HUNTON& WILLIAMS

SPOTLIGHT

ON INTERNATIONAL BUSINESS OPPORTUNITIES

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A Note From the Publisher

"Brussels Rules the World"

This issue of *Spotlight* continues a three-part series of articles discussing how EU legislation affects global business.

Companies increasingly need to structure their European business ventures to conform to EU regulations and to develop corporate strategies for dealing with potentially trade-restrictive EU legislation and regulation. Where rules earlier only confined potential damage to the environment, regulation is increasingly oriented to new concepts of integrated pollution control.

EU legislation and resultant international policies increasingly focus on measures to reduce the environmental impacts of products. This product life cycle approach affects all businesses that place their products in the EU market. Initiatives such as IPP and WEEE extend a manufacturer's responsibilities from environmental impacts generated at its production facility, no matter its location, to those associated with a product's consumption and eventual end of life.

There are ways for limiting the risks for business by preventative means: dispute resolution, WTO arbitration, lobbying. Developing strategies can only be done on a case-by-case basis and requires a sound understanding of the law, policy, and politics relevant to the issue.

Thurston Moore

EU Product-Related Standards Drive Product Design and Manufacture in Multinational Enterprise

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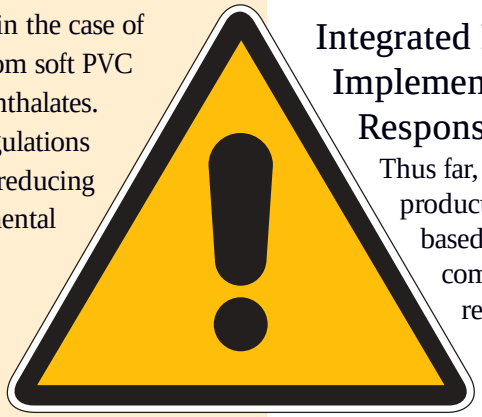
Product design and product component selection and use in manufacturing are no longer a matter exclusively for engineers, designers, and product developers. Traditionally, the law only dealt with issues such as warnings and instructions for use, which are not at the core of product design or component choice. Increasingly, however, product design and component selection are themselves driven by legislation, and thus lawyers must now get involved. Further, manufacturers are increasingly required to shoulder the costs or responsibility for recycling. or disposal of their products through new product return (or "take-back") legislation. Because Europe is a frontrunner in this area, and often imposes the most stringent requirements, it effectively forces corporations to live up to European requirements around the world.

Product-focused EU legislation governs critical aspects of the design and manufacturing of products ranging from toys to cars, and from electronics to any product containing certain chemical substances. Multinational corporations that design and manufacture products for the global marketplace should take such EU law requirements into account at the development, design, and manufacturing stages of new products. Existing products should be regularly reviewed for compliance with EU law. Further, new product-related legislation sets requirements and standards that may create barriers to international trade in products that are inconsistent with World Trade Organization ("WTO") disciplines.

This article reviews some of the main trends in the EU's product standards policy. It discusses the EU's new integrated product policy, its proposed new chemicals policy, its phthalates ban, and its proposed electronics regulation. These are only some examples of how EU policies and legislation affect product development and design. There are many other examples. The EU's biotechnology policy, for instance, has effectively caused many food companies to discontinue the use of biotech ingredients in their production process. The EU's automotive vehicle take-back legislation also imposes bans on product components.

Environmental and Health and Safety Concerns Are the Drivers

Much of the recent EU product-focused legislation is driven by concerns about products' environmental impact at some point in their life cycle, as in the case of electronics, or health concerns, as in the case of toys made from soft PVC containing phthalates. These EU regulations are aimed at reducing the environmental and health impacts of products by requiring, e.g., that they be recyclable or reusable, or by restricting the use of hazardous chemicals. Since much of this legislation is based on the notorious "precautionary principle," there is often no hard science to back up the regulatory requirements.



Integrated Product Policy Implements "Producer Responsibility"

Thus far, the EU's approach to product regulation has been based chiefly on direct command and control regulation. Over time, the emphasis has shifted from "means" to "results" requirements, but the basic idea is government control. With respect to product take-back, recycling, and disposal, for instance, the EU developed the basic concepts initially in the 1995 Packaging Waste Directive. This Directive sets so-called essential requirements that are aimed at ensuring that packaging material is reusable, recyclable, compostable, or can be incinerated with sufficient energy recovery. All packaging, in and of itself and on a product, must meet the Directive's essential requirements, including limits on the concentration of four heavy metals — limits which decrease over time. In addition, the Directive imposes targets for the recovery and recycling of packaging. EU member states must ensure that these targets are met. The same concepts have since been applied to automobiles and electrical and electronic products (see also below), and have been embodied in the concept of "producer responsibility" and "extended producer responsibility."

These principles assert that the producer remains responsible for his products throughout their life cycle, including the disposal phase. The objective is to force "the producer to take the environmental impacts occurring throughout the product's life cycle into account as part of production decisions," by imposing liability on the producer for those impacts. Once producers are made responsible for the adverse environmental and health effects of their products, the reasoning goes, they will redesign their products to reduce these effects.

