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## The concept of extended producer responsibility – the example of a deposit-return system

### Koncepcja rozszerzonej odpowiedzialności producenta na przykładzie systemu kaucyjnego

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**Abstract:** In May 2018, the Directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste (2018/851) was redrafted. These amendments constitute a direct cause of changes in the internal law of the European Union countries in terms of Extended Producer Responsibility (EPR). Poland also projects changes to the provisions of national law in order to manage waste in a better and more efficient manner. The packaging deposit-return system (with reference to plastic bottles, glass bottles, cans) currently operates in 10 European countries, covering 26% of the European population. In Poland, the planned date of launching the deposit-return system is January 2022. The aim of the article is to present the concept of EPR and an attempt to diagnose this system comprising the possibility of introducing a deposit-return system, made from the perspective of legal sciences.

**Keywords:** waste, recycling, deposit-return system (DRS)

**Abstrakt:** W maju 2018 roku została znowelizowana Dyrektywa Parlamentu Europejskiego i Rady zmieniająca dyrektywę 2008/98/WE w sprawie odpadów (2018/851). Zmiany te są bezpośrednio przyczynkiem zmian w prawie wewnętrznym krajów Unii Europejskiej w zakresie rozszerzonej odpowiedzialności producenta (ROP). Polska również prognozuje zmiany w przepisach krajowego prawa, w celu lepszego gospodarowania odpadami. System kaucyjny dotyczący opakowań (butelki plastikowe, butelki szklane, puszki) działa obecnie w 10 krajach europejskich obejmując 26% populacji Europy. W Polsce planowany

termin wprowadzenia systemu kaucyjnego to styczeń 2022 r. Celem artykułu jest prezentacja koncepcji ROP oraz próba zdiagnozowania tego systemu obejmująca możliwość wprowadzenia systemu kaucyjnego podejmowana z perspektywy nauk prawnych.

**Słowa kluczowe:** system kaucyjny, odpady, recykling, system depozytowo-zwrotny

## 1. Preliminary remarks

From 2021, an EU charge (the so-called *Plastic Levy*) – which will be charged for every kilogram of non-recycled plastic – will enter into force. Poland and other EU countries will be obliged to pay EUR 800 per ton of plastics that have not been recycled. In practice, this can mean huge costs on a yearly basis. A solution may be the introduction of a deposit-return system combined with the Extended Producer Responsibility (EPR) to national schemes.

The charge would be of a retroactive nature, which means that even if individual member states delayed adopting the EU Decision, then, at the moment it comes into effect, the fee will be charged automatically from the beginning of 2021. The methods of calculating both charges (produced and recycled waste) are to be determined on the basis of Directive 94/62/EC of the Council Regulation laying down implementing measures for the Decision.

The target of the EU countries' policy on the municipal waste management, including plastics, is to gradually increase the recycling of this waste. An element that is particularly problematic today is the post-use phase, related to the formation of post-consumer waste. Nevertheless, the issue that has become controversial nowadays is the post-use stage, linked with the accumulation of post-consumer waste. Based on the assumption of the ecological life cycle analysis, product responsibility should cover all its phases – *from cradle to grave* – including post-consumer transformation or disposal of the resulting waste.

The data published by Eurostat show that in 2017, within the entire Community, 41.9% of plastic packaging waste was recycled. A year earlier it was 42.4%, in 2015 - 39.9%, and in 2014 - 38.9%. In 2006, 26.4% of such waste in the EU was recycled. The EU statistical office indicated that in 2017 the highest level of recycling of plastic packaging waste was achieved by Lithuania (74%). Next in the order were: Bulgaria (65%), Cyprus (62%) – data for 2016), Slovenia (60%), the Czech Republic (59%), Slovakia (52%) and the Netherlands (50%). Eurostat data show that in Poland 34.6 percent of plastic packaging waste was recycled. Every year the level of recycling increases, however, the level of consumption of packaging waste rises, too. (<https://ec.europa.eu/eurostat/data/browse-statistics-by-theme>).

