



PRODUCT-FOCUSED ENVIRONMENTAL CONTROLS IN A GLOBALISED WORLD

Travers Smith LLP, based in London, and Beveridge & Diamond, with its principal office in Washington, DC, have worked together in 2013–2014 on a host of international product-related environmental matters. Here, listed individuals **Doug Bryden** and **Russell LaMotte** give us their impressions of this blossoming area of environmental legal practice.

THE GROWTH OF PRODUCT-FOCUSED ENVIRONMENTAL CONTROLS

Readers of *Who's Who Legal: Environment* will be familiar with tracking trends in the global environment legal market. Often, environmental practitioners will speak of a growing projects practice, their transactional expertise or big-ticket litigation.

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However, one significant and arguably dominant trend in the market over recent years is the growth of product-focused environmental controls.

The traditional “core” of environmental law is usually thought of as being represented by centralist “command and control” structures, particularly in the fields of environmental permitting, contaminated land, water pollution and nature conservation. These environmental challenges are, to a large extent, geographically fixed and are characterised by a focus on operations at an “end-of-pipe” or facility level.

Over recent years, an additional layer of environmental regulation, controlling the environmental impact of products throughout their life cycle, has been added to this traditional “core”. These requirements primarily seek to address environmental impacts and risk during use or at the end of a product’s life. Increasingly, the conditions under which products are being made and the raw materials used in their manufacture are also subject to regulatory constraints.

Two of the largest markets in the world, namely the US and the EU, have seen rapid growth in such product-focused environmental controls in recent years, matched by an uptake in related product-focused legal work. With this regulatory expansion comes a unique suite of challenges of which environmental lawyers should be aware.

Product-focused environmental controls are marked by a high degree of complexity, specificity and dynamism. Product regulation can come in the form of substance controls that transcend sectors, for example, the EU’s Restriction of Hazardous Substances (RoHS) and Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regimes. At the same time, product regulation is becoming increasingly specialised and sector specific, for example, the well-known waste electrical and electronic equipment (WEEE) Directive, which addresses the electrical waste sector. The regulatory landscape is further complicated by products themselves, which are constantly evolving to incorporate new materials and techniques.

A distinctive characteristic of these controls is that they require information sharing and disclosure, both to customers and within supply and distribution chains. Examples include labelling, declarations of conformity, marking with harmonised symbols and details of products’ ingredients and treatments. The latest areas of product stewardship, for example, on conflict minerals, push the boundaries of what environmental lawyers are working on, and rewards those practitioners with broader regulatory skills.

From a compliance perspective, product-focused environmental controls typically only apply to manufacturers and importers, that is, those operators placing products on the regulated market for the first time. However, the globalisation of supply and distribution chains gives these controls extraterritorial effect. In practice, environmental product regulation in one major jurisdiction causes ripples worldwide as multinational companies seek to harmonise standards, processes and procedures throughout their product networks. Consequently, key trading centres with well-developed product-focused environmental controls set de facto global standards to which multinationals adhere: the “race to the top”. Global companies increasingly need to track developments in a variety of countries and make choices about where to allocate limited advocacy resources.

A related and growing issue is that of private environmental governance, the notion that products are regulated not merely by public regulation, but by decentralised and individual private choices. Companies exposed to these forces acknowledge that customers are the new regulators, brandishing arguably greater power than traditional federal, national or supranational organisations. The evolution of these new realities create fresh

challenges for companies and lawyers alike because these “rules” are not bound by traditional regulatory structures such as the opportunity for consultation and challenge.

DETAILED INSIGHT – EU

In recent years, the EU has introduced a raft of product-related environmental regulatory controls. In this section, we seek to summarise the key characteristics of this regulatory landscape, developing trends and areas of key activity.

Characteristics

The EU remains one of the most important global trading blocs, particularly for US exporters. Product-related environmental controls bite on a whole range of products, posing significant compliance challenges when bringing product to market, so access to this valuable market remains the primary concern of most operators.

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Key legislation in the EU includes the “product stewardship” regulatory framework, which includes the WEEE, batteries, packaging waste and end-of-life vehicles directives. These directives seek, among other things, to preserve, protect and improve the quality of the environment and implement the “polluter pays” principle, enshrined in the Treaty on the Functioning of the European Union. To ensure market access, economic operators must where appropriate mark and label products, register with relevant national competent authorities and join producer compliance schemes to discharge their obligation to finance the collection, recovery and environmentally sound disposal of certain named products.

Further relevant legislation includes the ecodesign or ecolabelling regimes, chemicals and biocides regulations, and regulatory controls on sectors include food, feed and pharma. Common regulatory tools deployed include maximum substance concentrations, substance prohibitions, approvals, authorisations, labelling, declarations of conformity, marking with symbols, design standards, registrations, compliance schemes and record keeping.

The EU has a mature and progressive system of product-related environmental controls, and owing to the size of its market is often turned to as a model for regulatory systems. Examples of this include REACH and RoHS, the principles of which have been rolled out in numerous countries including China, Japan and South Korea.

Trends in EU product-focused environmental controls

As a mature regulatory market, the initiation of new product-focused environmental controls has, to a certain extent, slowed down. The EU has in recent years concentrated on increasing harmonisation across such product regulations by recasting families of regulations to standardise key requirements. Where possible, Union-wide authorisations and procedures have been introduced, further integrating compliance across the bloc. In addition, new measures have more frequently been enacted as regulations as opposed to directives, thereby avoiding divergent member state transposition.