The EU is now attempting to impose a watered-down version of these principles on *all* products. The European Commission has proposed a new "Integrated Product Policy" (or "IPP"). IPP is aimed at creating conditions under which products with a reduced impact on the environment and human health will be able to gain market share in the EU's fifteen member states. The important question is whether this "incentive" approach will be replaced by the "liability" approach already used with packaging, cars, and electronics.

Greening Supply and Demand

As part of the IPP, the Commission has proposed a series of measures intended to "green" both the supply and demand side and which include a wide range of regulatory instruments. Product prices would be adjusted by reduced taxes and subsidies for green products. Demand for green products would be stimulated by ensuring that consumers be provided with more and better information about the products they buy, including increased use of ecolabeling. Demand would be greened also by getting large, public-sector organizations to adopt green procurement strategies. Green production would be promoted by requiring eco-design ("design for the environment"), encouraging life-cycle analysis of products and production processes, and integrating environmental considerations into European product standards. The Commission has suggested too that "product panels" be established to guide product design and development. Such panels, which are currently active in some EU member states, bring together industry and representatives of consumer and environmental organizations to develop new standards for particular products or product groups.

Needless to say, many of these proposals create a potential for disguised protectionism favoring domestic producers. In setting reduced tax rates, granting subsidies, adopting criteria for green procurement, or awarding eco-labels, there is ample opportunity for discrimination against non-EU producers, overt or hidden. Indeed, many of the Commission's proposed instruments could raise serious issues under international trade WTO law.

New Chemicals Policy Hits All Manufacturers

In a 2001 White Paper on a future chemicals policy, the Commission has proposed an overhaul of the EU's chemical policy. Based on a review of the existing EU chemical legislation, the Commission concluded that its current chemical legislation does not provide a "high level of protection," as the Treaty requires. A major problem identified by the review is "the general lack of knowledge about the properties and the uses of existing substances" that were already on the EU market in September 1981 and that are therefore listed in EINECS, the European Inventory of Existing Chemical Substances. Existing substances, which amount to some 90 percent or more of the total volume of all substances on the market, are not subject to testing as to their properties. The risks assessment process applicable to some existing substances to evaluate their properties, which is conducted by the member state governments, is slow, ineffective, and inefficient.

The new chemicals regime would be based on the precautionary and substitution principles. The Commission's White Paper on the proposed new program acknowledges that chemicals produce "benefits on which modern society is entirely dependent," but also notes that "certain chemicals have caused serious damage to human health resulting in suffering and premature death and to the environment." Having thus set the stage, the White Paper continues "the lack of knowledge about the impact of many chemicals on human health and the environment is a cause of concern." Phthalates in toys and penta bromo diphenyl ethers (a flame retardant) in breast milk, according to the White Paper, "expose the weaknesses of the current EU chemicals policy." To address the current weaknesses, the Commission proposes several new programs. It proposes to impose testing and notification requirements for certain existing substances that are currently exempted, and to establish a new pre-marketing authorization scheme for certain other chemicals. In addition, it proposes an obligation on producers to provide information on their chemicals to the public. These obligations would not necessarily fall exclusively on chemical producers.

Indeed, as discussed below, the proposed regime would affect all "downstream" users of chemicals in a major way.

The REACH System Covers All Chemicals and All Users of Chemicals

The main feature of the proposed strategy would be the creation of a single system for existing and new substances. The proposed system is called "REACH", which stands for the Registration, Evaluation, and Authorization of Chemicals. Under the REACH system, the requirements, including the testing requirements, that apply to a specific substance would depend on the proven or suspected hazardous properties, uses, exposure, and volumes of chemicals produced or imported.

The current system requires pre-market testing and notification of new chemicals, but does not impose pre-marketing authorization. The proposed system would require pre-market *authorization* for certain substances, both new and existing. The REACH system would involve three elements: registration, evaluation, and authorization. Registration of basic information would be required for approximately 30,000 substances, including all existing and new substances exceeding a production or import volume of one ton*. This information is to be submitted by companies to a central database. The Commission estimates that 80 percent of these substances would require only registration. Evaluation of the registered information would be required for all substances exceeding a production volume of 100 tons (approximately 5,000 substances corresponding to 15 percent) and, "in case of concern," also for substances at lower tonnage levels. The evaluation would be carried out by authorities and would include a "substance-tailored testing program focusing on the effects of long-term exposure." Full pre-market authorization would be required for substances with certain hazardous properties that give rise to "very high concern." These substances include carcinogenic, mutagenic or reprotoxic substances ("CMR") (categories 1 and 2 under the current Dangerous Substances Directive) and persistent organic pollutants ("POPs"), as defined in the Stockholm Convention. Authorization would be specific and limited to a substance's use "for particular purposes demonstrated to be safe." The number of substances likely to be subject to authorization is estimated at 1,400 (5 percent of the registered substances). The proposed pre-marketing authorization scheme would be expensive, would seriously restrict chemical producers' and users' freedom, and would involve significant bureaucratic delays.

