

# PRODUCT POLICY AND THE ENVIRONMENT - EC LAW ASPECTS

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outline<sup>1</sup>

## Definitions

Product policy is generally understood to encompass any policy measure, be it of legal nature or not, aimed at influencing the composition and characteristics of movable objects with a view to decreasing their impact on the environment. "Product" may refer to individual chemicals or preparations, finished products, waste, and so on<sup>2</sup>. Definition of product policy. There is no legal definition, but several instruments may be brought under "product policy"

Several types of measures may be brought under the meaning of "product policy". Environmental problems are in principle caused by the intrinsic physical characteristics of products (composition, recyclability) or by the way products are produced. There is, however, no single or agreed definition of product policy, not there is an inventory of environmental problems related to products or even substances which are harmful to the environment. In general, known examples of product policy cover:

- Marketing and/or use restrictions, authorisations and registrations
- Standards and norms
- Testing and substitution requirements
- Economic instruments: taxes, charges, deposits, liability rules
- Selling, distribution and collection/recycling arrangements, such as take-back systems, advertisement restrictions, recycling quotas

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<sup>1</sup> At this stage, it is not the intention of the author to provide an exhaustive description and analysis of all relevant issues falling under the subject of "product policy and the environment - EC law aspects". This outline is intended to provide references and to draw the attention on a number of issues which will be touched upon during the oral presentation on 16 January, with a view to stimulating the discussion of that day.

<sup>2</sup> Definitions of the term "product" are to be found in the Directive on the liability for defective products (85/374/EEC as amended): "all movables even if incorporated into another movable or into an immovable. 'Product' includes electricity"; in the Directive on general product safety (92/59/EEC as amended): "any product - including in the context of providing a service - which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used, or reconditioned". Definition of "substances" and "preparations" are given in Directive 67/548/EEC on the classification labelling and packaging of dangerous substances; the term "waste" is defined in Directive 75/442/EEC on waste as amended.

- Product's information, labelling
- Voluntary restrictions on marketing and use

### **What should be done/can be done in relation to products and the environment (at the EC level)?**

The first logical step would be to identify the problems. If certain substances (e.g. heavy metals), consumer goods (e.g. batteries, electronic appliances, cars) or materials (e.g. PVC) are known to be related to environmental issues, a comprehensive list or substances/materials/products harmful to the environment does not exist. A first list of "pollutants for priority investigation" as well as "second-category pollutants" is to be found in the EEC Council and Member States declaration of 22 November 1973 on the programme of action of the European Communities on the environment<sup>3</sup>, which called for the drawing up of a definitive list of pollutants by mid-1974. Lists of pollutants/problematic products in relation to air, water and pollution by waste are to be found also in the two subsequent action programmes. Over time, the "list approach" was integrated in several legal acts (Examples: Directive. 76/464/EEC on discharge of dangerous substances into the aquatic environment<sup>4</sup>; Directive 84/360/EEC on the combating of air pollution from industrial plants<sup>5</sup>; Directive 96/61EC (IPPC)<sup>6</sup>; Directive 96/62/EC ambient air quality assessment and management<sup>7</sup>). However, depending on the media/problem targeted, the classification/lists used are different. Other approaches have also been used, such as in chemicals legislation (Dir 67/548/EEC<sup>8</sup> and Reg. (EEC) 1993/793<sup>9</sup>) and waste legislation (Dir. 75/442/EEC<sup>10</sup>, 91/689/EEC<sup>11</sup> and Decision 2000/532<sup>12</sup>). A new list of priority substances in the field of water policy, under the framework of Directive 2000/60EC - water framework Directive<sup>13</sup> - has been adopted by the European Parliament and Council in 2001 (Decision 2455/2001<sup>14</sup>). Comparisons and conclusions are therefore very difficult to draw.

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<sup>3</sup> OJ (1973) C 112

<sup>4</sup> OJ (1976) L 129

<sup>5</sup> OJ (1984) L 188

<sup>6</sup> OJ (1996) L 257

<sup>7</sup> OJ (1996) L296

<sup>8</sup> OJ (1967) 196

<sup>9</sup> OJ (1993) L 84

<sup>10</sup> OJ (1991) L 78

<sup>11</sup> OJ (1991) L 377

<sup>12</sup> OJ (2000) L 226

<sup>13</sup> OJ (2000) L 327

<sup>14</sup> OJ (2001) L 331

The approach followed at Community level in defining substances and products in relation to environmental protection is mirrored by the substantial product-related measures which have been adopted or are in the process of being adopted so far.

