

# Guidance on authorisation and contractual arrangements for international producers and authorised representatives

## 1 Introduction

On 3 July 2021, a new provision in section 35 (2) VerpackG (Packaging Act) entered into force allowing producers without a branch within Germany to appoint an authorised representative to fulfil their duties under the Verpackungsgesetz (Packaging Act) on their behalf. An exception applies to the registration requirement pursuant to section 9 VerpackG, which continues to rest with the producer. A new definition in section 3 (14a) VerpackG governs who can be an authorised representative.

These provisions give rise to a number of basic questions that have an impact on the contractual arrangements between producers and authorised representatives, for example:

- ◆ Who can appoint an authorised representative?
- ◆ Who can be an authorised representative?
- ◆ What obligations does an authorised representative have?
- ◆ What obligations continue to lie with the producer?
- ◆ During the registration process, how can the party under obligation pursuant to the Verpackungsgesetz access the authorised representative's information?
- ◆ What contractual arrangements should a producer and authorised representative agree upon at the very least? From the point of view of the Zentrale Stelle Verpackungsregister (Central Agency Packaging Register – ZSVR), what should producers and authorised representatives watch out for?

### 1.1 Who is who? Key terminology for producers and authorised representatives

#### 1.1.1 Producers who can appoint an authorised representative

Every producer within the meaning of the Verpackungsgesetz without a branch within Germany can appoint an authorised representative located in Germany.

This applies to all producers of packaging within the meaning of section 3 (14) VerpackG, in particular:

- ◆ producers of packaging subject to system participation (section 7 (1) VerpackG);

- ◆ producers of transport packaging, commercial retail or grouped packaging and packaging for hazardous contents (section 15 (1) VerpackG);
- ◆ producers of single-use beverage packaging subject to deposit (section 31 VerpackG).

International producers who do not make use of the option to appoint an authorised representative must meet all obligations themselves.

### 1.1.2 Authorised representatives

Any natural or legal person or a joint partnership with legal capacity located in Germany, or operating a branch in Germany can be an authorised representative (section 3 (14a) VerpackG).

## 1.2 Obligations of an authorised representative under the VerpackG

### 1.2.1 Authorised representatives 'effectively' become producers

For the purposes of the Verpackungsgesetz, an authorised representative is a producer – even though the authorised representative does not distribute packaging themselves.

Unlike appointed third parties pursuant to section 35 (1) VerpackG, authorised representatives act in their own name and not in the producer's name.

As such, the authorised representative is responsible for fulfilling the obligations under the Verpackungsgesetz that they have assumed. If these obligations are breached, or where packaging law dictates that information must be provided, it will be the authorised representative who will serve as the point of contact for the authorities, not the producer. In particular for government authorities, the authorised representative effectively becomes the producer.

### 1.2.2 Reference to producer registration number

Although authorised representatives act in their own name, they always must also make reference to the registered producer. This reference is made by using the producer's registration number.

- ◆ Since 1 January 2019, producers of packaging subject to system participation are required to register with the LUCID Packaging Register. As a consequence, they have a registration number. Indicating this registration number is especially important when submitting data reports pursuant to section 10 VerpackG and filing declarations of completeness pursuant to section 11 VerpackG for a producer.
- ◆ As from 1 July 2022, the registration requirement will also apply to producers of other packaging. This means that producers of other packaging will also have to register with the LUCID Packaging Register and that they will receive a registration number.

### 1.2.3 'All or nothing' approach

A producer can only appoint a single authorised representative to fulfil their duties under the Verpackungsgesetz on their behalf.

Conversely, this authorised representative has to fulfil all of the producer's obligations under the Verpackungsgesetz, with the exception of registration. Authorising a representative follows an 'all or nothing' approach – it is not possible to split authorisation vis-à-vis third parties amongst various representatives, or to limit it to certain obligations. There is only one exception: the registration requirement (see paragraph 2 below).

Producer obligations *in particular* comprise the following:

- ◆ obligation to conclude a system participation agreement (section 7 (1) VerpackG) if the producer of packaging subject to system participation pursuant to Ort, 3 (8) VerpackG places packaging on the German market;
- ◆ obligation to submit data reports and file annual declarations of completeness, as applicable, if the producer places packaging subject to system participation pursuant to sections 7 (1), 3 (8) VerpackG on the German market (sections 10, 11 VerpackG);
- ◆ obligation to organise the return of transport packaging, commercial retail and grouped packaging as well as retail packaging of hazardous contents (section 15 (1) VerpackG);
- ◆ obligation to present documentation pursuant to section 15 (3) VerpackG when distributing the above-mentioned packaging and in the case of reusable packaging;
- ◆ obligation to participate in a nationwide container deposit scheme pursuant to section 31 (1) VerpackG.

