fulfilment service providers

- **Contents:**
 - Independent **compulsory verification**, not linked to the criterion of being a producer
 - Prior verifications of products to be offered on marketplaces and/or to be dispatched to ensure that producers comply with national **registration requirements**
 - In the case of **infringement** by producers (and/or authorised representatives),
 - Electronic marketplace may **not allow products to be offered on website** and/or the fulfilment service providers may **not provide services** for these products
 - **Enforcement of existing bans** on offering/placing on the market according to ElektroG, BattG, VerpackG
 - **Producer** (or, according to ElektroG, authorized representative) remains obliged to **register**

Purpose of compulsory verification

- Offers to be published on the **electronic marketplace** should be restricted solely to those from verified and properly registered producers.
- Services of **fulfilment service providers** should only be provided for products of properly registered producers.
- The **legal ban** implies the compulsory verification!
- Violations must be **sanctioned** for effective enforcement.

What is the consequences of the compulsory verification?

Electronic market places

- Electronic marketplace must verify the **WEEE-Reg. No.** (of the producer or of the authorised representative) given by their contractual partners for all goods with electronic components including the brand and type of equipment
- Parameters can be automatically compared with the official register (in Germany: stiftung ear in terms of EEE and batteries) via an **IT interface**.

What is the consequences of the compulsory verification?

- **Fulfilment service providers**
 - No compulsory verification as far as (for shipping packaging) they are regarded **as producers**, in accordance with the **VerpackG**
 - Otherwise: **compulsory verification**
 - Prior to **products being dispatched** by the fulfilment service provider; to ensure the usual delivery time of a few days, in the case of deliveries of goods purchased via electronic marketplaces established solely in third countries, fulfilment service providers in Germany or the EU are regularly used.
 - Advantage regarding fulfilment service providers: **Enforcement** by competent authorities is easier if located in the EU, than for economic operators in third countries.
 - **Compulsory verification** for electronic marketplaces remains unchanged.

Compulsory verification: proposed amendments regarding WEEE Directive (electronic marketplaces)

The following points could be added to Article 3 (1) WEEE Directive:

'h) [respective renaming of all paragraphs after the previous point (h)]: 'electronic marketplaces' 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

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'

Compulsory verification: proposed amendments regarding WEEE Directive (electronic marketplaces and distributors)

In a new Article 16 (2a) WEEE Directive the compulsory verification for electronic market places (as well as distributors) could be added: Member States ensure that

- ‘a) *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;*
- b) 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;*‘

Compulsory verification: proposed amendments regarding WEEE Directive (Fulfilment service provider)

In Article 3 (1) WEEE Directive could be added:

‘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;’

-In a new Article 16 (2a) WEEE Directive could be added: Member States ensure that

‘c) each fulfilment service provider only warehousing, packaging, addressing or dispatch of electrical and electronic equipment if its producer or authorized representative, designated in accordance with Article 17, is properly registered;’

Compulsory verification: proposed amendments WEEE Directive (electronic marketplaces and Fulfilment service provider)

A new recital could be:

- *'Electronic marketplaces and fulfilment service provider 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 and fulfilment service provider carrying the responsibility. This has led to existing bans regarding the placing of products on the market being extended to electronic marketplace operators and fulfilment service provider, thus further strengthening the existing market self-regulation'*

Alternatively: electronic marketplace and fulfilment service providers deemed to be producers?

Instead of compulsory verification: Electronic marketplace and fulfilment service providers could be **deemed to be producers**?

However: Deemed to be producers means **all producer obligations** (labelling, monthly/annual quantity reporting, return and disposal, information, etc.) apply if the actual producer does not properly register/notify.

Alternatively: electronic marketplace deemed to be producers (as an example)?

- **Examples of proposed amendments regarding the EU-law:** In Article 3 (1) (f) WEEE Directive could be added: *‘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;’*
- **Examples of proposed amendments regarding the German law:** In Section 3 No. 9 last half-sentance ElektroG could be added: *‘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 duly 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;’*

Alternatively: Simplified producer responsibility model (proposal on behalf of an international electronic marketplace operator)?

Instead of compulsory verification: Simplified producer responsibility model?