That said, new regulatory frameworks are frequently being introduced, including the new Biocidal Products Regulation, which applied from September 2013 and the revised F-Gas Regulation adopted in 2014. This year is likely to see an enhanced focus on transparency and supply chain due diligence, particularly owing to the Commission’s recent proposed

regulation on a responsible trading strategy for minerals from conflict zones.

Importantly, businesses must also keep abreast of amendments to existing regulations. Flexible delegated and implementing powers are now a more common feature of EU legislation, allowing the Commission to update and amend operational elements of regulations without recourse to the full legislative process. In addition, several regimes (particularly in the chemicals sector) are subject to ongoing review programmes, staged registrations, product authorisations and the phase-down of certain product types, necessitating almost constant review by operators.

Finally, central reviews of the efficacy of legislation followed by amendment remain standard, driving successive legislative updates.

Key Areas of Activity

Throughout 2014 at Travers Smith we have focused on a spread of environmental regulatory work including ozone depleting substances and F-Gas regimes, REACH, the classification, labelling and packaging (CLP) Regulation and biocides compliance, pan-European electronics compliance and pharmaceuticals advice. Several of these mandates have required expert jurisdictional advice both across the EU and inevitably further afield.

DETAILED INSIGHT – US

The European Union has undoubtedly led the way in this new generation of product-focused regulations, but US-based practitioners have been active in the field from the beginning. In part that is because our US-based multinational clients are directly affected by the EU-driven market access requirements: although the US is the dominant market in the global IT sector, for example, it was the EU’s RoHS Directive that transformed the global supply chain regarding materials restrictions in electronic products. Close cooperation with our EU colleagues has therefore been a mainstay of a US products regulatory practice.

Product regulation is, however, by no means new in the United States. California adopted the infamous Prop 65 chemical warning requirements in 1985 (unlike the EU's requirements, Prop 65 has fortunately not served as a model for regulations in other jurisdictions). In other areas, such as product-level energy efficiency requirements, US federal law has set the standard for what have largely become global norms, thanks to the marketing

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success and technical rigour behind the standards set by the US Energy Star program. These US standards are now being adopted and further amplified in other jurisdictions globally.

We have also seen a dramatic expansion in home-grown regulatory developments at the state level in the United States. State governments in the US are increasingly enacting "product stewardship" measures to regulate product design, ban or restrict the use of certain chemicals, expand environmental labelling and certification programmes, and manage end-of-life consumer and commercial products. In the first generation of these state initiatives, many laws were based on EU models. (Indeed, material restriction laws in California and New Jersey incorporated the EU's RoHS Directive by reference, a highly unusual if not unprecedented integration of US legislation with foreign law.) In recent years, however, we have seen several states cast their own moulds for new product-focused regulations. Many states have imposed new requirements relating to the disclosure of chemicals in children's products, for example. And California – one of the world's largest economies – is also charting new territory with the adoption last year of a potentially sweeping new "Green Chemistry" regulatory framework. Those regulations will require manufacturers and importers to notify regulators if certain categories of products contain listed chemicals of concern, to conduct an alternatives assessment, and to adhere to risk management measures adopted by regulators.

The US is also emerging as a world leader in the expansion of product-focused social responsibility requirements. California's Transparency in the Supply Chains Act 2010 requires companies that do business in California to disclose the steps they have taken to address slavery in their supply chains. And the federal conflict minerals disclosure rule adopted by the US Securities and Exchange Commission requires manufacturers to investigate their supply chains for the presence and source of certain common "conflict minerals" that might have been sourced in the Democratic Republic of Congo and adjacent countries. The conflict minerals rule sets a new high watermark in the degree of mandatory due diligence and supply chain visibility required for affected for public companies and their suppliers.

We expect similar requirements to be adopted in the future with respect to due diligence relating to human trafficking in the product manufacturing supply chain (led by a pending federal procurement rule that will be finalised in late 2014).

These new product-focused requirements are not environmental in nature, but they raise the same kinds of supply chain management demands as traditional environmental material restriction requirements. As a result, many companies have charged their internal environmental product stewardship managers (and their lawyers) with devising management plans to ensure compliance. Environmental product requirements are therefore increasingly merging with social responsibility demands to impose new pressures on companies to have full visibility into the content and production methods of their products, starting from the extraction of raw materials right through the recycling and disposal of products at their end of life.

Many of the new generation of US product-focused requirements rely increasingly on disclosure (rather than command-and-control prohibitions or restrictions) as a regulatory tool. Disclosure requirements are favoured by regulators and NGOs as a seemingly less burdensome, more flexible approach to achieve desired policy outcomes. But the new emphasis on product-level transparency can pose significant concerns on the part of companies that seek to avoid misleading or alarming consumers and to protect confidential business information. And the increase in product-related information disclosure can also present significant new product liability risks. The growth in product- and ingredient-related disclosures offers a rich new vein of information that can be exploited by claimants and plaintiffs lawyers, regardless of whether those disclosures are required in the United States or overseas, or imposed by a retailer or government procurement rule. Companies and their lawyers therefore have to carefully balance these new risks against the market access opportunities associated with these product-related disclosures.

CONCLUDING THOUGHTS AND ROLES FOR LAWYERS

Overall, while the nexus between environmental and product work is rarely fêted by practitioners, it increasingly forms part of a well-balanced environmental practice aligned with clients' present concerns.

Key roles for lawyers in this field include pre-legislative advocacy (to help shape requirements before they are finalised); advisory (policies and procedures on appropriate due diligence and compliance strategies); contractual drafting; protection of confidential business information; and multi-jurisdictional crisis management and regulatory defence.

Owing to the globalised and increasingly complex nature of these product-focused environmental controls, environmental lawyers will need to build strong links to practices in foreign jurisdictions with true expertise in this sector.