The Proposed REACH System

The EU estimates that of the expected 30,000 existing and new substances exceeding a production or import volume of one ton, 80 percent will require registration, 15 percent will require evaluation and 5 percent will require authorization. The proposed scheme would be costly, seriously restrict producers' and users' freedom, and involve significant bureaucratic delays.

* The EU uses the metric ton: Metric Ton, a unit of mass equal to 1000 kg or 2204.6 pounds sometimes called a long ton; unlike the US.

As noted above, this regime would apply to new and existing substances. However, a transitional period of 11 years would be allowed to phase in the large number of existing substances. "In general," the White Paper explains, "existing substances produced in higher volumes will have to be registered first. Yet the system will be flexible enough to allow for earlier registration of substances of concern produced in lower tonnage."

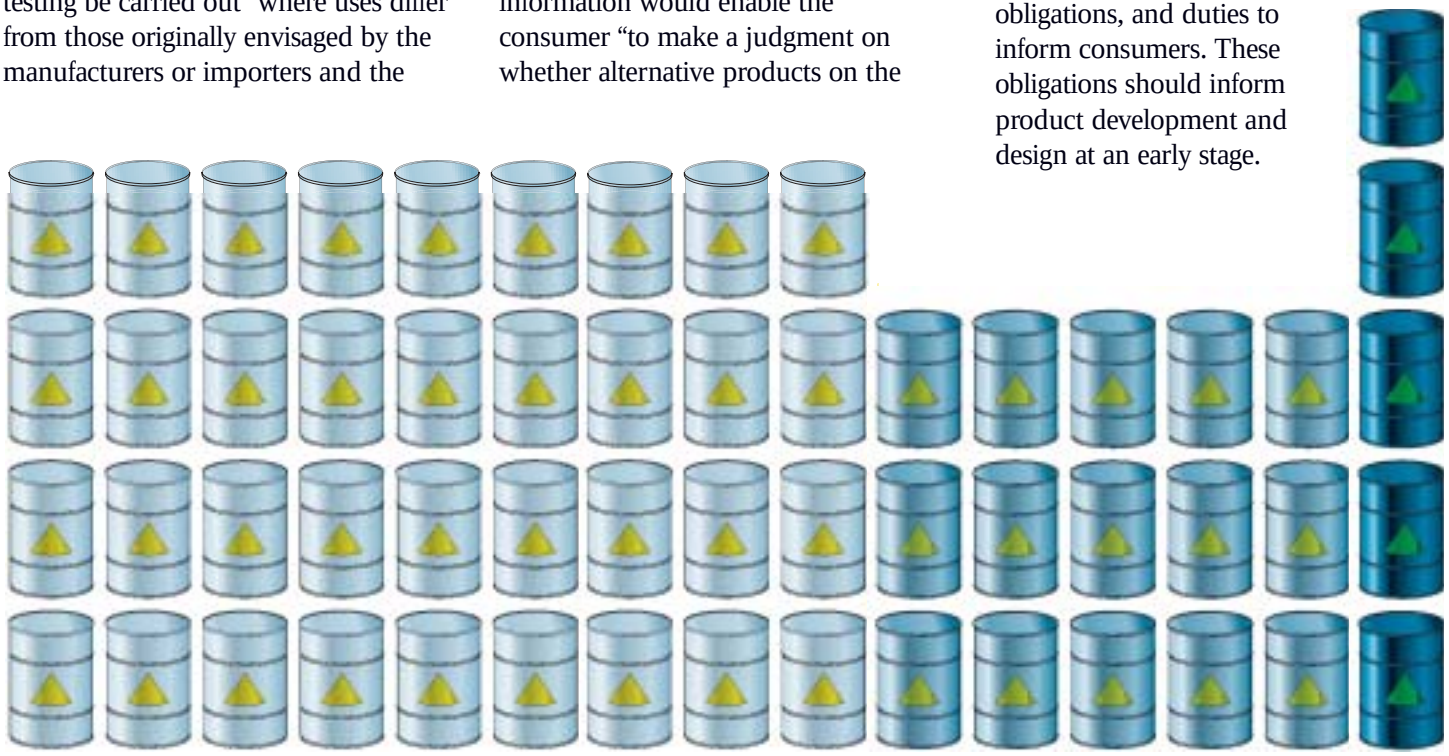
Responsibility for Reporting Data Falls on All Manufacturers

Under the new regime, responsibility for generating data and assessing exposure risks associated with chemicals would be placed on industry, not the government. Not only producers and importers of bulk chemicals, but also downstream users would be required to report data. Downstream users would be responsible for reporting data on the safety of their products, and the authorities may require additional testing be carried out "where uses differ from those originally envisaged by the manufacturers or importers and the resulting exposure patterns also differ substantially from those evaluated by them." In addition, producers and importers of products containing substances (known as "articles," which are currently exempted from testing) may be requested to provide "appropriate information" where products categories (e.g., toys or textiles) can lead to "significant exposure of humans and environment" to chemical substances. The additional information generated by downstream users would allow for more selective testing and targeted risk assessments.

