

The European Union's Energy using Products – EuP – Directive 2005/32 EC Taking Transnational Eco – Product Design Regulation One Step Further

BERNHARD KUSCHNIK*

The time for the national implementation of the European Union's ("EU") framework directive promoting the eco-design of energy-using products ("EuP"), which became law in 2005, has just run out. The Member States were required to transpose it into national law by August 11, 2007.¹ Consequently, the United Kingdom enacted Statutory Instrument 2007 No. 2037² and Germany implemented the *Energiebetriebene Produkte Gesetz* – EBPG – (Energy Using Products Act).³

Since the scope of the Energy using Products Directive ("EuP Directive") is widely drawn and targets almost any product that uses an external energy source, including household equipment and computers,⁴ it should have a great regulatory effect both within and outside of the EU. For a better understanding of its implications, the author gives a structural legal analysis of the Directive in the first part of the essay, including references to the relevant provisions dealing with the new regulatory style of implementing measures and self regulations. The second part addresses macro-economic questions and draws connections between the Directive and international competitiveness, the "race to the top", and the legality of international environmental regulation.

INTRODUCTION

In the last years the EU has been particularly busy with EU-wide environmental regulation. As part of its "New Approach" and "Global Approach", which are codified in the "Blue Book", the EU has restricted its focus to the core issue of product regulation for product groups.⁵ Already classic examples are the "Directive on End of Life Vehicles" ("ELV Directive"), the "Waste of Electronic and Electric Equipment Directive" ("WEEE Directive") and the "Restriction on certain Hazardous Substances Directive" ("RoHS Directive"), which currently have major effects on product manufacturing around the world.⁶ Furthermore, the effect of the WEEE and RoHS regulations has extended beyond the EU's boundaries.⁷ Due to the increased importation of electronic waste,⁸ the Chinese government has already adopted a mandatory "China RoHS".⁹ Additionally, Japan has introduced the voluntary JGPSSI (2003) and JEITA (2005) Guidelines¹⁰ whereas California has enacted the "Electronic Waste Recycling Act of 2003"¹¹, commonly referred to as "California RoHS", which prohibits the in-state sale of any

electronic product that would be prohibited from sale in the EU, because of excessive heavy metals levels since January 2007.¹²

The EuP Directive, formally signed by the European Parliament and Council in July 2005,¹³ extends the regulation of energy using products even further.¹⁴ For the sake of effective climate protection, the reduction of health risks and the equalisation of rules within the EU, which is expected to positively influence trade, the Directive's subject matter is widely drawn to apply to almost all products that require energy usage.¹⁵ Comparably, the Directive, as part of the Commission's Integrated Product Policy ("IPP"),¹⁶ covers a wide temporal span of application.¹⁷ Because approximately 80 % of an energy using product's eco-friendliness is already determined in the design stages,¹⁸ the EuP Directive, contrary to the WEEE and RoHS Directives, includes regularising measures which, as part of a preventive approach, range from the first stroke of a product's design to the its recycling (cradle to grave principle).¹⁹ Thus, the Directive does not limit compliance to contemporary environmental standards, but extends its eco-design regulations towards the assessment of a product's complete life-cycle.²⁰ It also leaves the door open for EU member states to create additional legal provisions to require a showing of a quantifiable improvement in the environmental impact of energy using products from one generation to the next.²¹

Although the adoption of the EuP Directive has not yet led to great public awareness, it very likely will have a similar (or even greater) practical impact as the WEEE and RoHS Directives.²² Hence, this essay intends to contribute to a better understanding of the Directive by giving an in depth analysis of its provisions. (pp. 1-3)

... 3. The EuP Directive as an illegal foreign trade barrier or a justified legal tool of regulation?

The new regulatory proceedings of the EU, which are based on the New Approach and Global Approach, have been criticized by Non EU Members as being non-compliant with WTO law.²⁵⁶ In particular, some claim that the EU does not limit its regulation to technical details of standardization but rather extends it to broad public safety requirements.²⁵⁷ This is insofar problematic as at least two WTO agreements – the SPS Agreement²⁵⁸ and the TBT Agreement²⁵⁹ – were designed to prevent countries from enacting technical regulations and/or standards that constitute unnecessary obstacles to international trade.²⁶⁰ If a state or a supra national organization like the EU act contrary to these agreements, their measures might constitute disguised (and illegal) non tariff foreign trade barriers.²⁶¹ For example, the EUs eco-labelling program, which also

has been implemented into the EuP Directive, is based on a ‘life – cycle analysis’, a measure which explicitly covers the way imported products are made.²⁶² As at least one commentator claims, European eco-labelling standards have pressured Brazil, a major exporter of shoes, to change the way its leather goods are produced. This in turn has affected processing standards for hides in Argentina and Uruguay, for whom Brazil is a major export market. Likewise, a number of non-European firms have ‘voluntarily’ adopted ISO 14,000 in order to maintain their access to European markets.²⁶³

*The EU refutes that their broad regulatory approach is in line with the above mentioned agreements and is not in breach with international law, citing the “precautionary principle” as a defence.*²⁶⁴ **The idea at the heart of the precautionary principle is that when human activities may have dramatic damaging effects, decision-makers should not wait for full scientific proof before adopting appropriate protective measures.**²⁶⁵ Yet, the sole reliance on the “precautionary principle” seems to be somewhat shaky... (p. 28)

²⁵⁶ Lawrence A. Kogan, *Unscientific Precaution: Europe’s Campaign to Erect New Foreign Trade Barriers*, WASH. LEGAL FOUND., Working Paper No. 118, 2003 available at <http://www.itssd.org/White%20Papers/WLFKoganArticle2.pdf>.

²⁵⁷ *Id.*

²⁵⁸ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493.

²⁵⁹ Agreement on Technical Barriers to Trade, U.S. -World Trade Org., Apr. 15, 1994.

²⁶⁰ Kogan, *supra* note 256, at 3.

²⁶⁵ Kogan, *supra* note 256, at 3.