

ENERGY BRIEFING: Photovoltaic modules in Germany: urgent need to act in order to avoid war- ning letters

February 2016

The new photovoltaic modules registration requirements in Germany under the revised German Electrical and Electronics Equipment Act ("Elektro- und Elektronikgerätegesetz", short "ElektroG") imply the risk of injunctive relief procedures by competitors. Particularly taking into consideration a tendency of an increasing use of such an approach in order to stop competitors from selling / marketing products on the German market – further to any possible authority actions – such registration requirements should urgently be fulfilled. In addition, companies possibly concerned should prepare themselves for potential further steps in case of receipt of a warning letter.



The revised German Electrical and Electronics Equipment Act

On 24 October 2015 the revised German Electrical and Electronics Equipment Act ("Elektro- und Elektronikgerätegesetz", short "ElektroG") came into effect. By these means, the European WEEE directive 2012 / 19 EU has been implemented in German national law.

In general – and based on the European directive – the German Electrical and Electronics Equipment Act aims for implementing the responsibility of producers and other stakeholders involved during the life-cycle of the respective products into the legal framework. The regulations place a number of duties – such as a registration requirement – on producer but also supplier of the products included in the legal framework.

The registration requirement regarding photovoltaic modules

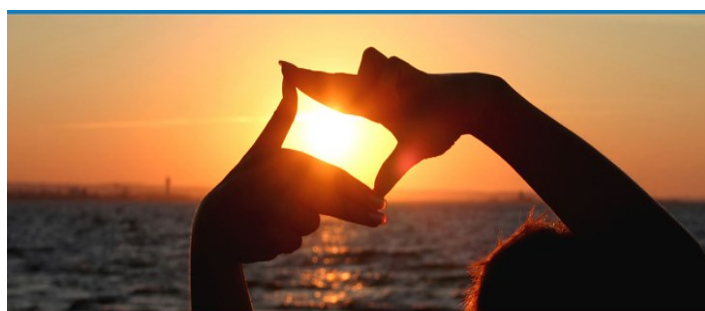
Based on the revised German Electrical and Electronics Equipment Act, inter alia photovoltaic modules are now generally categorized as electrical devices. Therefore, as of the coming into effect of said act, producers of photovoltaic modules have to fulfil the registration requirements with the competent foundation, the "Stiftung elektro-altgeräte register (ear)". The respective grace period for such registration ends on 31 January 2016. Any marketing and supply of products of unregistered producers – either by the producers themselves or also by suppliers – are prohibited starting from 1 February 2016.

The Stiftung ear – which is the authority that had been entrusted with sovereign rights by the Federal Environment Agency ("UBA") in this regard – provides on its website the possibility to create an account and to submit all relevant registration data.

Regarding the affected companies of the new regulation it has to be considered that the definition of a producer under the German Electrical and Electronics Equipment Act is very broad. A company may for example also be defined as a producer if it resells products under its own brand which had been produced by another manufacturer. It is therefore very important to have legally assessed whether any handling with photovoltaic modules might fall within the scope of the German Electrical and Electronics Equipment Act and its respective legal requirements – particularly its registration requirements.

The inherent risk in case of missing or delayed registration

As set out above, as of 1 February 2016 any marketing and supply of unregistered products is prohibited. In this regard it has to be noticed that under German law such non-compliance with registration requirements stipulated in the German Electrical and Electronics Equipment Act may generally be categorized as an infringement of a market conduct rule under the German Act against Unfair Competition. Therefore, any sale of photovoltaic modules without registration implies the risk of competition law warning letters by competitors or a consumer protection organization based on German unfair competition law and the allegation of non-compliance with market conduct rules – further to authority procedures and financial penalties in this regard.





The procedure in practice will most likely start with a warning letter and the request to sign a cease and desist declaration. If the alleged infringer does not react or rejects to sign a cease and desist declaration the attacking party may file a motion for preliminary injunction if the matter is deemed to be urgent. If a court follows the argumentation brought forward in the motion for preliminary injunction it might grant such preliminary injunction “ex parte”, i.e. without hearing the defendant. Such decision might be made by the court within a very brief time frame, usually within as little as one to three days.

In a worst case scenario, a company not complying with a market conduct rule may therefore be prohibited by a court order to continue distributing its products with immediate effect.

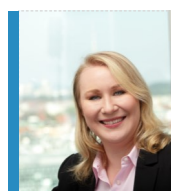
Important steps

Further to a compliance check whether the respective business fulfils the requirements of the revised Electrical and Electronic Equipment Act it is also recommended to think about potential steps in order to be prepared in case of any allegation by competitors or a consumer protection organization. Even if a registration requirement is not yet fulfilled a cease and desist letter does not necessarily have to be justified. It is of utmost importance to duly double-check all allegations – based on a previous internal compliance check regarding the fulfilment of legal requirements. In this respect it has to be kept in mind that following the receipt of a cease and desist letter swift action is required.

In order to be prepared against the risk of receiving a warning letter due to missing or delayed registration under the revised German Electrical and Electronics Equipment Act one of the most important steps is therefore a proper legal assessment whether any registration requirement still needs to be fulfilled and – if necessary – to prepare a proper defence strategy.

Should you like to discuss these issues please do not hesitate to contact us.

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