Consumer Right to Information About Chemicals in Products

The EU believes that citizens should have a right to access information about chemicals to which they may be exposed, and acknowledges the consumer's right of choice. "Consumers need access to information on chemicals," the White Paper argues, "to make informed decisions about the substances that they use." Adequate information would enable the consumer "to make a judgment on whether alternative products on the market are more favorable in terms of their intrinsic properties and risks." The information would therefore have to be presented in such a way that it "enables a person to understand the risks and to develop a sense of proportion in order to make a judgment on the acceptability of those risks." In terms of substance, the information would cover health effects, environmental effects, other serious hazards, and instructions for safe use of chemical products. Producers, importers and downstream users, the White Paper stresses, "should mainly be responsible for providing this information to consumers." The Commission believes that this would lead to better informed purchasing decisions.

Obviously, the EU's new chemical policy would raise major issues for all producers and downstream users of chemical substances. They may be faced with bans or serious restrictions on the use of chemicals in their products, onerous reporting obligations, and duties to inform consumers. These obligations should inform product development and design at an early stage.



Electrical and Electronic Equipment

In the context of the EU's producer responsibility policy, new legislation on electrical and electronic equipment is pending at the EU. This legislative package for electronics would involve three directives. Two proposed directives are far along in the legislative process, a third one is still on the drawing board. The proposed directive on waste electrical and electronic equipment (known as the "WEEE Directive") would make producers responsible for the take-back, recovery, and treatment of virtually all end-of-life electrical and electronic equipment. A conceptually similar take-back scheme has already been adopted for vehicles (the "End-of-Life Vehicles Directive"). A second proposal provides for restrictions on the use of hazardous substances in electrical and electronic equipment (the "RoHS Directive"). The Commission's Enterprise Directorate General is considering a third proposal that would set forth eco-design rules (the "EEE Directive"). The first two proposals raise policy and international trade issues; the third proposal is highly problematic from a WTO law perspective and probably trade-illegal. In addition to these Union proposals, there has been considerable legislative activity on end-of-life electronics at the national level.

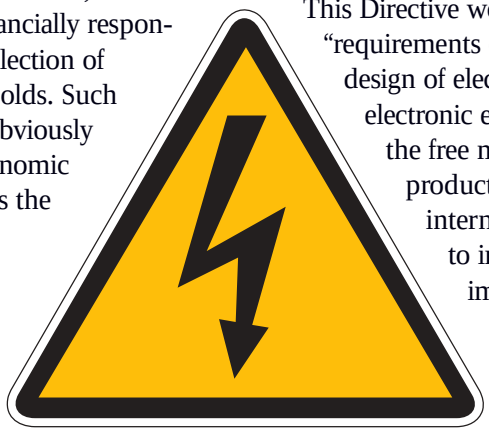
Waste Electronic Equipment Is Broadly Defined

The WEEE Directive's scope would be broad. It would cover virtually all end-of-life electrical and electronic equipment: large and small household appliances, IT & telecommunications equipment, consumer equipment, lighting equipment, electrical and electronic tools, and toys. The Directive would cover also components (e.g., screens, keyboards, circuit boards, and such), sub-assemblies, and "consumables," i.e., short-term disposable parts that are part of the product at the time of discarding, and not themselves "electrical or electronic" (e.g., toner cartridges). The term "producer" includes anyone who manufactures and sells electrical and electronic equipment under his own brand, resells equipment produced by other suppliers under his own brand, or imports such equipment into the Union.

The Directive would establish general principles of WEEE management and financing, and permit member states to work out the specifics on the basis of national and regional conditions and preferences. The measures proposed by the Commission include: (1) separate collection of WEEE from other waste streams, (2) take-back obligations on producers of electrical and electronic equipment and on distributors thereof (who can pass the WEEE back to the producer), (3) minimum standards for the treatment of WEEE, (4) certain recovery targets, (5) financing obligations on producers and importers for the treatment of WEEE, and (6) information and reporting obligations.

The WEEE Directive, as currently drafted, will likely fail to achieve the harmonization that the Commission considers essential to guaranteeing

comparable competitive conditions between electronics manufacturers. Being based on Article 174 of the Treaty, the Directive sets forth only the main, minimum principles for the management of WEEE and the financing thereof. Member states would remain free to adopt more "protective" measures, such as stricter pre-treatment requirements, or to make producers financially responsible also for the collection of WEEE from households. Such national measures obviously create diverging economic circumstances across the EU. Further, EU institutions are still haggling over the issue of how the financing of take-back and recycling programs should be regulated; individual financing would imply that each manufacturer pay only for the cost allocable to handling its products, while collective financing would not necessarily have this implication.