Pursuant to Directive 2018/851 of 30 May 2018 amending Directive 2008/98/EC on waste, many Member States have not yet fully developed the necessary

waste management infrastructure. It is vital for the EU to define clear long-term policy objectives to target measures and investments, in particular by preventing the build-up of a structural production overcapacity to process residual waste and blocking the disposal of recyclable materials at lower levels in the waste handling hierarchy.

The above-mentioned directive sets out a number of measures to protect the environment and human health by preventing and reducing the amount and negative impact of waste generation and management, and by reducing the overall impact of resource use and improving the efficiency of such use, which is essential for the transition to a circular economy, as well as to ensure the Union's competitiveness in the long term. Pursuant to Article 8a of the aforementioned Directive, Member States ought to clearly define the roles and obligations of all relevant entities involved, including product manufacturers, placing products on the market in a Member State, organizations implementing – on their behalf – the extended producer responsibility obligations, private or public economic operators managing waste, local authorities and, where applicable – entities dealing with re-use and preparing waste for re-use, as well as social economy enterprises (Directive 2018/851).

The need for changes in the responsibility for waste based on the *from cradle to grave* concept and the producer responsibility increase was noticed by the EU when it amended the package of waste directives in 2018: 1. Waste Directive (2008/98/EC), 2. Directive on packaging and packaging waste (94/62/EC), 3. Landfill Directive (1999/31/EC), 4. Directive that specifies the requirements for EPR systems (2008/98/EC). The amendment package entered into force in July 2020. In the Amendment Directive, the EU has established a legal framework for waste processing. This framework aims to protect the environment and human health by emphasizing the importance of proper waste management, as well as recovery and recycling techniques applied to reduce the demand for resources and their better use. The Directive establishes a waste hierarchy which consists of prevention; reuse; recycling; other recovery methods, e.g. energy recovery; and neutralisation. Also, a “polluter pays” principle was established, based on which the original waste producer must cover the costs of waste management.

A significant legal act is also the latest directive on plastics – Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the environmental impact of certain plastic products (hereinafter referred to as the Single-Use Plastics Directive – (SUPD)), according to which, in order to achieve a closed loop throughout the entire life cycle of plastics, the problem of generating an increasing amount of plastic waste and its release into the environment, in particular into the marine environment, must be dealt with. The European plastics strategy is a step towards establishing a circular

economy. For this reason, many countries have introduced extended producer responsibility solutions.

It follows from the preamble to the SUPD Directive that it promotes circular economy approaches that give preference to sustainable and non-toxic reusable products and re-use systems over single-use products that are primarily aimed to reduce the amount of waste generated. Such waste prevention is at the top of the waste hierarchy provided for in Directive 2008/98/EC of the European Parliament and of the Council. This Directive constitutes a *lex specialis* in relation to Directives 94/62/EC and 2008/98/EC and supplements Directives 94/62/EC and 2008/98/EC, and Directive 2014/40/EU of the European Parliament and of the Council.

In the context of the EU action plan for the circular economy set out in the Commission Communication of 11 March 2020 entitled “A new EU Action Plan for the Circular Economy for a cleaner and more competitive Europe”, we can read: “The amount of materials used to make packaging is constantly growing, and in 2017, the amount of packaging waste in Europe reached a record 173 kg per capita, i.e. the highest ever. To ensure that all packaging on the EU market is reusable or recyclable in a cost-effective manner by 2030.” To this end, the Commission intends to carry out activities consisting in:

1. reducing the (excessive) use of packaging and packaging waste, e.g. by establishing targets and other waste prevention measures;
2. promoting planning activities with a view to the reuse and recyclability of packaging, including possible restrictions on the use of certain packaging materials for certain applications, in particular where alternative products or reusable systems are possible, or where consumer goods can be safely sold without packaging;
3. considering the reduction of the complexity of packaging materials, including the number of materials and polymers used (COM (2020) 98 final).

