

Transnational law making and EC product policy: the WEEE-example

Führ, Martin

Veröffentlichungsversion / Published Version
Arbeitspapier / working paper

Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:
SSG Sozialwissenschaften, USB Köln

Empfohlene Zitierung / Suggested Citation:

Führ, M. (2005). *Transnational law making and EC product policy: the WEEE-example*. Darmstadt: Hochschule Darmstadt, FB Gesellschaftswissenschaften und Soziale Arbeit, Sonderforschungsgruppe Institutionenanalyse (sofia).
<https://nbn-resolving.org/urn:nbn:de:0168-ssoar-391237>

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Transnational Law Making and EC Product Policy

– The WEEE-Example

*Martin Führ**

Society for Institutional Analysis (sofia)
University of Applied Sciences
Darmstadt, March 2005

www.sofia-darmstadt.de

* This paper will be published in the liber amicorum for Ludwig Krämer (edited by Gerd Winter). It was written in collaboration with Jaqui Dopfer and Stefani Merenyi (both with sofia, Darmstadt) in the context of the INVERSI-Project (cf. n. 6) in cooperation with *Rheinisch-Westfälisches Institut für Wirtschaftsforschung (RWI)*, Essen, and *Gesellschaft für Arbeits-, Reorganisations- und Ökologische Wirtschaftsberatung mbH (ARÖW)*, Duisburg, Germany. The projekt was funded by the *German Federal Ministry of Education and Research* as part of the *:[riw]-program - Frameworks for Innovation towards Sustainability* (Rahmenbedingungen für Innovationen zum nachhaltigen Wirtschaften).
Martin Führ, professor of public law, legal theory and comparative law at the University of applied sciences Darmstadt; contact: fuehr@sofia-darmstadt.de.

Content

1	Introduction	2
2	Cross Border Product Responsibility.....	3
3	Interface problems on different levels.....	3
3.1	Practical Interfaces: The Monitoring System (Art. 12 (1) WEEE)	4
3.1.1	Data to be notified when EEE is put on the Market.....	5
3.1.2	Data to be notified when EEE is given back as WEEE	5
3.2	Conclusions with Respect to the Different Interfaces	6
3.3	Requirements for an appropriate legal and institutional framework	7
4	Reciprocal transnational legal obligations	9
5	Recommendations concerning the legal and institutional framework.....	10
6	Prerequisites of transnational producer responsibility	12
7	Bibliography.....	Fehler! Textmarke nicht definiert.

1 Introduction

The product and waste related environmental legislation of the European Community is based on the concept of producer responsibility; e.g. the Directives on end-of-life vehicles and waste electrical and electronic equipment (WEEE).¹ Within the concept of sustainable development the Directives intend stipulating significant changes in current patterns of the design of these products as well as better possibilities of repair, reuse and recycling. To give the concept of producer responsibility a maximum effect, each producer has to be responsible for financing the management of the waste of his own products even, concerning the WEEE-Directive², if his electrical or electronic equipment crosses borders.

Electronic commerce will be growing considerably within the next years, even if expectations have become more cautious.³ This will also lead to larger trade streams routed directly to private consumers (P2C: producer to consumer) by border crossing distribution channels. Due to significant price differences electrical and electronic equipment (EEE) forms a relevant part of the cross border P2C. This development may undermine the objectives of the European Community's product related environmental policy.⁴

1 Cf. Krämer, EC Environmental Law, 5th Ed., 2002, 10-56 et seq.

2 Art. 8 (4) Directive 2002/96/EC on waste electrical and electronic equipment [2003] O.J. L37/24.

3 European Commission, The Impact of the E-economy on European Enterprises: Economic Analysis and Policy Implications. Brussels: COM (2001) 711 final, p. 25, NFO Infratest (Hrsg.) 2002: Monitoring Informationswirtschaft. 5. Faktenbericht 2002. München., p. 343 ff.

4 Product regulation and materials flow management has been scrutinized by the Enquete Commission of the German Bundestag on the „Protection of Humanity and the Environment“ (ed.): Responsibility for the Future – Options for Sustainable Management of Substance Chains and Material Flows, Bonn 1994. For the development on the EC level cf. Krämer, Perspektiven eines EG-Stoffrechts – Vom Gefahrstoff-

Against this background a coordinated – “transnational” – implementation of the WEEE mechanisms into the legal framework and administrative structure of the 24 Member States is needed. The WEEE example indicates new challenges for product related environmental regulations.