Restrictions on Hazardous Substances in Electronics

To reduce the amount of hazardous substances that ends up in the environment, the EU is also about to adopt the proposed RoHS Directive. This complicated piece of legislation would impose concentration limits with respect to certain hazardous substances in electronic equipment, such as lead. Certain applications would be exempted, however. It would also effectively require that other materials be substituted for various heavy metals and brominated flame retardants in new electrical and electronic equipment. The limits would not, however, apply to equipment that is already on the market before the new regime's effective date.

Electronics Design for the Environment

Finally, the Commission is working also on a proposal for a Directive on the Impact on the Environment of Electrical and Electronic Equipment. This Directive would harmonize "requirements concerning the design of electrical and electronic equipment to ensure the free movement of these products within the internal market, aiming to improve their overall impact on the environment." The proposal's basic thrust would be that manufacturers should perform a comprehensive environmental impact assessment of EEE products throughout their life cycle and seek to ensure that the products' design represents the "optimal balance between environmental factors and technical and economic aspects" of production. In designing the product, manufacturers must also consider how the product will be disposed of or recycled when the consumer is finished with it.

Plastic Toys Are Subject to Phthalates Ban

Based on asserted human health concerns, the EU has imposed a "temporary" ban on the use of phthalates, a class of chemicals used to soften plastics, in toys for children under three years of age. The fear is that these chemicals may cause unfavorable health effects to children who ingest these chemicals when sucking on soft-plastic toys. The ban on phthalates was supposed to be temporary, but it has already been extended several times. The ban has prompted the leading US toy manufacturer to switch entirely to softening agents derived from edible oils and plant starches.

EU-Driven Product Design

Whatever the merits of its legislation, the EU has changed the process of product design. And there is more to come. Product developers and designers for multinational enterprise should now not only consider the performance and cost of materials and designs, but also the regulatory requirements that affect the choice of materials and product design. Some of these requirements are relatively simple (e.g., bans on certain ingredients), while others impose more complicated tests (e.g., "design for the environment" rules). The new EU chemicals regime would have an enormous effect on all manufacturers selling products in the EC, who would have to ensure not only that the chemicals they use are registered and authorized for their specific applications, but also that reporting and disclosure with respect to these chemicals will not put them at a competitive disadvantage. The relevant requirements are set not only at the EU level, but also at the national level, which further complicates the job of the product designer. However, there is no choice. If corporations do not pay sufficient attention to these rules, they may pay a hefty price when products are not admitted to European markets or have to be recalled. ■

Remedies Against Unlawful, Unfair, or Discriminatory European Regulatory Requirements

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Many of the preceding articles in this issue of *Spotlight* have this theme in common: EU legislative and regulatory requirements have a significant potential to result in trade barriers. In particular non-EC manufacturers are exposed to a risk that their products will be subject to unlawful, unfair, or discriminatory EU regulatory requirements. As a result, they may suffer a competitive disadvantage, lose market share, or even have to withdraw completely from the European market. EU law is not very generous when it comes to providing private rights of action against EU regulation. In some cases, however, remedies may be available to manufacturers that are faced with unlawful, unfair, or discriminatory EU law requirements. In addition, World Trade Organization ("WTO") law may provide a remedy.

Lobbying

In many instances, an ounce of prevention is better than a pound of cure. Non-EU manufacturers may be able to prevent the adoption by the EU of unfavorable regulatory requirements through an effective corporate public affairs or "lobbying" program.

Such a program should involve a number of elements. First, it should include a mechanism for monitoring policy initiatives that are important to the corporation. Significant policy initiatives include not only draft proposals for legislation or regulation, but also scientific studies that may provide a basis for future legislative proposals. Second, significant initiatives should be analyzed carefully to determine how the corporation's business will be affected. Third, if a proposed measure would have adverse effects on the corporation's business, the corporation should develop a position that explains why and how the measure would adversely affect the public interest and what alternative means are better suited to pursue the particular policy objective. Fourth, the corporation should develop a plan for conveying its position to key decision-makers and others. Throughout this

process, a deep understanding of the politics behind the issue and the positions of other "stakeholders" and optimal "packaging" of the corporation's message, are necessary. In addition, the corporation should consider soliciting support from industry associations, such as the American Chamber of Commerce, and government agencies, such as the US Mission to the EU and the US Trade Representative (the "USTR," see also below).

Influencing the EU legislative process has recently become somewhat easier for non-EU corporations. In numerous instruments, the EU has expressed its commitment to transparency, public access, and stakeholder consultation and participation. It has also committed to involving interested non-EU corporations in its legislative and regulatory processes, and has entered into a regulatory cooperation agreement with the United States.

Legal Remedies

Of course, lobbying, or legislative advocacy, is not always effective. In some cases, the politics behind a proposed measure are such that rational argumentation does not help. In those cases, corporations should examine whether they have any legal remedies against the EU regulatory requirements that cause them grief.

Causes of action against unfair EU measures may be available under WTO, EU, and national law. Under national law, member state legislation or enforcement proceedings based on such legislation may be actionable. The applicable provisions of national law, including the pertinent standing rules, determine what specific actions may be available to a corporation in each member state. Actions under national law can normally be initiated only once the particular member state has implemented (or is in the process of implementing) the disputed EU legislation.