The Communication of 11 March 2020 was reinforced by the previous Commission Communication of 2 December 2015 Closing the cycle – An EU Action Plan for the Circular Economy (COM (2015) 614 final).

The implementation of the assumptions of the waste directives requires legislative action by the national legislator. The current organization and functioning of the waste management sector in Poland (including specific aspects related to the functioning of EPR systems in their current shape) is regulated by a number of key national law acts:

- the Act of 13 September 1996 on Maintaining Cleanliness and Order in Municipalities (i.e. Dz. U. of 2020, item 1439),
- Act of 11 May 2001 on Duties of Business Operators with respect to Managing Certain Types of Waste, Product Fee, and Deposit Fee (i.e. Dz. U. of 2020, item 1903),

- Act of 20 January 2005 on Recycling of End-of-Life Vehicles (i.e. Dz. U. of 2020, item 2056) and the Act of 24 April 2009 on Batteries and Accumulators (i.e. Dz. U. of 2020, item 1850).
- Act of 14 December 2012 on Waste (i.e. Dz. U. of 2020, item 797),
- Act of 13 June 2013 on the Management of Packaging and Packaging Waste (i.e. Dz. U. of 2020, item 1114),
- Act of 11 September 2015 on Waste Electrical and Electronic Equipment (i.e. Dz. U. of 2020, item 1893).

The waste directive has been implemented into the act on waste and to the act on maintaining cleanliness and order in municipalities, and the packaging directive into the management of packaging and packaging waste directive. First of all, they should reduce the amount of packaging waste, ensure its recycling at the level specified in the directive and encourage producers to produce packaging, taking into account the essential requirements related to environmental protection (Badowska-Domagala [ed.] 2016: 74).

The provisions of the EU framework directive on waste (Article 11) are crucial for Poland. In its content we can read that in order to comply with the objectives of this directive and to bring us closer to the goal of a European resource-efficient recycling society, Member States take all necessary measures to achieve the following objectives:

a) by 2020, preparation of waste materials for re-use and recycling; at least such materials as paper, metal, plastic and glass from households and possibly other origins, provided that these waste streams are similar to household waste, will be increased by weight to a minimum 50%;

b) by 2020, preparing for re-use, recycling and other recovery of materials, including backfilling where waste replaces other materials, for non-hazardous construction and demolition waste, with the exception of naturally occurring material as defined in Category 17 05 04 of the European Waste Catalogue will, be increased by weight to a minimum of 70%.

Summing up, from the EU level, the most important thing is to implement a closed system into the national legal order. A suitable system seems to be the deposit-return system, which already functions in some EU countries. It covers beverage packaging products (plastic and glass bottles and cans).

## **2. Extended Producer Responsibility concept**

The EPR concept is an environmental strategy in which the producer's responsibility for the product is extended to the end of the product life cycle. As defined in Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC, this concept is understood as a set of activities obliging producers of products placed on the

market to bear financial or financial and organizational responsibility for their management throughout the entire life cycle of the product, i.e. both during its use period and when it becomes waste, including selective collection, sorting and processing. This obligation may also include organizational accountability and responsibility for contributing to waste prevention and improving the reusability and recyclability of products. Producers, under the extended producer responsibility scheme, may fulfil their obligations individually or collectively.

Extended Producer Responsibility is defined as a kind of a model approach in environmental protection that determines the manner of dealing with an item (product) that is a product of human activity. The essence of this concept is to make the manufacturing entity responsible for this product in all phases of its life cycle, and, in particular, in the phase when it becomes waste. As part of this concept, the product manufacturer, in the waste management phase, is responsible for the proper implementation of waste collection, recovery and disposal activities. (Karpus 2014: 239).

It should be noted that the EPR concept has been mentioned in EU acts as one of the basic legal institutions aimed at achieving the new objectives of the waste law or, more broadly, the environmental protection policy in the spirit of the principle of sustainable development (Ezroj 2009).