2 Cross Border Product Responsibility as a New Challenge

Art. 8 (2.2) WEEE obliges every “producer”⁵ to provide a financial guarantee which covers the “end-of-life” treatment (waste management) of the product. Art. 8 (4) WEEE additionally addresses cross borders P2C:

“Member states shall ensure that producers supplying electrical or electronic equipment by means of distance communication also comply with the requirements set out in this Article (i.e. marking their products and providing the guarantee in order to finance the waste management) for the equipment supplied in the Member State where the purchaser of that equipment resides”.

Therefore the national implementation of this Directive must contain an entitlement against the producer, also across state borders.

The importance of this guarantee can only be understood against the background of the directive’s proper aim: The predominant goal of the WEEE-Directive is to ensure producers’ responsibility for the financing of the collection, treatment, recovery and environmentally sound disposal of WEEE from private households (Art. 8 (1) WEEE, recital 20). The aim behind this is the encouragement of design and production of such EEE which take into full account and facilitate their repair, possible upgrading, reuse, disassembly and recycling (see Art. 1, Art. 4 and recital No. 12 WEEE). So product responsibility is a strategic measure to realise product related environmental policy, focusing “design for the environment”. In the centre of this strategy is the connection between the cost of collection, treatment and disposal of WEEE on the one hand and the design and construction of the goods on the other hand. Unless this approach is successful, it will conclude with increasing life cycles of EEE. Then, a producer’s company may not be existent any more when the appliances at the end of their lives will be given back as WEEE. Therewith the guarantee is also meant to give incentives to an environmentally sound product design and to secure the financing of waste treatment independently from a further existence of the responsible producer.

3 Interface problems on different levels

Transnational P2C-transactions create interface problems on different levels of legislation, standardization, monitoring and enforcement.⁶ Main interfaces in this context are, firstly,

und Abfallrecht zu einer umweltorientierten Produktregulierung auf EG-Ebene, in Führ (ed), *Stoffstromsteuerung durch Produktregulierung*, Baden-Baden 2000, p. 225 et seq.

⁵ Art. 3 (i) WEEE-Directive defines ‘producer’ as “any person who, irrespective of the selling technique used, including by means of distance communication [...] (i) manufactures and sells electrical and electronic equipment under his own brand, (ii) resells under his own brand equipment produced by other suppliers, a reseller not being regarded as the ‘producer’ if the brand of the producer appears on the equipment [...], or (iii) imports or exports electrical and electronic equipment on a professional basis into a Member State.”

the legal interfaces concerning the financial guarantee and its enforcement and, secondly, the practical interfaces like the necessary monitoring systems (see figure 1, p. 9). In coping with these interface problems appropriate legislative tools and cooperation mechanisms are to be developed. Regarding the trade of electrical and electronic equipment the prominent tool is the financial guarantee each producer has to provide when placing a product on the market in order to show that the management of the deriving waste will be financed by him and free-riding⁷ of producer is prevented.

In this context the integration clause of Article 6 EC is relevant. Significantly, the integration clause expressly states that “environmental protection requirements must be integrated into the definition *and implementation* of the Community policies”. Thus, it is not enough for the EU to merely enact regulations that look good on paper but lacking in reality the mechanisms that could translate into an acceptable impact level; including in conjunction with various other legislative instruments and their implementation by the Member States. In the subject matter a coordinated effort of all Member States is necessary, based on the framework of the WEEE-provisions.

3.1 Practical Interfaces: The Monitoring System (Art. 12 (1) WEEE)

Besides the legal level, impeding interfaces also appear on the practical level where the national legislation has to be applied. In the centre of this application is the monitoring system as demanded by Art. 12 (1.2) WEEE. It is meant to enable the evaluation of compliance with the requirements from Art. 8 (4) WEEE. According to Art. 12 (1) WEEE this monitoring system must be installed in every Member State.