WTO Law

Under WTO law, private parties have no standing to bring actions against trade-restrictive measures adopted by countries that are members of the WTO. Their governments, however, do have this right. Thus, the United States government has standing to file complaints against trade-illegal EU measures. The United States has had some success in challenging EU measures that constituted trade barriers. For instance, the WTO Appellate Body ruled in favor of the United States with respect to the European Union ban on bovine meat from cattle treated with certain hormones. WTO litigation for the United States is handled by the USTR.

With the adoption through the WTO of an efficient and effective dispute resolution mechanism and the specific international agreements on sanitary and phytosanitary standards and technical barriers to trade, WTO proceedings have become an attractive option for challenging trade-restrictive EU regulatory requirements. The two specific agreements just noted impose limits on the European Union's ability to adopt regulatory restrictions based on such vague principles as the precautionary principle. WTO law, for instance, requires that there be a "rational relation" between the problem identified by the European Union and the regulation adopted by it. Thus, the European Union must be able to back up its measure with credible scientific evidence. The main limitation faced by private parties is that they cannot litigate directly before the WTO. However, they can work with the USTR, push their home government to file suit, and play an important "behind-the-scene" role in actual proceedings before the WTO courts.

EU Rights of Action

In general, the EU Treaty does not grant private persons a right to initiate action before the European Court of Justice ("ECJ") seeking the annulment of EU legislation or regulation. However, private persons do have limited standing to bring actions against "decisions" that are of "direct and individual concern" to them. The EU Treaty does not define the term "decision." The ECJ has defined this term as "a measure taken by a Union institution, acting as a body, intended to produce legal effects and constituting the culmination of procedure within the Union institution." On the basis of this narrow interpretation, the ECJ has held that "informal" acts such as letters, communications, and statements issued by Commission staff do not qualify as decisions subject to judicial review. The requirement of

"direct and individual concern" has been interpreted by the Court to exclude generally binding EU measures, such as directives and regulations. Thus, a corporation may bring an annulment action before the ECJ if an EU measure takes the form of a "decision." Most relevant regulatory requirements the EU may adopt would probably not be in the form of actionable decisions. However, some decisions made in connection with a legislative procedure may be actionable under this heading.

Thus, in general, a private party does not have standing before the ECJ to challenge the validity of generally binding EU legislation and regulation. Consequently, private parties have no cause of action against EU directives, the most common EU legislative instrument. To obtain standing, they have to establish that the measure is, in fact, a "disguised decision." Thus far, the ECJ has not enthusiastically entertained such arguments, but it has created a limited opening where a contested provision of a directive affects legal persons "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons." If a directive is very specific and affects an easily identifiable and small group of parties, the Court may find that it meets this test and grant the private claimant standing.

Note that a recent judgment of the Court of First Instance has effectively created a right of action against directly effective EU regulations where no judicial review would otherwise be available. This judgment, if it is upheld on appeal, would expand standing rights for private parties significantly and set an important precedent.

Noncontractual Liability

In addition to injunctive relief, which, as discussed above, is available only in some cases, private parties may have a claim for damages against the EU. Many regulatory restrictions result in serious economic harm to corporations. If such restrictions are unlawful, a cause of action against the Union grounded in noncontractual liability is available. However, claims for damages against the EU grounded in noncontractual liability have generally failed for a number of reasons. First, national law remedies must first be exhausted. Second, a sufficiently serious breach of superior rule of law must be established, or, if an area is deemed to be characterized by wide discretion, it must be shown that the EU "manifestly and gravely" disregarded the limits on the exercise of its powers. Third, it must be established that the alleged damage goes beyond the normal risks inherent in the activities in the sector concerned, and that the damage was confined to a clearly defined group of traders.

A directive that violates some aspect of EU law, e.g., the proportionality requirement, could trigger the EU's noncontractual liability. However, it would seem necessary first to exhaust national law remedies against the laws implementing the directive. If the ECJ declares the claim admissible, a mere violation may not be sufficient. A serious breach or "manifest and grave disregard" in exercising discretion in adopting the directive would likely have to be established. As a result, even if a directive is in violation of, say, the proportionality principle, it will not trigger the EU's liability unless the violation is deemed either serious, or if discretion is involved, manifest and grave.

Informal Complaint

In addition to these traditional, formal legal remedies, certain informal "remedies" are provided for. A private party could file a complaint with a national government or the Commission arguing that there is violation of EU law. A national government or the Commission could commence an action against the member state at the ECJ. If the national government or Commission does not believe that there has been a violation of EU law, they, of course, will not initiate action before the ECJ. Where a national law merely implements an EU directive, the Commission is not likely to take action.

