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Free movement of goods: Commission asks Germany to change its deposit and return systems for certain types of one-way packaging

After considering Germany's response to an initial request for information sent in October 2003, the European Commission has now decided to send Germany a formal request to change the rules in its packaging law ("Verpackungsverordnung") on the deposit and return of one-way packaging (typically cans and plastic bottles). While the Commission sees the environmental benefit of charging a deposit and of taking back packaging, it believes that the way in which the deposit and return systems function in Germany constitutes a disproportionate barrier to the free movement of packaged beverages from other Member States, in violation of the Treaty's Internal Market rules (Article 28) and of Article 7 of Directive 94/62/EC (the "Packaging Directive"). These measures particularly affect imported drinks, given that, for reasons mainly related to long distance deliveries, some 95 per cent of imported drinks are in 'one way' packaging. The Commission's request will take the form of a reasoned opinion, the second step of an infringement procedure under Article 226 of the EC Treaty. If Germany does not respond satisfactorily within two months, the Commission could decide to take the case to the European Court of Justice.

Where national rules hinder the free movement of goods within the European Union (one of the fundamental principles of the Internal Market and provided for by Article 28 of the EC Treaty), companies are deprived of their right to sell a product throughout the Union. Competition on national markets is thus liable to be reduced, so that consumers have less choice and risk having to pay more.

Internal Market Commissioner Frits Bolkestein said "We have held a number of high-level discussions with the German authorities in an attempt to resolve this case consensually. Insufficient progress has been made to satisfy the Commission that the German system would no longer be in breach of EU rules that Germany and all other Member States have agreed. The Commission now has no alternative but to proceed with the case, although we continue to hope that a solution can yet be achieved which would avoid us having to refer this case to the European Court of Justice"

Under the German "Verpackungsverordnung" (law on packaging) a mandatory deposit of at least €0.25 or €0.50 (depending on the volume of the product) is being charged on mineral waters, beer and sparkling soft drinks sold in one-way packaging (typically, cans and plastic bottles). At the same time, retailers are obliged to accept the return of used packaging of the same type, shape and size as the packaging they carry in their own product range.

However, as of today there is not yet a properly functioning nationwide return system allowing consumers to return such one-way packaging to any point of sale to recover the deposits paid. Instead, retailers are only required to accept the return of packaging of exactly the same type, shape and size they have in their own stock. They can refuse to take back other types of empty packaging. As a result, a number of so-called "island solutions" have been established – this means packaging specifically designed for certain retailers with minor changes to its type, shape and size compared to that supplied to others. In this way, retailers limit their financial obligations, by only taking back and refunding the packaging of those products they have themselves sold.

The end result is that, instead of a nationwide return system, currently there is in Germany a mosaic of different return systems that are closed in themselves and not compatible with each other. The two existing return systems which may potentially become nation-wide do not currently cover more than a very limited part of the relevant German drink market. Meanwhile, products using one-way packaging have been removed from the shelves of many shops.

Such a situation increases manufacturing costs and hinders imports of beer, mineral water and soft drinks from other Member States.

Under EU law, measures that restrict the free movement of goods can be justified for overriding requirements in the general interest, such as environmental reasons, as long as they are applicable without distinction to national and imported products and as long as they are proportionate. The principle of proportionality requires among other things that the measure taken restricts trade within the EU as little as possible.

Furthermore, the Packaging Directive specifically requires Member States which introduce deposit and return systems to ensure that this is done in a way which does not create barriers to intra-EU trade. Experience from other Member States has shown that a deposit system can be introduced without disrupting trade within the Internal Market.

The Commission considers however that the way the deposit and the take-back obligation foreseen by the “Verpackungsverordnung" have been implemented in Germany in practice creates disproportionate barriers to intra-EU trade. Furthermore, it doubts that the measures taken are necessarily the most appropriate ones in order to protect the environment.

None of the additional factual elements provided by the German authorities following the letter of formal notice sent by the Commission in October 2003 provides sufficiently substantial evidence to allay the Commission’s concerns.

The latest information on infringement proceedings concerning all Member States can be found at the following site:

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm