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PLANNING THE FUNERAL AT THE BIRTH: EXTENDED PRODUCER RESPONSIBILITY IN THE EUROPEAN UNION AND THE UNITED STATES

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*This Article examines how governments in the world's two largest economies are diverging in their approaches to regulating hazardous products and packaging, with major ramifications for manufacturing, waste management, and trade. The European Union is implementing product-oriented environmental regulation based on the principle of Extended Producer Responsibility ("EPR"), which assigns responsibility to manufacturers to take back their products after consumers discard them. In theory, EPR could dramatically alter production practices by internalizing externalities from products and providing incentives for environmentally friendly design. However, practical problems of implementation raise questions about the effectiveness of EPR as a policy tool. This Article explores the European experience with EPR, the reasons for apparent resistance to EPR in the United States, and the implications of a move toward product-oriented environmental law. **It critiques EPR on the grounds that the transaction costs of EPR may outweigh its environmental benefits and that practical problems of implementation may preclude the achievement of expected product design incentives. Given the substantial cost and technical hurdles to establishing the legal underpinnings of EPR programs, this Article recommends that the United States consider alternative policy instruments to address environmental externalities from products.***

The United States and the European Union are rapidly diverging in their approaches to environmental regulation.

(p. 51).

...In comparison to the United States, the European Union has taken a far more aggressive approach to discarded electronics and to other products that pose substantial environmental impacts. Under the principle of Extended Producer Responsibility, the European Union has looked to manufacturers to fund, and in some cases directly undertake, waste management responsibilities. As discussed below, the implementation of EPR is plagued by high transaction costs, and these costs are creating an increasing gap between the predictions of the economic theory behind EPR and the actual results of EPR programs in Europe.

(p. 62).

...The merits of EPR need to be assessed for diverse product types and national circumstances. The full range of transaction costs under conditions of producer responsibility must be examined and should be compared against the costs and benefits of municipal responsibility or retailer or consumer responsibility. Even if there are strong theoretical arguments for assigning responsibility to producers, problems of implementation may lead policy-makers toward second-best alternatives. The costs and benefits of EPR also need to be compared against alternative policy instruments that could approximate the upstream and downstream benefits of EPR at lower transaction costs. Such instruments, such as Advance Recovery Fees, content standards, and recycling subsidies, are discussed in more detail in Part V.

The goal of this Article is not to conduct a comprehensive cost-benefit analysis of EPR for every possible product type. Rather, the Article illustrates the problem of transaction costs and lack of design incentives in EPR programs in the European Union, and it suggests that many of the ambitious claims of EPR proponents are overstated.

(pp. 67-68).

...[A]s one British scholar has noted...the EU's environmental program over the past three decades has "been transformed from its origins as a restricted body of technical standards designed primarily to eliminate trade restrictions into an expansive programme committed to the vision of sustainable development and the wholesale integration of environmental, social and economic policies."

(p. 70).

...In short, the evidence from the European Union strongly suggests that high transaction costs hinder achievement of cost-internalization and de-sign incentives through EPR, at least for products that are more complex than packaging.

(p. 79).

...A major reason that EPR is hailed as a "next-generation" environmental policy is that it seems to rely on economic incentives rather than command-and-control regulatory requirements. Under EPR theory, assigning responsibility to producers does not dictate any particular product design, but rather allows producers to assess the marginal costs and benefits of product redesign, given the prospect of product take-back or the fee structure imposed for waste management. But the market-based aspects of EPR may be overstated. In fact, as practiced in the European Union, EPR involves substantial regulatory mandates and does dictate product design decisions in certain respects. The most far-reaching impacts of the new EU waste legislation are likely to result from these command-and-control mandates rather than from the more market-based mechanism of the product take-back requirements.

(p. 80).

...Given the amount of state control and the centrality of the RoHS substance ban, advocates are likely overstating how market-based EPR really is.

(p. 82).

...C. Implications of Product-Oriented Environmental Legislation

(p. 83).

...Finally, the cross-border trade implications of environmental regimes focusing on products are far greater than for regimes that target fixed industrial sources of pollution.

(p. 84).

On the international plane, policies that address externalities from products have a global reach and can affect manufacturing practices around the globe, unlike facility-based regulation, which is necessarily restricted to sources within a jurisdiction. As noted above, the RoHS Directive is leading to major changes in electronics manufacturing in the United States, Europe, and Asia, as manufacturers seek substitutes for the substances banned under the Directive.

By focusing on products directly, countries are implicitly extending their jurisdictional reach in environmental policy. In theory, this could lead to a "race to the bottom" (as countries relax product standards to encourage foreign investment), but more likely, **it will lead to a "race to the top" as a few large markets with stringent product policies (such as the European Union or Japan) are able to "export" their policies globally because foreign manufacturers will not want to be shut off**

from lucrative markets. Smaller foreign manufacturers that cannot easily retool their factories to serve different markets may be placed at a disadvantage. Will product-oriented environmental policies be used as disguised protectionist measures to favor local industry? Will such measures be deemed to be in conflict with the General Agreement on Trade and Tariffs (“GATT”), even if the measures are facially neutral, i.e., take-back requirements apply equally to domestic and foreign producers? **While the GATT implications of product-oriented environmental legislation are beyond the scope of this Article, these are critical questions that policy-makers need to address. The American Electronics Association has already prepared a detailed position paper on why the WEEE Directive and bans on certain toxic substances in electronics violate the GATT.**¹⁴⁹

149 See American Electronics Association, Position of the American Electronics Association (AEA) on the European Commission’s draft directive on Waste from Electrical and Electronic Equipment (WEEE) (1999), available at <http://www.svtc.org/cleancc/weee/directive/weeeaea.htm> (arguing that the EU’s proposed electronics substance bans would infringe GATT’s prohibitions on quantitative restrictions as well as the Agreement on Technical Barriers to Trade); **National Foreign Trade Council, Inc., Looking Behind the Curtain: The Growth of Trade Barriers That Ignore Sound Science 72–73 (2003), available at <http://www.nftc.org/default/white%20paper/TR2%20final.pdf> (noting conflicts between the RoHS Directive and the GATT).**

(pp. 85-86).