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Producer responsibility

Report Denmark

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General observations on the concept

The concept “*producer responsibility*” reflects a fundamental legal principle for allocation of responsibilities: the person acting must ensure that acting is performed in a way not causing damages or nuisances to other protected interests. In relation to manufacturing of goods the concept requires operators to prevent pollution, hazards, risk of damaging public health and damaging of neighbouring properties - or at least to minimize these negative externalities to a certain level defined by legislation and/or a licence and to apply certain procedures. Hence, the preventative costs lay in the operator. It is generally accepted that these preventive responsibilities apply for manufactory processes and includes the waste generated by the manufactory process.¹ It seems also accepted that the principle of allocation also applies for manufactured goods. Products placed on the market must be safe and secure in general² and on certain products as pesticides, GMOs and vehicles, the placing of the product on the market is subject to a prior license scheme. Taking into account that the chain of causation from an abstract view is endless, the principle legal question is: how far do the concept apply in the chain of causation. One thing is sure: it has to end somewhere.

Inspired by *the principle of cradle to grave on products*, the concept of producer responsibility has been given a more specific meaning referring to responsibility of the producer for the treatment of the products once these become waste. In this narrow sense, the concept concerns whether the producer should be (to some extent) responsible for the (waste)-treatment of his end-of-life-products. In this paper the producer responsibility will be discussed in the narrow sense but taking into account the concept’s origin, reason and limitation.

The paper will deal with six questions: (1) the overall approach in Danish Law towards allocation of responsibilities for waste treatment; (2) packaging waste; (3) end of life vehicles; (4) WEEE - electronic waste; (5) reform of Danish waste policy; (6) the interrelation between integrated approach under the IPPC Directive and the producer responsibility approach discussing: what is (or should be) integrated ..?; and (7) the limitations of the concept.

1. Overall approach towards producer responsibility for waste treatment

¹ As a consequence the operator is liable for damage caused by the process although the standard for liability (strict or negligence) differs. But the fact that the operator could be liable for damage caused by industrial operation demonstrates a basic principle of priority in the legal order: the right to produce does not give a right to damage.

² See Directive 92/59 on product safety.

The *Cradle to Grave Principle* is reflected in section 3(1)(2) of the Environmental Protection Act saying: "When determining the extent and nature of measures to prevent pollution consideration shall be given to [...] (2) the whole cycle of substances and materials, with a view to minimizing wastage of resources."

The provision was adopted by the Danish Parliament in 1991 and indicates that Denmark has implemented the concept of producer responsibility for the allocation of responsibilities of waste treatment in general. This is not the case. In contrast, Danish Law has taken almost the opposite position making municipalities (the 270 local Councils) responsible for the treatment of waste from households as well as waste from private business. The only exceptions are related to EC directives. It seems even doubtful whether Denmark complies with the IPPC Directive requiring an integrated approach towards all environmental externalities including waste because the treatment of waste from IPPC plants is neither directly nor indirectly integrated in the IPPC permit under Danish Law.

2. *Packaging waste*

The total generation of packaging waste was in year 2000 1 million ton according to statistics of which 57% was identified as transport packaging. The Danish implementation of Directive 94/62 on packaging and packaging has with the exception of packaging for beer and soft drinks followed the general scheme in Denmark: - the responsibility for treating packaging waste has formally been placed on the local Councils.³ Hence, in contrast to the other Member States Denmark has not adopted a separate scheme for collection and treatment of packaging waste but rely on the local Councils supplemented by economic incentives. In year 2000 the Parliament adopted a new tax on packaging based on a so called environmental parameter differentiating between different types of material.⁴ The basic requirements for packaging is implemented by Statutory Order no. 298 of 30 April 1997 on certain demands to packaging.

Compared to the EC targets for recovery and recycling in the Directive, Denmark has met all the targets except for recycling of plastic - provided that municipal incineration of packaging should be considered waste for recovery when used for heating.

The most famous part of the Danish legislation on packaging is the deposit and return scheme for beer and some soft drinks which with some modification was found in accordance with EC law in the famous Danish Bottle case [C 302/86]. Later the can-ban (only for beers and soft drink) was challenged before the ECJ - and even before the ECJ decided the case, the can-ban was withdrawn. In stead a new scheme

³ Statutory Order no. 619 of 27 June 2000 on waste requires the 270 local Councils (municipalities) to adopt plans and regulations on treatment of packaging waste.

⁴ See Act no. 101 of 13 January 2001 on taxes on packaging, backs and other items.

was established by Statutory Order no. 713 of 24 August 2003 on deposits and collection etc. of packaging for beer and certain soft drinks. Under the new scheme the private owned company "Dansk retur-system A/S" (controlled by the Danish brewery, Carlsberg) has been given the exclusive right to collect all packaging from beers and soft drink and all stores are obliged to pay to "Dansk retur-system". The advantage of the system is that consumers are able to return used packaging from beers in all stores selling beer provided that the beer has been sold in Denmark. There are however at least two deficits: (1) the scheme does not apply to the high percentage of private imported beer from Germany which therefore is not subject to any recycling system; (2) the scheme disturbs free competition and free trade in a way so it is doubtful whether the scheme is in compliance with EC law.

Regarding allocation of responsibilities one might dispute whether the exclusive system on deposit and return established by the new legislation really allocates responsibilities. Competitors claim that the scheme protects the interests of Carlsberg which by the system is almost ensured against any economic deficit and by the system is given new insight in competitors. From an environmental perspective the advantages of the exclusive system seem doubtful compared to more open systems for deposit and return.