In terms of cross border trade, monitoring systems of two different Member States will have to interact. It is obvious that this interaction requires at least a certain degree of compatibility of the two systems. From a technical point of view, the easiest way of course would be the existence of identical or at least highly similar monitoring systems in every Member State.⁸

In order to enable the tracing of WEEE streams across Europe data have to be notified when EEE is put on the market and when given back and treated as WEEE. Assuming that the monitoring systems of different Member States will not be completely identical, pre-definitions must be made with respect to these data and their handling. In so far it can already be stated, that this tracing will be possible only with help of a well organized data management. This requires that the data will be processed or at least standardized by central institutions (clearinghouses) which could either be established within every single Member State or on EU level. Independently from their organization in detail (which will be referred to in chapter 4.2), equivalent data have to be notified to these central institutions when EEE is put on the market and when it is given back as WEEE.

⁶ For a detailed analysis cf. RWI/Aröw/sofia, Internalization versus Internationalization - A Framework of Action for National and International Environmental Policy against the Background of Increasing Globalization and the Development of Electronic Markets, Essen/Duisburg/Darmstadt 2004.

⁷ So called “free riding” would happen, if the producer of the EEE (which turned to WEEE) would not exist any more or would try to prevent to be pursued.

⁸ Also suggested by Fischer, Zur Umsetzung von EG-Richtlinien für Elektro- und Elektronikgeräte, Umwelt- und Planungsrecht 2004, p. 14.

3.1.1 Data to be notified when EEE is put on the Market

Art. 11 (2) WEEE demands that any producer of an electrical or electronic appliance put on the market after 13 August 2005 is clearly identifiable by a mark on the appliance. Further more it is necessary that producers are enrolled in the register according to Art. 12 (1) WEEE. Additionally, Art. 8 (2) requires that each producer provides a guarantee when placing a product on the market. However, the directive does not provide any information with respect to the perceptibility of this information for consumers. In order to create a special incentive for producers to comply with these demands, perceptibility of this information for customers should be assured with help of the national legislation. Also with respect to recital No. 15 WEEE, stating that consumers have to actively contribute to the success of this system, consumers' knowledge of these information could be meaningful in different ways. From knowing that the producer has provided the guarantee, the customer could conclude that waste from appliances of this producer will be treated according to the rules unless the verification of the guarantee was forged. The proof that the guarantee was given properly only consists in the producer's enrolment into the national register. So customers need to have access to the registration data as well. Therewith the unequivocal mark of EEE shall contain both, an identification of the producer (producer ID) as well as a verification of the given guarantee.

In addition, the monitoring system requires information on the categories of the traded EEE as specified in Annex IB of the directive. This information, which becomes important in terms of the waste treatment, is also part of the identification of an appliance and should therefore be presented on the mark as well.

Finally, Art. 11 (2) WEEE requires a mark on the appliance specifying that it was put on the market after 13 August 2005. Indeed, it also states that this information shall enable the date upon which the appliance was put on the market to be determined unequivocally. Therefore it is not enough to know if the appliances were sold before or after 13 August 2005. Much more the precise date would be necessary. The knowledge about the precise date is also needed with respect to the verification if under the WEEE regime lifetimes of EEE will increase. Therefore, national legislations should ask for the precise date when EEE was put on the market.

Recapitulating, when EEE is put on the market, producers need to be enrolled into the register, must have provided the financial guarantee and need to show when and what category of EEE was sold. These information need to be observed by the monitoring system and have therefore to be notified to the competent central institution. In addition, consumers' knowledge thereof could give an incentive to producers to comply with these requirements. Therefore the information should also be perceptible for consumers. This is why they should be presented within the unequivocal mark of EEE which is required by Art. 11 (2) WEEE.

As an EU wide monitoring system needs the readability of these marks in every Member State, they have to be at least compatible within the whole union. Therefore a certain level of standardization is necessary.

3.1.2 Data to be notified when EEE is given back as WEEE

When the appliances are given back at the end of their lives and turn from EEE into WEEE, the financial guarantee has to stand the test. As prescribed in Art. 8 (2) sub (2) WEEE it

must now serve to finance the management of the WEEE which will probably take place in the purchaser's Member State.

So the national WEEE management system has to find out which percentage of the WEEE derived from foreign producers. Therefore when WEEE is given back data about amount, category and the responsible producer (i.e. origin of the appliance) have to be notified. The purchaser's state then needs to align these data with the producer specific and guarantee specific data. Details on this exchange depend on which decisions will have been made on the questions where to provide the guarantee. If the guarantee was already provided in the purchaser's country this data exchange does not necessarily to be a cross border data exchange. This, however, would also require that the producer had also enrolled into the national register of the purchaser's Member State.