Legal responsibility for the management of things/waste concerns specific groups of entities (mainly entrepreneurs operating on the market) that the public authority is able to control and effectively cover with legal regulation – unlike entities operating by nature in a significant dispersion on the market, qualified as the so-called end consumers (Karpus 2014: 245).

Certain fixed elements form the EPR model that contribute to its smooth operation. They are also specified in Articles 8 and 8a of the Waste Directive published as part of the circular economy package. In accordance with its assumptions, an effective system should be based on the following elements: 1. a clear division of responsibilities; 2. ensuring adequate financial contribution; 3. fair competition between recovery organizations; 4. reporting and control.

The EPR system, in accordance with the Directive of 19 November 2008 on waste and repealing certain directives, applies to any natural or legal person who professionally develops, manufactures, processes, treats, sells or imports products (product manufacturer) (2008/98/EC).

Based on the current legal status in Poland, an entity introducing packaged products to the market may fulfil the requirements of the EPR system in the following way:

1. by recycling/recovering the packaging on its own,
2. by depositing the so-called product fee to the Marshal Office,
3. through the scheme called *Organizacja Odzysku Opakowań* [packaging recovery organization (OOO)].

A packaging, within the meaning of the Packaging Act, is a product, including a non-returnable product, made of any material, intended for storage, protection, transport, delivery or presentation of products, from raw materials to processed goods. The provisions of the above-mentioned act apply to all packaging, regardless of the material used for its production, and to packaging waste generated from it. The obligation to apply this act concerns entrepreneurs: 1. being packaging recovery organizations; 2. making intra-Community supplies of packaging waste, packaged products; 3. distributing packaged products; 4. exporting packaging waste, packaging, packaged products; 5. recycling or conducting other non-recycling packaging waste recovery process; 6. introducing packaging; 7. introducing packaged products.

Waste law has become one of the largest and most complex segments of environmental law in international law, European Union law and the domestic law of many countries in the world. It is no different in Poland (Danecka, Radecki 2020:25). Based on the freedom granted at the EU level in the implementation of the framework directive, the Polish legislator confined itself only to introducing Article 18 sec. 1, according to which: "Anyone who undertakes activities that cause or are likely to cause waste generation should plan, design and conduct such activities applying such production methods or forms of services, as well as raw materials and materials, so as to, in the first place, prevent waste generation or reduce the amount of waste and its negative impact on human life and health and the environment, also at the stage of manufacture of products, during and after their use. Additionally, Article 22 of the Waste Act can be indicated, according to which: "The costs of waste management are borne by the original waste producer, or by the current or previous waste holder. In the cases specified in separate regulations, the costs of waste management are borne by the product manufacturer or the entity introducing the product into the territory of the country, specified in these regulations" (Karpus 2014: 252).

### **3. Projected assumptions**

As the data from the Central Statistical Office reveal, in Poland, the achieved recycling levels of PET bottles, packaging glass and aluminium cans comprise 43, 62, and 81 percent, respectively. The necessity to achieve the objectives of Directive 2018/851 makes it important to consider new instruments supporting the implementation of the EPR, including the deposit-return system.

The above-mentioned system is one of the EPR solutions. It is a packaging management system, based on which a deposit is introduced for the packaging at the time of purchase. The packaging that is most often covered by the system is: glass (glass bottles), aluminium (cans), and plastics (mainly PET). The system allows for the recovery of all beverage packaging that is placed



on the market, its reprocessing and use in the further production cycle. The purpose of the deposit is to encourage consumers to care about the packaging and return it to the right place. Then the deposit is returned to the consumer. This system is financially neutral for the consumer, it links the producer to the packaging that it places on the market. The SUPD directive on single use products explicitly recommends deposit-return systems as a way to meet the challenge of environmental pollution caused by plastics. The deposit collection mechanism effectively implements the primary objective of the EU directive, i.e. it reduces the environmental impact of single-use plastic products.

