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PRODUCT-BASED ENVIRONMENTAL REGULATIONS: EUROPE SETS THE PACE

by Paul E. Hagen*

INTRODUCTION

Following several years of successful political integration, the adoption of a single currency, and an expansion from fifteen to twenty-five Member States in 2004, the European Union now boasts a single market comprised of over 455 million people. The emergence of an expanded single market has coincided with a sustained effort on the part of the EU to advance environmental protection through the increased products regulation. While not without some controversy, the EU has in recent years adopted legal measures that condition market access for automobiles, household appliances, electronic equipment, and biotech products on compliance with new product-based environmental requirements. In the coming years, the EU is expected to adopt additional measures that would similarly regulate imports of chemicals, energy using products, and certain timber products.

Environmental law practitioners in the United States will want to take note of these new product-based measures for several reasons. First, as the EU is the largest trading partner of the United States, these new product-based measures are critically important to U.S. companies. Second, in conditioning market access to adherence with new product standards, the EU is, in effect, establishing global product standards, as few U.S. companies can afford to ignore a potential consumer market that is now much larger than the United States or even all of North America. In this regard, in-house counsel and environmental health and safety managers face new and difficult challenges as they work to understand and anticipate new product-based mandates in Europe.

To better understand the significance of the EU's new emphasis on product regulation, it is helpful to review some of the more significant legislation that has been enacted or proposed in recent years.

END-OF-LIFE VEHICLES DIRECTIVE

Consistent with the EU's policy on waste management, which seeks to avoid waste by improving product design and increasing the recycling and re-use of waste, the EU adopted the End-of-Life Vehicles Directive ("ELV Directive") in 2000.¹

Among other things, the ELV Directive requires Member States to establish systems for the collection and recycling of all end-of-life vehicles and sets ambitious re-use and recycling goals. The ELV Directive also imposes several design mandates on automobile manufacturers by requiring Member States to ensure that vehicles "put on the market" after July 1, 2003, do not contain lead, mercury, cadmium, or hexavalent chromium, except as allowed under the limited exemptions set forth in Annex II of the Directive. The legislation also calls on manufacturers to implement design changes to facilitate dismantling, re-use, and recycling, and to increase the quantity of recycled material used in vehicles and other products. The EU's ELV Directive has driven changes in automotive component design and supply chain management not only in Europe but across the globe.

WEEE AND ROHS DIRECTIVES

The EU has recently adopted two new directives aimed at the design and end-of-life management of a wide range of household appliances, information technology and telecommunications equipment, consumer electronics, lighting products, and other electrical equipment. Under the Directive on Waste Electric and Electronic Equipment ("WEEE Directive"), Member States are to establish new systems for managing WEEE (defined broadly).² The new systems are to allow consumers to "take back" their used electrical and electronic equipment to retailers selling the equivalent

type of equipment. Retailers, in turn, are obliged to accept the products free of charge. The WEEE Directive also establishes new product marking, registration, and ambitious materials recovery rates for collected products.

A companion directive establishes new material bans for a wide range of recent electrical and electronic equipment "put of the market" after June 30, 2006. Under the Directive on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment ("RoHS Directive"), manu-

With its push into new product-based environmental requirements, the EU is breaking ground on a new generation of environmental legislation. . .

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facturers and importers are barred from placing on the market electrical and electronic equipment containing lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls ethers (“PBB”), and polybrominated diphenyl ethers (“PBDE”).³ Limited exceptions to these prohibitions for certain applications are set forth in an Annex to the Directive. By conditioning market access for thousands of products ranging from dishwashers to cell phones on new environmental requirements, the EU has, in effect, set new global product standards that will drive design changes for covered products regardless of where they are manufactured and sold. Member States are now in the process of implementing both of these directives at the national level.

PRODUCTS DERIVED FROM BIOTECHNOLOGY

With respect to biotechnology products, the EU has had a de facto moratorium on the approval of new biotech crops arising out of the lengthy process currently in place for approvals. In September 2003, the EU adopted new requirements for labeling, traceability, and placing on the market of biotech crops and food and feed products derived from biotech crops.⁴ The new EU regulations require that all pre-packaged products containing more than trace amounts of genetically modified organisms (“GMOs”) bear a label reading: “This product contains genetically modified organisms” or “This product contains genetically modified [name of organism(s)].” The regulation further requires that all covered operators (*i.e.* those who place a biotech product on the market or receive a biotech product placed on the market within the EU) be able to identify their supplier and the companies to which they have supplied the products. Operators must keep documentation of each transaction involving biotech crops for five years and must make such records available to public authorities on demand.