These data can also serve as a basis for a profound estimation of future costs of waste management and in order to plan the necessary facilitations for collecting and treating the waste in the Member State of the purchaser.

It has to be mentioned again, that the structure of the monitoring systems also depends on the implementation of the guarantee. The better the guarantee systems in the single Member States cooperate, the less effort is needed with respect to the monitoring system.

3.2 Conclusions with Respect to the Different Interfaces

The P2C-obligation within WEEE represents a new development in the operating method of legal systems known so far: Firstly, a citizen is subject not only to the legislation of his home country but also to foreign legislation. Indeed, this constellation was known as an exception from the principle of territoriality before, for instance (beside the VAT-System, c.f. section 3.3) within social security schemes as also mentioned in the regulation (EEC) No 1408/71 of the Council of June 14, 1971 on the application of social security schemes to employed persons and their families moving within the Community. Under this regulation it was already possible that a person who was insured in its home country only, could become subject to a foreign health insurance scheme by legal fiction. This exception is limited to emergency cases only in order to guarantee the needed medical treatment and thereby the social security of invalid persons also in another than their home country.⁹

However, the second break with the principle of territoriality appears where a foreign legislation is meant to be applicable on the home territory of a person. Regarding the social security example the person itself moved from one state into another and moved thereby from the purview of one national legislation into another. So here, like in all legal systems known before, the location of the addressee (*subject of law*) decided on the equivalent legislation which had to be applied. Hence, only one national legislation was to be applied at a time. In contrast hereto under the WEEE regime as described above, many different national legislations shall become applicable on the same territory. Moreover, the decision which one is to be applied in a certain case will no longer depend on the location of a subject, but on the *final location* of the traded EEE, which will transform into WEEE later on. This *object of law* turns out to be the crucial condition deciding on the applicability of a certain foreign regulation on the territory of the producer's Member State. Without leav-

⁹ Becker Gesetzliche Krankenversicherung im Europäischen Binnenmarkt, NJW 2003, p. 2275.

ing his home country, the producer will have to comply with WEEE legislations from many foreign Member States. The decision on which legislation is the right one to be applied in a single case could be gained with help of the matrix shown below.

So Art. 8 (4)-producers supplying EEE by means of distance communication need to keep track of every destination state they have sent their appliances to. It needs to be elucidated which legal and practical provisions must be fulfilled in order to meet the demands from this particular legal interface.

Thirdly, the enforcement of transnational law also means a break of the principle of territory. Either the authorities have to enforce their own law on foreign territory wherefore they need the support of the law enforcement authorities of the country of destination. In the other case they have to enforce foreign law against a person within their home territory. Both forms need completely different institutions and incentives for all actors involved.

3.3 Requirements for an appropriate legal and institutional framework

Against this background it becomes evident, that the WEEE-Directive has left a broad need for adaptation in form and content between all affected organisations and actors. Particular problems rise from the number of uncertainties appearing on many different levels which can mutually hamper an effective implementation process. For instance, as long as it has not been commonly decided by all Member States, where the guarantee shall be given and into which national register the distance seller has to enrol, it is impossible to develop a sufficient data design for the monitoring system. This opacity may also be continued on the national level as it has been described in the Final report of the IMPEL¹⁰ better legislation project: "If legislation is initially unclear [...] the usual practise of Member States has been to adopt much of it word for word into national legislation, including terms that lack clarity."¹¹

So it has to be feared that Member States, instead of gaining a common decision on these questions, could just transpose these obligations by simply demanding what is already demanded in the directive itself: that all producers must give a guarantee and must be registered and that distance sellers need to comply with these requirements in the purchaser's country. So the basic decisions needed to enable EU-wide product responsibility would still not be taken because of a vast and unsorted need for harmonisation between all types of institutions (national legislators, national authorities, national systems, standardization institutions etc.) in and between the Member States.

This new type of cross border enforcement needs to be sorted out conscientiously before implementing the directive. So when attempting to transpose the WEEE-Directive into national law nevertheless, national governments need to consider all the interdependencies mentioned so far, in order to realise step by step both, the different interfaces themselves and the numerous impediments they can cause when they are not thought-out

¹⁰ European Union Network for the Implementation and Enforcement of Environmental Law.

¹¹ IMPEL Effective Enforcement Needs a Good Legal Base: the Final Report of the IMPEL Better Legislation Project, Number 13, 2003, p. 18.

well. Only then, regulatory options and coordinative measures in order to overcome the identified impediments can be developed.