Access to Documents

To be effective in lobbying and to examine whether a legal remedy may be available, access to documents held by EU institutions often is critical. In this regard, the EU Regulation regarding public access to European Parliament, Council, and Commission documents (the "Documents Access Regulation"), which entered into force on 3 December 2001, may turn out to be a substantial improvement. Under this regulation, any natural or legal person residing or having its registered office in a member state has a right of access, subject to certain exceptions, to documents held by EU institutions, including the European Parliament, Council, and Commission. This right of access applies to both documents drawn up and documents received by the institutions, and in all areas of EU activity. It applies also to the legislative process. "In particular," the Document Access Regulation provides, "documents drawn up or received in the course of a legislative procedure shall be made directly accessible" to the public in electronic form or through a

register. Importantly, the Document Access Regulation provides not only for administrative review procedures, but also grants a right to judicial review to enforce access rights.

Corporate Strategy

Companies should develop corporate strategies for dealing with potentially trade-restrictive EU legislation and regulation. This strategy should start with establishing an effective EU public affairs effort. Lobbying should be informed also by an analysis of applicable WTO and EU law requirements, as well as available legal remedies. Indeed, in a lobbying campaign, an argument to the effect that a proposed EU measure is trade-illegal, or otherwise unlawful, can be a powerful deterrent. Recent moves by the EU to provide for more trans-parency, greater access to documents, and greater stakeholder involvement in legislative and regulatory procedures, make corporate public affairs programs more effective and less costly.

Specific strategies should be developed in dealing with specific EU measures affecting a corporation's business. Where the EU does not respect WTO or its own law, companies may have a cause of action. They may have standing to bring suit against an EU measure before the ECJ or a national court. They should consider also pushing a national government to bring an action under EU or WTO law. Developing these strategies can only be done on a case-by-case basis and requires a sound understanding of the law, policy, and politics relevant to the issue. If done well, however, such strategies can be very effective in securing access to markets and improving the corporation's bottom line.

Finally, a private party has a right to file a complaint with the European Ombudsman. Established in 1994, the Ombudsman is an independent office empowered to receive complaints from any EU citizen or legal person concerning instances of "maladministration" in the activities of the Union institutions, with the exception of the Court of Justice. The Ombudsman is required "to conduct enquires for which he finds grounds," except where the alleged facts are or have been the subject of proceedings. If he finds an instance of maladmin-istration, he must give the institu tion concerned an opportunity to present its views within three months and then issue a report to the European Parliament and the institution concerned. The concept of maladministration has been interpreted by theOmbudsman as the failure of an EU institution or body to comply with a binding rule or principle.

In the Ombudsman's review of administrative behavior, codes adopted by the EU institutions play a major role. The Commission, for instance, has adopted a Code of Good Administrative Behavior (Relations with the Public), which sets forth general principles of good administration, guidelines for good administrative behavior, and rules on the rights of third parties and dealing with enquires. The general principles of good administration include lawfulness, nondiscrimination and equal treatment, proportionality, and consistency. The guidelines for good administrative behavior require objectivity and impartiality, and the timely provision of information on administrative procedures to members of the public. The rules on third party rights require that Commission officials, where EU law requires consultation, listen to all parties with a direct interest, justify their decisions, and, where EU law provides a right of appeal, indicate arrangements for appeal. In dealing with enquires, the Code requires that Commission officials answer in the most appropriate manner and as quickly as possible (there are specific rules for requests for documents, correspondence, telephone communications, and electronic mail). Under the Code, any person may lodge a complaint about a violation with the Secretariat-General of the Commission or the Ombudsman. The Ombudsman has no power to impose sanctions, but his decisions, at least in some cases, have significant impact. ■

COMPLEX EMPLOYMENT RULES ARE CRITICAL TO EUROPEAN BUSINESS DEALS

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A major difference between business transactions in the European Union and the United States is the far bigger role employment laws play in Europe. European employment rights are as much public policy as they are contractual. US dealmakers rely on broad latitude to alter workplace arrangements as a key tool for affecting the value of business restructurings. In Europe, though, an intricate web of rules has been crafted to protect employees and their agents during such business events. These are laws that can materially affect deal valuations — and even control — of the transaction.

In order to treat the complexities and high costs of European workplace regulations as opportunities rather than obstacles, it helps to understand two basic reasons for the vast difference in European and US employment relations.

Social Philosophy. European employment laws reflect a philosophy of capital and labor as "social partners" overseen by a benevolently paternal state. To a much greater degree than in the United States, capitalism is seen as a servant of the public and of the citizens who are, among other things, employees.

Multiplicity. The politics of its member state economies have prevented the European Union from "harmonizing" labor and employment laws to the same extent as some other areas of the law. So, unlike in the United States where uniform federal laws routinely preempt inconsistent state rules, employment law compliance in the European Union means coordinating the very diverse laws and procedures of individual member states.

Employment Contracts, Labor Unions, and Works Councils

European laws relevant to M&A activity are designed to protect the three foundational elements of European employment laws. These fundamentals are not always familiar to US lawyers.