The simplified producer responsibility model includes:

- **Charges levied** by electronic marketplace operators on **producers** offering on their websites.
- Guarantee of the fulfilment of **all producer obligations**.
- **Option** for producers to be **exempted** from registration, disposal and return obligations.
- **Collective fulfilment** of obligations by electronic marketplace.
- **Fee levels**: according to the quantity of equipment traded on the electronic marketplace.
- Disposal or recycling of waste equipment by `**commissioned domestic structures**`.
- Electronic marketplaces as `**uniform interface** for sellers and authorities`.

Alternatively: Simplified producer responsibility model (proposal on behalf of an international electronic marketplace operator)?

- Examples of proposed amendments regarding the German law: New Section 8a ElektroG ***'Simplified responsibility'***

*'(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. ...'*

*(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.'*

Legal review

- Wherever possible regulation at **Union level**, but in the legal opinion, primarily, national level is regarded.
- **Compulsory verification:**
 - Independent of the scope of the TBT Agreement and GATT: compatible with **world trade law requirements**
 - Compatible with fundamental (freedoms of goods and services) **freedoms of the internal market**
 - **Simplified producer responsibility model** not an equally suitable instrument regarding its voluntary nature
 - **deemed to be producer** not a milder means in view of the legal consequences
 - Compatible with **EU-secondary law**

Legal review

- **Compulsory verification:**
 - Interventions in **fundamental freedom rights** (freedom of occupation: Article 12 Basic Law, freedom of property: Article 14 Basic Law, general freedom of action: Article 2 (1) Basic Law) are all justified.
 - **Equal treatment** between
 - electronic marketplace operators and fulfilment service providers on the one hand, and distributors on the other
 - electronic marketplaces operators and fulfilment service providers
 - no violation of the **general principle of equality**, Article 3 (1) Basic Law

Legal review

Simplified producer responsibility model:

- **Advantage** for producers offering on electronic marketplaces
 - E-commerce is privileged over stationary trade in that only this type of producer benefits
- **(Double) voluntariness:** for the electronic marketplace as well as for the provider, therefore, **not suitable** to prevent third-country free-riders,
- No objective reasons for **unequal treatment**
- Does not comply with the basic concept of producer responsibility based on the **polluter-pays principle**
- Annual quantity reports contradict monthly quantity report-based **collection coordination system**
- **Allocation of quantities** to the various Member States?
- may cause complications for producers selling on various electronic market places as well as their own independent webshop

Concept: producer responsibility in e-commerce

- **EU-level** – two possible ways:
 - **1) uniform, EU-wide registration** with a European registration agency
 - However, since the actual execution would lie with the national authorities who have a closer proximity, **subsidiarity reasons and practical considerations** exist.
 - Registration in another country could not be recognized in Germany.
 - Free-riders could not be identified and prosecuted.
 - **2) (Futher) Harmonisation** of registration procedures for EEE, batteries and packaging through coordinated specifications in the relevant EU directives
 - **Preferable!**

Concept: producer responsibility in e-commerce

- **National level:** introduction of **compulsory verification**
 - **Producer responsibility remains:**
 - Producers are subject to the registration obligations and the subsequent take-back, disposal obligations, etc.
 - **Electronic marketplaces:**
 - Are obliged to check the due registration of the producers offering on their websites.
 - **Fulfilment service providers:**
 - Are only allowed to provide services in the future if the products come from duly registered producers.
 - Common compulsory verification for both fulfilment service providers and electronic marketplace operators.
 - Relevant, if either electronic marketplace operators with a branch office in Germany do not fulfil their obligations, or if they have their headquarters abroad.

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Annex

Additional slides

Are e-commerce stakeholders **producers** according to the ElektroG, BattG und 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 (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 to be a producer (Section 3 no. 9 clause 2)	Deemed to be a producer (Section 2 (15) sent. 2)	Importer (deemed to be a producer) (Section 3 (14) sent. 2)
Operator of an electronic marketplace	Not a producer (does not offer)	Not a producer (does not place on the market)	Not a producer (does not initially place on 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 the shipping packaging)

Are e-commerce stakeholders **distributors** according to the ElektroG, BattG und 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)