In the Polish legal order, we will not find a legal definition of the deposit-return system anywhere, and thus it has not been determined by law what packaging should be included in this system. In the current legal framework, there are still open questions about the shape and scope of the system in question, with particular emphasis on such issues as the rights and obligations of the system participants; the status, nature and tasks of the entity performing the functions of the system operator; the role of municipalities and other public entities in this system.

The end customer, from the point of view of the deposit-return system, is the core link.

In September 2020, the Ministry of Environment and Climate presented a proposal for assumptions related to this system. In accordance with them, statutory obligations with regard to packaging and packaging waste will be accounted separately for the packaging of products intended for use in households and for other packaging (e.g. transport, industrial packaging, etc.). The Ministry's scheme includes an assumption that the entities introducing packaged products will be obliged to pay two fees:

- 1) P1 fee to the commune through the Marshal Office, intended to co-finance the selective collection of municipal waste
- 2) P2 fee for the EPR organization, intended for the implementation of statutory obligations, including collection, transport and recycling of packaging waste, as well as financing the deposit-return system.

The first fee, called P1, should cover the costs of collecting packaging waste from its producers in packages. P2 fee is to be calculated based on the procedure regulated in Article 17 of the Act on the management of packaging and packaging waste (i.e. Dz. U. of 2020, item 1114), i.e. by the so-called Voluntary Agreements or Packaging Recovery Organizations. It is assumed that a minimum rate will be introduced; a regulator will be responsible for the rates, i.e. a special entity that will control them. In summary, the introducing entity will pay a certain amount, some of which will flow through P1 (to the municipality) and some to P2 (to finance recycling).



As the draft amendment to the act on waste says, to prevent waste formation measures will be applied, which at least encourage the re-use of products and the creation of systems that promote repair and reuse, especially in relation to packaging. The costs of waste management, including costs related to the necessary infrastructure and its operation, are borne by the original waste producer, or by the current or previous waste holder.

In March this year, 3 parliamentary bills concerning management of packaging and packaging waste were submitted to the Sejm. The first one (EW-020-425/21) assumes the introduction of additional marking on the packaging. This obligation would apply to traders introducing products in packaging, manufacturing packaging and importing or acquiring intra-Community packaging, by affixing a label indicating “the fraction of waste to which packaging will belong as packaging waste.” The second project (EW-020-426/21) concerns the introduction of a mandatory deposit “for each unit packet constituting a bottle or can in which a beverage is sold” in retail units with an area of 2000 m<sup>2</sup>. In addition, this project obliges entrepreneurs to allow the return of packaging waste “using an automatic device”. Such a device will have to be purchased within 6 months of the entry into force of the Act, and the cost of its acquisition could be 80% co-financed by the NFOŚiGW [National Fund for Environmental Protection and Water Management]. The last project (EW-020-427/21) aims to reduce the number of plastic bags introduced into the environment. It assumes, among others, a 50% share of shopping bags suitable for recovery by composting and biodegradation (on 1 July 2021), as well as a total ban on offering plastic bags (other than biodegradable) from 1 January 2022. In the case of stores with an area of less than 250 m<sup>2</sup>, the above dates would be postponed to: 1 July 2023 and 1 January 2024, respectively. [sejm.gov.pl].

#### **4. Final remarks**

The development of the EPR system, in conjunction with the deposit-return system, may give a positive image effect for the regulator of the EPR system and public administration bodies.

It can be concluded that changes to the national EPR system are a necessity. The main premises are the EU regulations that we must implement in terms of the assumed limits, EPR and liquidation of disposable packaging. In the present legal circumstances, apart from maintaining the existing solutions that already exist in the Polish legal system, something new is needed. Boundary conditions ought to include the provisions of the revised Waste Directive and penetrate the provisions of national legislation. In this space, such conditions may be satisfied by the deposit-return system.

The Ministry of Environment and Climate points out that: “The possibility of introducing a deposit-return system in Poland is being analysed as part of work on the transposition of the so-called waste package, i.e. the amended waste directives. This system is considered as one of the most effective instruments to achieve high levels of collection of packaging and packaging waste, including plastic waste” (press release).

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