Against this background, the authorised representative must know which packaging the producer is placing on the market. The authorised representative must know the scope of their obligations and potentially mitigate associated risks contractually (see paragraph 3.2.2 below).

#### **1.2.4 Authorised representative appointing third parties**

As authorised representatives are treated as producers, they can appoint third parties pursuant to section 35 (1) VerpackG where the Act allows this. This could apply for declarations of completeness, for example. However, the authorised representative will remain the contact for authorities – as would be the case if a producer had appointed a third party.

### **1.3 Producer's obligations when appointing an authorised representative**

There is a legal exception to the transfer of obligations to authorised representatives: it concerns the producer's obligation to register with the LUCID Packaging Register. Producers have to register with the ZSVR themselves and notify the ZSVR of changes to their register entries themselves (section 9 VerpackG). Nothing has changed there. When registering for the first time or notifying the ZSVR of changes, the authorised representative must be named. While naming and publishing the authorised representative in the register is not required for authorisation to be effective, the producer's registration will be incomplete without these details.

## **2 Collaboration between the producer and authorised representative in the registration process**

The collaboration between the producer and authorised representative in LUCID as described here in paragraph 2 is not enough for an authorisation to take effect on its own. Rather, authorisation requires a contractual agreement that complies with the requirements set out in section 35 (2) VerpackG (see paragraph 3 below). Successful collaboration in LUCID results in



the status 'Accepted' for the authorisation in LUCID. This in turn allows the authorised representative to fulfil the obligations of the producer in LUCID (see paragraph 2.4 for details).

## **2.1 Producers: information to be provided in the LUCID Packaging Register**

International producers under obligation are required to disclose information about their authorised representative in the LUCID Packaging Register, namely the authorised representative's (company) name and contact details (street address, postcode and town/ city in Germany, phone number). The authorised representative's European (VAT number) or national taxpayer reference number are considered contact details, as well as an e-mail address and national identification number (e.g. commercial register number), which must also be provided. This information will be taken from the authorised representative's login for the purposes of producer registration.

Furthermore, the producer is required to confirm that an effective authorisation is in place (see paragraph 3.1 below).

To make it easier for the producer to enter the information, one or more suggestions for authorised representatives will appear once the first four letters of a name or first name, or the first four characters of an authorised representative ID, have been entered during the producer registration process. Once the authorised representative has been selected, the remaining fields will automatically be filled with their most recent contact details.

The option of adding an authorised representative in the LUCID Packaging Register has been available since 3 July 2021. Entries must be forward looking and cannot be retrospective.

## **2.2 Appointed representatives: information to be provided in the LUCID Packaging Register (login)**

For an authorised representative to be selected as described above, that authorised representative must have created a login for themselves in the LUCID Packaging Register (in their role as an authorised representative). Once such a login for an authorised representative has been created, the authorised representative will receive an ID. With this ID, the authorised representative will be able to manage their status in the LUCID Packaging Register.

Authorised representatives have to confirm that they are indeed the authorised representative of a producer and should do so without undue delay to support the producer. Which producers have selected them as their authorised representative can be seen by clicking on the 'Edit' function in the 'Manage producers' tile, under 'Producer requests for authorisation'.

## **2.3 Finishing the appointment and publishing the authorised representative**

Not until the authorisation has been confirmed will the producer receive an administrative act stating that the authorised representative has been added to their data in the LUCID Packaging Register. With the next update of the public register, the authorised representative will be shown in the producer's entries. Likewise, the producer will not be activated in the authorised representative's dashboard until the authorisation has been confirmed. This activation is necessary for the authorised representative to submit data reports for the producer, amongst other things.

## 2.4 Effects on the LUCID Packaging Register

Producers who have appointed authorised representatives continue to have read permission for their dashboard, but the write permissions necessary to fulfil their producer obligations will be restricted. This does not apply to the permission to change producer registration data as the producer remains solely responsible for that.

The authorised representative can act for the producer in the LUCID Packaging Register as long as the authorised representative is named in the producer's register entries. While authorised representatives can select, in their respective login area, that the authorisation of a certain producer has ended, this only changes the status of the authorisation to 'In process'. Only producers can terminate the authorisation in the register and only then will the status of the authorisation change to 'Terminated'.

If a producer had appointed third parties before appointing an authorised representative, these appointed third parties will be deleted from the producer's dashboard for the future. Only authorised representatives are able to enter appointed third parties pursuant to section 35 (1) VerpackG in the LUCID Packaging Register in connection with fulfilling the producer obligations that have been passed on to them (e.g. for filing declarations of completeness).