To enforce the financial guarantee a monitoring system must be installed in every Member State, enabling the evaluation of compliance with the requirements from Art. 8 (4) WEEE. This needs to monitor data about the EEE when put on the market and when given back as waste. Therefore an unequivocal marking of EEE is necessary, containing e.g. information about the producer and the product category.

However, the WEEE-Directive does not offer any detailed framework on how to establish these transnational duties. To allow a harmonized implementation of future European legislation and an optimising of cross border product responsibility new cooperation forms between the actors and authorities of different Member States have to be established and institutional innovations are needed. A close and proactive cooperation of all 25 Member States respectively of their authorities and private systems is necessary.

Legal interfaces derive from the fact that national WEEE legislations must provide tools which allow the enforcement of product responsibility also across borders. This means that producer shall become subject not only to the legislation of his home country but also is obliged to follow the provisions of the state where the purchaser resides. Therefore it must be decided e.g. if the sanctions will be enforced by the national authorities of the producer's or the purchaser's Member State.

Such an individual producer liability across borders can be designed in analogy to value added tax (VAT). According to the value added tax regulation in the EC all producers are obliged to pay the VAT of the receiving country for all products sold there. This VAT is transferred to the local fiscal authority of the suppliers' Member State. Between the member states a clearing process ensures that revenues will go to the receiving country. This mechanism transferred to the WEEE-Directive would require every producer of EEE to provide a financial guarantee by the national authority in his country for the cost of treatment and disposal of WEEE of the receiving country. The national authorities in the producer's Member state have to transfer the guarantees for the products exported to the other member states to their national agency which collects such guarantees and organizes and finances the treatment and disposal of WEEE. As soon as EEE becomes WEEE, electronic tags provide the necessary information to identify the relevant producer and to turn in the guarantee for cost collection. Actual cost collection will take place in the producer's home member state. The collected funds will be transferred to the member state which treats and disposes of the WEEE.

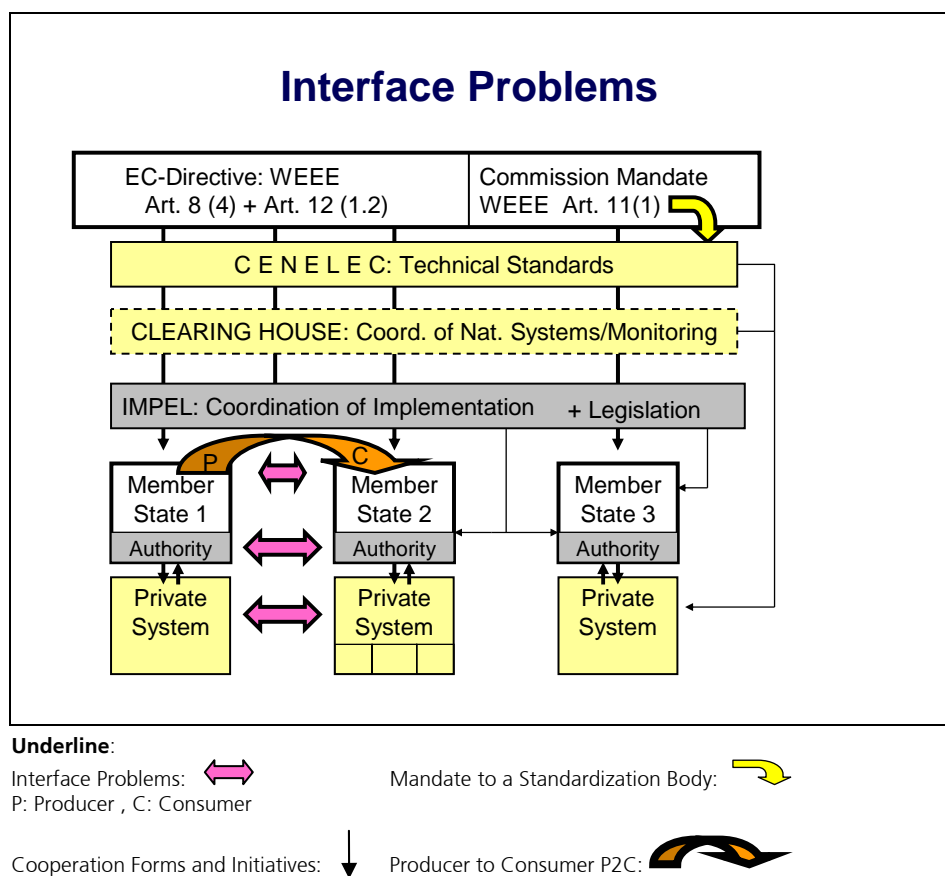


Figure 1: Interface Problems concerning Cross Border P2C in implementing the WEEE-Directive