3. End of life vehicles

Directive 2000/53 on end of life vehicles has in Denmark been implemented by: Act no. 372 of 2 June 1999 on environment Premiums and Reimbursement in connection with Dismantling and Scrapping of Vehicles as amended by Act no. 385 of 6 June 2002 and by two Ministerial Orders issued under the Environmental Protection Act: Statutory Order no. 782 of 17 September 2002 on collection of environment and scrapping premiums and payment of reimbursement in connection with dismantling and scrapping of vehicles; and Statutory Order no 480 of 19 June 2002 on management of waste in the form of motor vehicles and derived waste fractions.

The principles of the Danish implementation are that only licenced operators are allowed to deal with end-of-life-vehicles and that such licenced operators must follow the requirements laid down in the EC Directive. In this respect, the manufactures of vehicles have no responsibilities. Regarding the costs, the Parliament by adopting the Act on environment Premiums and Reimbursement in connection with Dismantling and Scrapping of Vehicles place an annual charge on every owner of a vehicle (about 9 Euro) and a charge on every new imported (or in Denmark produced) vehicle (in 2004: 1 Euro pr. vehicle). The revenue of the two charges (or tax) is used as a premium given to the owner of the vehicle when the end-of-life-vehicle is handed over to a licenced operator. The intention is that all the user of vehicle by the charge pay for the economic incentive to hand over the end-of-life-vehicle to a licenced operator. The Danish system at least partly ensure it is not the end-user who pays all the treatment costs. On the other hand the economic burden on producers of vehicle seems rather symbolic taking into account the price

of a vehicle and place the major burden for the premium on everyday users of vehicle.

4. WEEE - waste of electrical and electronic equipment

Four years before EC adopted the 2002/96 Directive on WEEE, the Minister of Environment established a Danish system by adopting Statutory Order no. 1067 of 10 December 1998 on treatment of waste of electrical and electronic equipment. In accordance with the general allocation of responsibilities and duties in Danish waste legislation, the responsibilities for collecting and treating waste from households and private business were placed on the 270 local Councils. Hence, the system does not include any element of producer responsibility. Because of the WEEE Directive it is now accepted that the existing system needs to be reversed - but how is yet not clear.

5. Reform of Danish waste law

During the last years the Danish waste legislation has been subject to strong criticism from several perspectives. Conflicting interests has been one argument against the Danish system from private waste industry because the local Councils which are economic involved in waste treatment also are given the power to decides the rules, to enforce them and to decide the price which has to be payed. Conflict with EC legislation on waste and in particular conflict with the 259/93 Regulation on shipment of waste has been another argument against the system. Lack of environmental concerns has also been mentioned, because the local oriented system is not able to deal with more advantage technological solutions. Missing polluter-pays principle has been mentioned from academics as an argument against the Danish system because it place the responsibility for proper waste treatment on authorities in stead of waste generator or the original producer. Also transporters of waste has criticised the system because the rules for transport of waste differs between the local Councils making the system rather administrative burdensome. Finally, it has been mentioned that the whole system needs a revision to implement the producer responsibility concept in new EC legislation.

Because of the critics, the Minister of Environment in the beginning of year 2002 established a committee to prepare a revision of Danish Waste Legislation. The outcome of the work is yet unknown.

6. Integration approach

The concept of producer responsibility is not only related to the cradle to grave principle but also reflects the holistic approach which lays behind the integration principle. In my opinion however there is a sort of potential conflict between the integration approach under the IPPC Directive and the integration approach under the concept of producer responsibility. This can be enlightened by one example.

Following the IPPC Directive all the environmental externalities including waste treatment must be taking into account in deciding the conditions for the IPPC-permit.

It will then be for the operator to comply with these conditions and to pay the costs. In the perspective of the chain of causation the integration approach is applied *horizontal* by using the manufacturing process as the fix point: - if restrictions are decided on use of rawmaterials they should be reflected in the IPPC permit - and even if the operator should be liable for end-of-life-products this should also be decided in the permit.

In contrast to producer responsibility applies the integration approach *vertical* using the manufacturing in itself as the fixpoint: - when the producer brings something on the market the producer should be kept responsible for the treatment after end use. And according to the WEEE Directive this should also be the case for products used in production.

In practice the two concepts might conflict. Many IPPC plants are using dangerous chemicals and electrical and electronic equipment in processing. Following the IPPC-concept, the operator of the IPPC plant is responsible for proper waste treatment and conditions are set in the permit. But following the producer responsibility concept, it is not the operator, but the original producer who is responsible for treatment of used chemicals and end-of-life products. It seems to me obvious that it is impossible to apply both concept. And it seems to me also clear that they cannot work in combination: - if one accepts producer responsibility should be used on IPPC plant it will require that the local authority has discretion to place responsibility on the original producer who often will be placed in another Member State.

7. Limitations on the concept of producer responsibility

The problems with the IPPC concept demonstrate in my view the limitations in applying the producer responsibility for waste generated by manufactures. Moreover, I will question to what extend the producer responsibility is the most adequate concept to allocate responsibilities on waste. On the one hand I accept that regarding selection of substances and design effecting waste treatment, the manufacture is the decision maker. On the other hand, when it comes to decision on how long time a product is used, how it is used and where end-user should place it, I don't think the original producer have that much influence.

That reasons a narrow application of the producer responsibility concept and not just to follow the deep-pocket idea.