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Judgments of the Court of Justice in Cases C-463/01 and C-309/02

*Commission of the European Communities v Federal Republic of Germany Radlberger
Getränkegesellschaft mbH & Co. and S. Spitz KG v Land Baden Württemberg*

The deposit and return obligations introduced in Germany for non-reusable drinks packaging, whilst contributing to achieving one of the general objectives of environmental protection policy, hinder the free movement of goods if producers do not have a reasonable transitional period and a guarantee that the new system will be operational when the old system ceases to exist

When replacing a global collection system with a deposit and return system, a Member State must ensure that there are a sufficient number of return points so that consumers who have been charged a deposit when buying goods in non-reusable packaging can recover the deposit even if they do not go back to the initial place of purchase.

A. Background to the cases

In Germany, producers and distributors of drinks in non-reusable packaging are, in principle, subject to an obligation to charge a deposit for, and accept the return of, the packaging¹. It is, however, possible for them to fulfil the obligation by participating in a global collection system such as ‘Der Grüne Punkt’ (‘The Green Dot’). This possibility is removed for certain drink sectors where, over two consecutive years, the proportion of all drinks in reusable packaging in Germany falls below 72% and, for the particular drink sector in question, the proportion of reusable packaging determined in 1991 is not achieved. In January 1999, the German Government announced that in 1997 the proportion of reusable drinks packaging fell below 72% for the first time. Assessments carried out between February 1999 and January 2000 and between May 2000 and April 2001 showed that the proportion remained below 72%.

¹ Under the Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (‘Verpackungsverordnung’) (Regulation on the Avoidance and Recovery of Packaging Waste) of 21 August 1998.

In Case C-463/01, the Commission brought an action against Germany before the Court of Justice in December 2001, in which it contested the German legislation in so far as it applies to mineral water, which, under a Community directive², must be bottled at source. According to the Commission, by introducing deposit and return obligations that depend on the proportion of reusable packaging on the German market that legislation imposes a particular burden on producers of natural mineral water that comes from other Member States and thus constitutes a barrier to intra-Community trade which is not justified by reasons relating to environmental protection.

Case C-309/02 concerns the Austrian undertakings Radlberger and Spitz, which export carbonated soft drinks, fruit juices, other non-carbonated drinks and table water to Germany in non-reusable packaging. With a view to recovery of the packaging, they joined the global waste-collection system 'Der Grüne Punkt' and on that basis were exempted from the obligation to charge the deposit laid down for drinks distributed in Germany in non-reusable packaging. In May 2002 Radlberger and Spitz brought an action against *Land Baden-Württemberg* before the Verwaltungsgericht Stuttgart (Administrative Court, Stuttgart) in which they submit that the German rules on rates for reusable packaging and the related deposit and return obligations are contrary to Directive 94/62/EC on packaging and packaging Waste³ and to the free movement of goods guaranteed by the EC Treaty. The Federal Republic of Germany was joined as a party to the action. The Verwaltungsgericht stayed proceedings and referred several questions in this context to the Court of Justice of the European Communities.

On 2 July 2002 the German Government announced that a mandatory deposit would be charged on mineral water, beer and soft drinks. By virtue of the prescribed six-month notice period, the deposit entered into force on 1 January 2003.

B. Relationship between Directive 94/62 and the free movement of goods

The Court of Justice holds in the cases before it that the German rules at issue must be assessed in light of not only Directive 94/62 but also the provisions of the EC Treaty relating to the free movement of goods. That directive, which does not establish a hierarchy between the reuse of packaging and the recovery of packaging waste, merely allows the Member States to encourage, in conformity with the EC Treaty, systems for the reuse of packaging that can be reused in an environmentally sound manner and thus does not harmonise completely the organisation of national systems designed to encourage the reuse of packaging.

C. Barrier to the free movement of goods

With regard to the question whether a barrier to intra-Community trade prohibited by the EC Treaty exists, the Court finds that **the German rules at issue do not affect in the same manner the sale of drinks produced in Germany and that of drinks from other Member States**. The changeover from a global system for the collection of non-reusable packaging to a deposit and return system causes every producer and distributor using such packaging to incur, apart from marking and labelling costs, additional costs connected with organisation of the taking back of packaging, the refunding of sums paid by way of deposit and any balancing of those sums between distributors. **Producers established outside Germany use considerably more non-reusable packaging** than German producers.

² 2 Council Directive 80/777/EEC of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters (OJ 1980 L 229, p. 1).

³ 3 European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10).

The Court draws attention, however, to its case-law according to which national measures capable of hindering intra-Community trade may be justified by overriding requirements relating to protection of the environment provided that the measures in question are proportionate to the aim pursued.

D. The environmental protection aspect

With regard to justification relating to protection of the environment, the Court recognises that the establishment of a deposit and return system is liable to increase the proportion of empty packaging returned and results in more precise sorting of packaging waste, thus **helping to improve its recovery**. In addition, the charging of a deposit **contributes to the reduction of waste in the natural environment** since it encourages consumers to return empty packaging to points of sale.

Furthermore, in so far as the rules at issue make the entry into force of a new packaging-waste management system conditional on the proportion of reusable packaging on the German market, they create a situation where any increase in sales of drinks in non-reusable packaging on that market makes it more likely that the system will change to one entailing an obligation to charge a deposit. Inasmuch as those rules thus encourage the producers and distributors concerned to have recourse to reusable packaging, they **contribute towards reducing the amount of waste to be disposed of**.

However, the Court finds that legislation, such as the German **Verpackungsverordnung**, **that makes the establishment of a deposit and return system dependent on a packaging reuse rate, which is certainly advantageous from an ecological point of view, complies with the principle of proportionality only if**, while encouraging the reuse of packaging, it gives the producers and distributors concerned **a reasonable transitional period** to adapt thereto **and ensures** that, at the time when the packaging-waste management system changes, **every producer or distributor concerned can actually participate in an operational system**.

The Court holds, in Case C-309/02, that it is for the Verwaltungsgericht Stuttgart to determine whether the change of packaging-waste management system provided for by the German rules allows the producers and distributors concerned to participate in an operational system.

In Case C-463/01, relating to natural mineral water which is to be bottled at source, the Court holds that the Verpackungsverordnung is not consistent with the principle of proportionality because the transitional period of six months is not sufficient to enable producers of natural mineral water to adapt their production and their management of non-reusable packaging waste to the new system.

E. Other aspects of the transition to a deposit system

Finally, in Case C-309/02 the Court answers in the negative the question of the Verwaltungsgericht Stuttgart as to whether Directive 94/62 confers on producers and distributors using non-reusable packaging who are permitted to fulfil their deposit and return obligations by participating in a global packaging-collection system the right to continue to participate in a global system of that kind in order to meet their legal obligations. According to the Court, **Directive 94/62 allows a Member State to require the replacement of a system for the collection of packaging near the homes of consumers or points of sale with a deposit and return system**.

However, in such a case the new system must be equally appropriate for the purpose of attaining the directive's objectives. In particular, where the new system is, as in Germany, a deposit and return system, **the Member State concerned must ensure that there are a sufficient number of return points so that consumers who have been charged a deposit when buying goods in non-reusable packaging can recover the deposit even if they do not go back to the initial place of purchase.**

In addition, **the changeover to that new system must take place without a break and without jeopardising the ability of economic operators in the sectors concerned actually to participate in the new system as soon as it enters into force.** In this context, the Court points out that the Member State concerned must ensure that the producers and distributors concerned have a reasonable period for the transition to the new system so that they can adapt their production methods and chains of distribution to the requirements of the new system.

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