The EU has recognized that, as a practical matter, it is virtually impossible to ensure that a small amount of biotech product will not commingle with a conventional product in the course of harvesting, storing, transporting, or processing the products. The EU, however, has set particularly low thresholds for the so-called “adventitious” (or technically unavoidable) presence of traces of GMOs in conventional products. The EU’s tolerance for unapproved varieties that have not been endorsed by a European Community Scientific Committee is zero. The extent of the EU’s impact in the Ag-biotech arena is significant and could have a dramatic impact on global trade in agricultural products if other governments decide to follow the EU’s approach to regulating agricultural commodities.

EUP DIRECTIVE

In July 2005, the EU adopted a directive establishing a framework for setting eco-design requirements for energy using products (“EuP Directive”).⁵ The EUP Directive establishes a

framework under which the EU will establish product-specific eco-design and performance standards through subsequent implementing measures. The legislation will require conformity with future implementing measures and standards as a condition to market access for covered energy using products. This Directive has the potential to regulate a wide range of energy using products marketed in Europe and contemplates new environmental performance and product design requirements.

REACH

The EU is also developing legislation that would create a new EU regulatory framework for chemicals. The legislation is known as REACH (shorthand for Registration, Evaluation, Authorization, and Restriction of Chemicals), and is expected to be finalized in 2007. The legislation is an effort to address “existing chemicals” – those chemicals in production prior to 1981 and for which limited health and safety information is available. REACH would replace over 40 existing directives and regulations, and would require companies that produce and import chemicals to assess the risks arising from use of the chemicals and take necessary measures to manage any risks they identify. As proposed, the new regime would impose new requirements on a wide range of U.S. companies seeking to import or use chemicals in Europe, including products containing chemicals.

IMPACTS BEYOND EUROPE

With its push into new product-based environmental requirements, the EU is breaking ground on a new generation of environmental legislation that looks beyond the environmental impacts associated with production and manufacturing alone. The EU’s

approach to product regulation is also serving as a catalyst for similar environmental initiatives in the United States and elsewhere. For example in the past year, legislation addressing the management of end-of-life electronics has been introduced in 28 states and in the U.S. Congress. California, Maine, Maryland, Washington, and the Province of Alberta in Canada have all recently adopted new laws addressing e-waste.

With respect to material bans, legislation passed in California in 2003 calls for the adoption of regulations that will prohibit the sale of certain types of electronic devices in California where the product is prohibited from being sold in Europe under the RoHS Directive. California, Illinois, Maryland, and Oregon have also recently adopted new restrictions on the use of certain brominated flame retardants in products. At the federal level, some members of Congress are pressing for amendments to the Toxic Substances Control Act (“TSCA”) based in part on work underway in the EU on the REACH proposal.

While the EU has moved quickly to enact new laws targeting products, questions remain about the overall environmental benefits to be gained and the impacts on international trade. For

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example, in the course of recent Congressional hearings on e-waste, the U.S. Environmental Protection Agency reported that the disposal of electronic waste in modern municipal landfills presented few environmental risks. The EU's actions to slow the introduction of products derived from biotechnology has been challenged by the United States under World Trade Organization ("WTO") rules as an illegal restraint on trade. Similarly, Japan has threatened to bring a WTO challenge against the EU if the REACH proposal is adopted in its current form.

CONCLUSION

For the near term, it appears that the EU will continue to set the pace when it comes to product-based environmental regulation. In the United States, it seems likely that an increasing num-

ber of state legislatures and even members of Congress will take a closer look at Europe's new emphasis on regulating products. Other countries outside of Europe, most notably the People's Republic of China, are also following the EU approach by adopting their own product-based environmental requirements. Whether these new national and sub-national initiatives gravitate toward harmonized product standards or instead evolve into a patchwork of competing mandates that undermine international trade remains one of the most important environmental and economic policy questions of the next decade.



ENDNOTES: PRODUCT-BASED ENVIRONMENTAL REGULATIONS

¹ Directive 2000/53/EC of the European Parliament and of the Council of 18 Sept. 2000 on End-of-Life Vehicles.

