

Product-based environmental regulations: Europe sets the pace

BY PAUL E. HAGEN

Following several years of successful political integration, the adoption of a single currency and an expansion from 15 to 25 member states in 2004, the European Union (EU) now boasts a single market comprised of more than 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 regulation of products.

While not without some controversy, the EU has adopted legal measures that condition market access for autos, household appliances, electronic equipment and biotech products on compliance with new product-based environmental requirements. In 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 lawyers in the United States will want to take note of these new product-based measures for several reasons. First, because 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, Europe is, in many instances, 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 challenges as they work to understand and anticipate new product-based mandates in Europe.

To better understand the significance of Europe'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.

EU Directives

Consistent with the EU's policy on waste management that 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. Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on End-of-Life Vehicles.

Among other things, the 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 directive also imposes several design mandates on car 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. Europe's ELV Directive has driven changes in automotive component design and supply chain management not only in Europe but across the globe.

The EU has 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, con-

sumer electronics, lighting products and other electrical equipment. Under Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on Waste Electric and Electronic Equipment (WEEE Directive), member states are to establish new systems for managing WEEE (defined broadly).

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 are, in turn, 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 new electrical and electronic equipment "put on the market" after June 30, 2006. Under Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS Directive), manufacturers 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). 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 are expected to 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.

In July 2005, the EU adopted Directive 2005/32/EC of the European Parliament and of the Council of July 2005—the Energy Using Products (EUP) Directive. The directive establishes a framework under which the EU will establish product-specific eco-design and performance standards for energy-using products through subsequent implementing measures. Conformity with future implementing measures and standards will be required as a condition to market access for covered energy-using products. The legislation has the potential to regulate a wide range of energy-using products marketed in Europe and contemplates new environmental performance and product design requirements.

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

The new EU regulations require that all pre-packaged products containing more than trace amounts of genetically modified organisms (GMOs) bear a label as follows: "This product contains genetically modified organisms" or "This product contains genetically modified [(name of organism(s)).]"

The regulation further requires 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) to be able to identify their supplier and the companies to which the products have been supplied. 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 an EC Scientific Committee is zero.

The extent of the EU’s impact in the agricultural-biotech arena is significant and could have a dramatic effect on global trade in agricultural products if other governments decide to follow Europe’s approach to regulating agricultural commodities.

REACH

The EU is also developing legislation that would create a new EU regulatory framework for chemicals. The legislation is known as REACH (Registration, Evaluation, Authorization and Restriction of Chemicals) and is expected to be finalized in 2007.

It is an effort to address “existing chemicals”—those chemicals that were in production prior to 1981 and for which limited health and safety information is available.

REACH would replace more than 40 existing directives and regulations and would require companies that produce and import chemicals to assess the risks arising from their use and to take the necessary measures to manage any risk 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.

Effects beyond Europe

With its push into new product-based environmental requirements, Europe is breaking ground on a new generation of environmental legislation that looks beyond the environmental effects associated with production and manufacturing alone. Europe’s approach to product regulation is also serving as a catalyst for similar environmental initiatives in the United States and elsewhere. For example, in 2005, legislation addressing the management of end-of-life electronics has been introduced in 28 states and in the U.S. Congress. California, Maine and Maryland as well as 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. Many more states have moved to restrict the use of mercury in various products. At the federal level, some members of Congress are pressing for amendments to the Toxic Substances Control Act based in part on work underway in Europe on the REACH proposal.

The increased regulation of products can be viewed as a predictable evolution of environmental law and policy as governments look to reduce environmental effects across a product’s life cycle. Nonetheless, while Europe has moved quickly to enact new laws targeting products, questions remain in some instances about the overall environmental benefits to be gained and related effects on international trade. For example, in the course of recent congressional hearings on electronic waste, the Environmental Protection Agency reported that the disposal of electronic waste in modern municipal landfills presented few environmental risks.

Europe’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.

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 number

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 Peoples Republic of China, are also following Europe’s 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.

Paul E. Hagen heads the *International Environmental Practice* at the Washington office of *Beveridge & Diamond, P.C.* He can be reached at phagen@bdlaw.com.

The increased regulation of products can be viewed as a predictable evolution of environmental law.