## 3 Guidance on contractual arrangements between producers and authorised representatives

### 3.1 Minimum requirements for effective authorisation

If a producer decides to appoint an authorised representative, they have to meet the requirements for authorisation to be effective pursuant to section 35 (2) VerpackG.

#### 3.1.1 Agreement (contract of agency)

Authorisations require a contractual agreement between the authorised representative and producer (appointment). As the authorisation is usually for consideration, it is considered a contract of agency under German law (section 675 BGB (Civil Code)).

#### 3.1.2 Written agreement in German

The agreement must be drafted in German (section 35 (2) VerpackG). Where a bilingual agreement is used, the German version must be defined as the binding one.

As the authorisation has to be made in writing, the agreement must be effected in written form as per section 126 BGB. That means that both contracting parties must sign the agreement (handwritten signature or qualified electronic signature, section 126a BGB).

The ZSVR inspecting the agreement is not a regular part of the registration process. Both contractual parties must confirm during the registration process that the authorisation is effective.



### **3.1.3 Appointment as an authorised representative pursuant to section 35 (2) VerpackG**

The agreement must make it clear that an appointment as an authorised representative pursuant to section 35 (2) VerpackG is being made. An appointment pursuant to section 35 (1) VerpackG can entail similar contractual arrangements and should therefore be clearly delineated from an authorisation. An authorisation should therefore always make explicit reference to section 35 (2) VerpackG.

### **3.1.4 Appointment to fulfil any and all producer obligations pursuant to the Verpackungsgesetz**

The producer appoints an authorised representative pursuant to section 35 (2) VerpackG to fulfil the producer obligations under the Verpackungsgesetz. This fulfilment must include any and all obligations that the producer in question may have under the Verpackungsgesetz, the registration requirement being the only exception. Against this background, the agreement must not limit the authorised representative's fulfilment of these obligations.

### **3.1.5 Fulfilment of producer obligations in the authorised representative's own name**

Section 35 (2) VerpackG provides for authorised representatives to fulfil the producer obligations under the Verpackungsgesetz in their own name.

## **3.2 What contractual arrangements does the ZSVR recommend?**

### **3.2.1 Contact details**

Bearing in mind the registration process, the authorising producer must have an interest in knowing the authorised representative's data that has to be entered in the LUCID Packaging Register, even though the contact details are filled in automatically when selected the authorised representative in LUCID. Likewise, the authorised representative must be able to contact the producer, for example where there have been breaches of packaging law obligations and the authorised representative is the point of contact, but has no influence over the matter (see paragraph 3.2.2). Both parties should therefore agree to update their contact details without undue delay if there is any change.

Furthermore, the authorised representative should agree to keep their contact details in their dashboard in the LUCID Packaging Register up to date at all times. If the authorised representative makes a change to their contact details in their dashboard, this will automatically trigger a change in the registration data of their associated producers in the LUCID Packaging Register. While there is no need for producers to enter these kinds of changes, they have a significant interest in the contact details of their respective authorised representatives being correct (see paragraph 2.4).

The authorised representative should also agree to create a login for LUCID; this login will remain valid as long as there are producers associated with that authorised representative and/or obligations to be fulfilled. If such a login has already been created, the authorised representative ID should be prominently featured in the agreement; otherwise, a provision should be included requiring the authorised representative to inform the producer of their authorised representative

ID without undue delay. The producer needs this ID to select the authorised representative during the appointment process in the LUCID Packaging Register.

### 3.2.2 Entering an appointed representative in the LUCID Packaging Register

Not until the producer has selected the authorised representative – using the authorised representative ID – and the authorised representative has confirmed this, will the authorised representative be published in the LUCID Packaging Register and be granted access to the dashboard they need.

The authorising producer should be contractually required to select the authorised representative in the LUCID Packaging Register, while the authorised representative should agree to confirm this selection in LUCID without undue delay. Otherwise, there may be an effective appointment – but without the authorised representative being able to fulfil the obligations passed on to them as described in paragraph 2.4 (e.g. in relation to data reporting, filing declarations of completeness).

### 3.2.3 Defining and fulfilling obligations

As explained in paragraph 3.1.3 above, the authorised representative must agree to fulfil any and all producer obligations pursuant to the Verpackungsgesetz, with the exception of the registration requirement.

It would make sense for the producer to agree to inform the authorised representative of changes in these obligations when the producer places only certain types of packaging on the German market. For both parties, this clarifies the obligations that must be fulfilled as a result of distributing certain types of packaging – and which obligations do not apply.

While such a breakdown of obligations is permissible and may be useful in the interests of clarity, it **must not** be phrased as being **exhaustive** (*‘in particular the following obligations’*) to avoid limiting the scope of obligations (see paragraph 3.1.3 above).