First, virtually all European employees are deemed to have an individual employment contract — to which a variety of legislated and collectively bargained rights attach. This is very different from the US doctrine of "at will" employment, under which employees can be fired for any reason other than an unlawful one. Employers in the European Union cannot unilaterally alter terms of employment as they often do in the United States; dismissals can involve elaborate notice procedures and generous severance payments.

Second, European labor unions operate under a diverse array of collective bargaining models much different from those in the United States. Unions in the United States customarily conclude periodic plant-level labor contracts under a single federal legal-adversarial bargaining model. In the European Union, basic work and pay patterns may be set at the national, regional, or sector level by groups of unions and employer associations in bargaining processes that have a more semi-public or social-partner nature. Labor contract terms are then often automatically incorporated directly into individual employment contracts.

Finally, there are works councils — statutory inventions intended to implement the social philosophy of private enterprise and employee democracy working as partners at various levels of the economy. While unions focus on traditional concerns of distributive economics and political or legal advocacy, works councils are aimed more at the integrative aspects of the capital or labor social partnership. Since they combine representatives from different levels of managerial and blue-collar employees, works councils sometimes provide a more productive forum than unions for discussion of business matters. In some instances, they are also entitled to exercise extensive rights of co-determination on important business issues.

Acquired Rights, Collective Redundancies and Consultation or Co-Determination

European employee protections in the M&A context are of three basic types: (1) "transfer-of-undertaking" or "acquired rights" laws, (2) "collective redundancy" (mass dismissal) regulations, and (3) consultation or co-determination rules. EU directives provide basic principles for each type, to which member states are expected to conform. In each area, though, there are still individual state regulatory mazes to negotiate.

Transfer-of-undertaking laws provide that an entity that acquires the rights to direct a business automatically acquires the employment contract obligations of the transferor of that same business. The transferee must also respect obligations regarding works councils, unions, and collective agreements, until they are terminated or replaced under member state laws. Pension plans do not transfer under these laws; EU directives require that member states otherwise protect employee pension rights. Employees may ordinarily not be dismissed as a result of a business transfer.

EU directives also seek to harmonize collective redundancy laws to prevent concentration of layoffs in member states where dismissal rules are most lenient. Companies must (1) notify state and employee representatives of planned dismissals above a certain level (e.g., 20 employees in 90 days), (2) satisfy consultation and justification standards before dismissals can occur, and (3) abide by supplemental notice and severance rules. Most member states require, in addition, that companies (4) reach agreement with employee representatives on "social plans" to limit and mitigate the harm caused by dismissals.

Both transfer-of-undertaking and collective redundancy laws rely on consultation and co-determination as the chief mechanisms to cope with the labor and employment impact of business transactions. A member state's M&A laws may require, for example, that consultation with employee agents commence "in good time" and proceed "with a view toward agreement" over specified topics in order to "avoid, limit or alleviate" adverse consequences to employees. On matters such as social plans, the laws may require co-determination of criteria for dismissals and severance benefits.

Transfer-related consultation is but one aspect of the EU trend to expand employee involvement on a variety of topics and organizational levels. By 2005, EU member states must require regular consultation with employee representatives over a company's economic status, probable business activities, employment trends, and decisions likely to lead to work or organizational changes. Still another directive requires EU-level works councils for companies with over 1000 employees and 150 in two or more

countries. Further laws may mandate co-determination for such steps as transferring employee data outside the European Union and monitoring employee e-mail and computer usage.

Timing, Tone, Value, and Control

Because they can be deal-critical in unfamiliar ways, European employment laws have become an integral part of company planning for EU transactions. Valuations can vary hugely based on the generosity of state-prescribed employee work terms and benefits, the capital mobility limits imposed on pension systems, and the parties and procedures required for consultation over these and other employment-related matters.

Employment laws may also influence the form and structure of a transaction in order to control whether, what, how much, and with whom consultation must occur. Moreover, consultation timing can be key to control and leverage in negotiating with employee representatives and state regulators. Trigger events for employment laws can differ from those required for deal closings, for example, and differing conflict-of-law standards can determine the effects of employment contracts and collective agreements. Minimizing the risk of regulatory delays based on employee objections over such matters can be critical.

Required consultations can also provide opportunities to set the tone for workplace relations, to clarify operating objectives, and to negotiate improvements in workplace productivity. Even amidst European protective laws, careful planning can equip companies with significant leverage in negotiating with employee representatives.

The diversity of employment laws among EU member states means that companies have choices in planning business deals there. The survival of collective contracts and employee representatives may depend on those choices, as may a company's ability to change work terms after reorgan-ization. Though em-ployee dismissals cannot be justified by business trans-fers per se, thoughtful plan-ning enables explanation of the "technical, economic or organiza-tional" cir-cumstances that make them per-missible under some member state laws.

As with other laws, the European Union's more stringent regulation of deal-related employment consequences will have a disproportionate effect on the way our multinational clients do business. It underlines once again the importance of Hunton & Williams' strategy to integrate the firm's labor and employment expertise with our international trade and business capacity, and with the experience of our European partners in dealing with complex regulatory regimes across all EU member states. ■

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