² Directive 2002/96/EC of the European Parliament and of the Council of 27 Jan. 2003.

³ Directive 2002/95/EC of the European Parliament and of the Council of

27 Jan. 2003.

⁴ See Regulation (EC) No. 1829/2003 and Regulation (EC) 1830/2003.

⁵ Directive 2005/32/EC of the European Parliament and of the Council of July 2005.

ENDNOTES: EUROPE'S REACH *Continued from page 28*

the Sub-Commission Has Been Concerned, Human Rights and the Environment, Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994); Paul Hunt, Report of the Special Rapporteur: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, U.N. Doc. E/CN.4/2003/58 (2003); Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Report Submitted by the Special Rapporteur on Toxic Waste, Mrs. Fatma-Zohra Ouhachi-Vesely, U.N. Doc. E/CN.4/2000/50 (2000).

²⁵ E.S.C. Res. 71, U.N. ESCOR Hum. Rts. Comm., 59th Sess. at 16-17, U.N. Doc. E/CN.4/2003/L.11/Add.7 (2003).

²⁶ See Powell & Rayner v. United Kingdom, 172 Eur. Ct. H.R. (ser. A) (1990), at ¶ 41; Guerra and others v. Italy, 26 Eur. Ct. H.R. 357 (1998), at ¶ 58; Taskin and others v. Turkey, Eur. Ct. H.R., Nov. 10, 2004, ¶ 113, available at <http://www.echr.coe.int/echr> (last visited Apr. 17, 2006).

²⁷ Fadeyeva v. Russia, Eur. Ct. H.R., June 9, 2005, at ¶ 89, available at <http://www.echr.coe.int/echr>.

²⁸ Oneryildiz v. Turkey, 39 Eur. H.R. Rep 12 (2004), at ¶¶ 89, 90.

²⁹ U.S. House of Representatives, Committee on Government Reform, Special Investigation Division, A special Interest Case Study: The Chemical Industry, The Bush Administration, and European Efforts to Regulate Chemicals, (Apr. 1, 2004). See also, Elizabeth Becker, *White House Undermined Chemical Tests, Report Says*, N.Y. TIMES, Apr. 2, 2004, at C2.

³⁰ U.S. House of Representatives, *id.* at 13. (The Commerce Department Report (Feb. 18, 2003) "notes that Mexico and Japan had expressed concern about REACH to the European Union. The Commerce Department report states: "We will be encouraging other delegations here to do likewise.")

³¹ See Notification G/TBT/N/EEC/52.

³² World Trade Organization, Agreement on Technical Barriers to Trade, art. 2.1, available at http://www.wto.org/English/docs_e/legal_e/17-tbt.pdf (last visited Apr. 17, 2006) [hereinafter TBT Agreement].

³³ See Submissions to the TBT Committee concerning REACH regarding Taiwan & Japan.

³⁴ See Submissions to the TBT Committee concerning REACH regarding Thailand ¶ 3.6.

³⁵ See Submissions regarding Thailand, *id.*

³⁶ TBT Agreement, *supra* note 32, at art. 2.1.

³⁷ Submissions to the TBT Committee concerning REACH regarding Brazil ¶ 6, Taiwan, Chile, United States ¶ 17, China ¶ 6.

³⁸ Submissions to the TBT Committee concerning REACH regarding Japan III.2. Brazil ¶ 3, Australia, Canada, USA ¶¶ 36-37.

³⁹ TBT Agreement, *supra* note 32, at art. 2.4.

⁴⁰ EC- Trade Description of Sardines, Report of the Appellate Body, WT/DS231/AB/R, (26 September 2002), ¶¶ 275, 282.

⁴¹ Submissions to the TBT Committee concerning REACH regarding Brazil ¶ 3, Thailand ¶ 5, Canada, China ¶ 6.

⁴² TBT Agreement, *supra* note 32, at art. 12.3.

⁴³ EC-Biotech, Interim Panel Report, WT/DS291/, WT/DS292/, WT/DS293/, ¶¶ 7.16, 13-4.

⁴⁴ TBT Agreement, *supra* note 32, at art. 11.3.

⁴⁵ Submissions to the TBT Committee concerning REACH regarding Brazil ¶ 3, China ¶ 9, Thailand ¶ 5.