### 3.2.4 Authorised representative appointing third parties

If the authorised representative may appoint third parties to fulfil their contractual obligations for them, the agreement should expressly allow for this.

German law does not require a provision under which the authorised representative will be held liable for agents and representatives (section 278 BGB). However, it may be useful for international producers to add such a provision to the agreement for the sake of clarity.

### 3.2.5 Evidence of authorisation for systems and auditors

If the producer and authorised representative successfully collaborate as described in paragraph 2 above, the authorised representative's information will be published in the LUCID Packaging Register – and the authorised representative can start acting for the producer. Irrespective of the aforesaid, it may be useful if the producer provides a confirmation to the authorised representative stating that the latter is allowed to enter into a system participation



agreement in their own name, but for the packaging volumes of the producer. This confirmation serves to ensure that the authorised representative can provide evidence of their authorisation vis-à-vis systems or declarations of completeness auditors, and that these systems or auditors can document the activities of the authorised representative. The main reason for this recommendation is the fact that authorised representatives act in their own name.

### **3.2.6 Indicating the registration number for certain activities**

For activities above and beyond LUCID, such as entering into a participation agreement pursuant to section 7 (1) VerpackG, the registration number of the producer in question – not the authorised representative ID used for LUCID – must be indicated. This should be pointed out to the authorised representative and/or stipulated in the agreement.

### **3.2.7 Producer relaying the information/documentation required for obligation fulfilment**

It would make sense to stipulate that the producer agrees to relay – fully and correctly – to the authorised representative any information required to fulfil obligations under the Verpackungsgesetz, either at certain points in time or upon the authorised representative's request.

This information includes: information about the packaging volumes placed on the market that the authorised representative needs to enter into system participation agreements (section 7 (1) VerpackG), for the purposes of data reporting (e.g. sections 10, 11 VerpackG), evidence (e.g. allocation of costs pursuant to section 15 (1) VerpackG) and documentation obligations (e.g. section 15 (3) VerpackG) or to enter into contractual agreements (system participation agreement, agreements to participate in a deposit scheme for single-use containers, as applicable).

If the producer places single-use beverage packaging subject to deposit on the German market, provisions governing labelling and deposit clearing might make sense.

Where retail packaging of hazardous contents pursuant to section 15 (4) VerpackG is distributed, the agreement should include provisions governing the return of this packaging.

It might also make sense for producers to agree to provide the relevant information in an onboarding form. Likewise, it would make sense for producers to agree to report changes to this information and be held liable vis-à-vis the authorised representative for the completeness and accuracy of their information.

### **3.2.8 Authorised representative's obligation to provide information / requests from authorities**

From the time the authorisation is legally valid, it is the authorised representative and no longer the producer who serves as the point of contact for government authorities. However, breaches committed by the authorised representative will impact the producer, the producer's compliance with packaging law and/or their public image. Producers should therefore ensure that they will be informed without undue delay about enquiries from authorities that relate to the fulfilment of obligations.

Against this background, it makes sense to include provisions about how to respond to enquiries from authorities. These provisions should include:



- ◆ the producer agreeing to support the authorised representative in responding to enquiries or relaying information/documentation;
- ◆ the authorised representative agreeing to coordinate the response to enquiries with the producer, to an agreed extent;
- ◆ an arrangement on how to proceed should the parties disagree;
- ◆ whether the authorised representative should seek legal remedies in administrative proceedings if instructed by the producer to do so.

As regards any potential duty to provide information on the part of the authorised representative that may be provided for in the course of their appointment, these provisions may also include a requirement that the authorised representative inform the international producer duly and adequately of producer obligations imposed under the Verpackungsgesetz. This applies in particular to amendments to the Verpackungsgesetz that impact producers.

### **3.2.9 Provisions regarding trade secrets**

The producer in particular may make appropriate provisions in the interest of protecting their trade secrets.

### **3.2.10 Term/termination of the agreement**

There is no statutory minimum term for the appointment of an authorised representative. Changing authorised representatives midyear is permitted; however, doing so prejudices the continuity of responsibility for submitting data reports under section 10 VerpackG and leads to former and new authorised representatives having to work together.

As such, it may be in the authorised representative's interest to require the producer to log the termination of the authorisation immediately in the LUCID Packaging Register, i.e. to terminate the authorisation there.

Once the appointment of an authorised representative ends, the producer again becomes responsible for all of the obligations that affect them as a producer under the Verpackungsgesetz. Upon the removal of an authorised representative, it may therefore also be in the producer's interest to name a new authorised representative in the LUCID Packaging Register and seek that the request be confirmed as soon as possible. Otherwise there will be a gap between authorisations.

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