In a vertical view the standardization of the different details is needed to solve or at least to reduce horizontal interface problems. Regarding technical issues, as e. g. the unequivocal marking of EEE (Art. 11 (2) WEEE), European standards could be promoted by a mandate given by the Commission to CENELEC¹² to support the implementation of WEEE. The implementation and enforcement of law could be supported by IMPEL. And regarding the monitoring system and the data management a central European Clearing House might be helpful to coordinate the different national systems.

4 Reciprocal transnational legal obligations

Transnational law making of the WEEE-Directive represents a shift in the operating method of legal systems known so far in the environmental policy. A specific type of transnational legal obligation is considered: producers shall no longer be subject to their national legislation only but shall have to comply also with the product related environmental rules in the purchaser's country, independently of having a business agency there. The second shift appears when not longer the location of the addressee (*subject of law*)

¹² Comité Européen de Normalisation Electrotechnique; European Committee for Electrotechnical Standardization.

decides on the equivalent legislation but the *object of law*. This means, the final location of the traded EEE, which in future be transformed to waste (WEEE), decides on the applicability of a certain foreign regulation on the territory of the producer's Member State.¹³

The legislation on the European level needs more precise defaults if and what kind of transnational law making is necessary. This will be contradicting to a Directive's nature as set out in Art. 249 (3) EC, but Member States can not benefit from a Directive's legislative flexibility any more when this leads to harmonization efforts which are impossible to be realised on the Member States' level. Especially the need for coordinated legislative strategies of all Member States shows that on these items a European decision is necessary.¹⁴ This could have been provided in a specific framework under the WEEE-Directive or even within a Regulation. In any case the specific effects resulting from the Directive need to be rethought in order to find out how its harmonized transformation into national law can be realised by Member States. Where uncertainties can appear on many different levels and can lead to a mutual obstruction in the implementation process, this danger must already be identified while the design of the Directive. It must then provide a defined procedure arranging the order in which the uncertainties have to be eliminated. Without that, every actor involved may wait for the other to start.

Regarding the legislation on the national level it has become evident that the transposition of an EC-Directive with any reference to transnational law making can not succeed by Member States acting separately: Each and every Member State would have to adopt legal links to the WEEE-related guarantee system of the 24 other countries. Therefore the need for early interactions between all Member States should be considered already while the design of that Directive by providing defined procedures in order to organize these communications. With respect to cross border enforcement of national legislation the need for coordination on the EC-Level is evident. Only on this level the necessary exchange between authorities of all Member States can be realised. Moreover the adaptation of technical aspects, such as central translations of national legislation, can be provided only here. In this context the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), already experienced in this field, should be integrated at an early stage.

5 Recommendations concerning the legal and institutional framework

The WEEE-Directive aims to secure Community wide product responsibility. Therefore the transposition of Art. 8 (4) WEEE needs a well adjusted and EU-wide coordination of the national legislation accompanied by a standardised data exchange between the national guarantee-mechanisms and the waste management systems. Transnational law making under the regime of the WEEE-Directive can be successful only with help of every actor involved and by the awareness of joint responsibilities of the various European institutions and the member states.

¹³ Similar mechanisms occur in the VAT system (cf. section 3.3).

¹⁴ Examples are how the monitoring system should be designed, where distance sellers have to provide their financial guarantee and into which national register they have to enrol.

Transnational law making is necessary in order to enforce individual producer responsibility. It requires organizations and agencies for the registration of producers, for the monitoring of product flows and waste flows, and for implementing financial guarantees etc. It also includes all necessary institutions, i. e. command-and-control-policies as well as incentive instruments etc. Individual producer responsibility includes that every producer is financially liable for the waste management of his products.

- Therefore all “producers” (as defined by Art. 3 (i) WEEE) must be registered, regardless of whether the products are destined for the national market or long distance trade across borders within the EU.
- In addition the “producers” must mark their products in a way the waste can be tracked back to them. Such tracking would be possible if electronic or other tags would provide producer data, so that collection, treatment and disposal costs can be recouped from the belonging producer.

Such provisions (concerning the registration of all producers and marking of all products) ensure equal treatment of all producers. Of course the producers will have to cover the differing costs of treatment across the receiving countries. But within the receiving country all producers will face the same burden for an equivalent appliance.

At the moment the need for a specific mark arises only in the scope of Art. 8 (4). This creates a particular burden for transboundary EEE-movements caused by P2C-transactions; a differentiation which is problematic for the internal market as well as in regard to the objectives of the WEEE-Directive since other forms of transboundary movements could also distort the financial stimulus of the WEEE producer responsibility. Both problems could be solved by amending the WEEE-Directive: an EU-wide uniform labelling and registration of all EEE-products will allow to cover all transboundary movements of EEE after placing on the market by the producer and thus strengthen the individual producer responsibility thus “*providing a high level of environmental protection, and, on the other hand, to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community.*”¹⁵

The general Directive’s objective of enforcing producer liability is reached by this approach to a higher extent as this form of implementation functions for all forms of trade (P2P, P2C, private import of EEE, etc.). At the same time a different form of labelling depending on the form of trade (transboundary P2C versus other forms) is avoided.

Under the WEEE regime, especially under national legislation deriving from transposing Art. 8 (4) WEEE, producers need a good regulatory understanding in order to find out which legislation they have to comply with. This requires producers’ readiness to admit to transnational legislation in general. Even if some producers may do so, it can not be expected that they will become legal experts. This is why it will be likely that most producers will need assistance in finding out which legislation they have to comply with. Industry associations should prepare in order to provide this assistance.

With regard to consumers, recital No. 15 and Art. 10 (2) WEEE provides appropriate measures which shall be adopted by the Member States, to stipulate consumers’ participation in the WEEE management. Against this background the national legislation should secure that consumers will have access to all data which is needed to evaluate if an

¹⁵ Art. 1(1) packaging waste Directive 94/62/EC, O.J. L 365/10.

Art. 8 (4)-producer complies with the basic demands from the WEEE-Directive (especially the registration of producers and the guarantee verification). So consumers and consumer organisations can be enabled to control the functionality of the guarantee system, e. g. with help of testing purchases in order to find out if the declared information can be confirmed. Moreover the transparency resulting from this data access should also avoid the trade of appliances without any given guarantee (free riders), as well informed consumers can consciously decide which producer they want to trade with.

To improve a harmonized form of transnational law the following measures have to be undertaken: First of all the implementation of Art. 8 (4) has to be harmonized and coordinated throughout the EU. Therefore the responsibilities have to be determined, a uniform system for the data transfer has to be developed and a system for providing a transboundary guarantee has to be established. Secondly, the product marking (what technical form and which tag content might be necessary) has to be standardised. And thirdly an Amendment of the WEEE-Directive will help clarifying the marking requirements for all EEE products.

6 Prerequisites of transnational producer responsibility

The efforts of implementing transnational producer responsibility are reasonable when an individual producer liability or a mechanism for individual cost coverage by the producer is intended. As a consequence, this form of transnational law making is an adequate solution only if innovations of product design can be expected. This depends on the available and future technologies, financial conditions, and future environmental objectives. Furthermore it is necessary considering thresholds of insignificance, e.g. minimum amounts of WEEE and minimum sizes and weights of appliances to avoid excessive administrative barriers. To sum this up, the development of transnational product responsibility should depend on certain criteria which specify whether an individual producer liability is necessary or not. If these criteria are fulfilled a tagging of products and a registration of producers should be legally enforced across borders of member states. If innovations of product design or in the utilization of products can not be expected or if the amount of products or their weight is negligible, a cost-benefit-analysis could suggest that a collective waste treatment liability is superior to an individual producer liability. In such circumstances all producers are responsible for the costs of treating and disposing WEEE collectively and must find criteria to share such costs. Such collective producer liability is currently enforced for batteries as well as packaging. The relatively high cost of electronic tags can be foregone in such cases and the efforts of monitoring the transnational product and waste streams as well as to manage the transnational data exchange will be much more less. But it is possible that individual member states will have higher costs than revenues from national producers as cross border trade is not covered. Free riding of foreign producers might occur.