- a. Substances and preparations (67/548/EEC, 76/769/EEC – COM (2003) 644 of 29.10.2003 - REACH). Specific substances, such as plant production products, Dir. 91/414/EEC<sup>15</sup>, biocides, Dir. 98/8/EC<sup>16</sup>, detergents, Dir. 73/404/EEC<sup>17</sup>; cosmetics, Dir 76/768/EEC<sup>18</sup>; GMOs, Dir 2001/18<sup>19</sup>)
- b. Product-related waste legislation (batteries, Dir. 91/157/CEE<sup>20</sup> and COM (2003) 723 of 21.11.2003; cars, Dir. 2000/53/EC<sup>21</sup>; hazardous substances in electrical and electronic appliances, Dir. 2002/95/EC<sup>22</sup>; packaging, Dir. 94/62/EC<sup>23</sup>; Sewage sludge, Dir 86/278/EEC<sup>24</sup>, [PVC, green paper of 26.7.2000]).
- c. Product-related water legislation (76/464/EEC and C-232/97 *Nederhoff*: a product in contact with water is to be considered a discharge: this limits the scope of application of Dir. 76/769. Similar arguments apply for underground water – Dir. 80/68/EC).
- d. Product-related air-legislation (fuel quality, Dir. 98/70/EC<sup>25</sup> as amended; [+ CO<sub>2</sub> voluntary agreements with ACEA/JAMA/KAMA])
- e. Product-related agricultural legislation (e.g. lead capsules, Reg (EEC) 3280/92<sup>26</sup>, sulphites in wine, Reg. (EEC) 1627/98<sup>27</sup>)
- f. Product-related consumers legislation (toys, Dir. 88/378/EEC<sup>28</sup>; general product safety Directive 2001/95/EC<sup>29</sup> on general product safety: *producers shall be obliged to place only safe products*

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<sup>15</sup> OJ (1991) L 230

<sup>16</sup> OJ (1998) L 123

<sup>17</sup> OJ (1973) L 347

<sup>18</sup> OJ (1976) L 262

<sup>19</sup> OJ (2001) L 106

<sup>20</sup> OJ (1991) L 78

<sup>21</sup> OJ (2000) L 269

<sup>22</sup> OJ (2003) L 37

<sup>23</sup> OJ (1994) L 365

<sup>24</sup> OJ (1986) L 181

<sup>25</sup> OJ (1998) L 350

<sup>26</sup> OJ (1992) L 327

<sup>27</sup> OJ (1998) L 210

<sup>28</sup> OJ (1988) L 187

<sup>29</sup> OJ (2002) L 11

*on the market* – Art 3; product liability 85/374/EEC<sup>30</sup>; can these concepts be extended to cover environmental concerns?)

- g. Product-related workers' protection legislation, Dir 89/391/EEC<sup>31</sup>.
- h. Product-related energy legislation (legal basis 175) (e.g. energy performance of buildings, Dir. 2002/91/EC<sup>32</sup>)
- i. Eco-labelling (Eco-label regulation, n. 1980/2000<sup>33</sup>; labelling of energy products, Dir. 92/75/EEC<sup>34</sup>; car fuel consumption information, Dir. 1999/94/EC<sup>35</sup>)

### Ongoing initiatives

- j. Standardization – New Approach (e.g. Dir 94/62/EC on packaging; EEE)
- k. Mercury strategy (Communication expected summer 2004).
- l. Integrated Product Policy [COM (2001) 68 of 7.2.2001 and COM (2003) 302 of 18.6.2003]
- m. Resource Management [COM (2003) 572 of 1.10.03]
- n. Voluntary agreements [COM(2002) 412 of 17.7.2002; CO2 from cars; PVC?]

### What are the remaining possibilities for Member States for introducing product policy measures?

#### Non regulated sectors

- i. Substantial constraints. Article 25, Articles 28-30 - *pr<sup>36</sup>oportionalit*y discussion from Danish cans<sup>37</sup> to PreussenElektra AG)
- ii. Procedural constraints. Notification obligations (Dir 98/34<sup>38</sup>, Dec. 3052/95<sup>39</sup>). *CIA Security International*<sup>40</sup>, *Unilever*<sup>41</sup>

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<sup>30</sup> OJ (1985) L 210

<sup>31</sup> OJ (1989) L 183

<sup>32</sup> OJ (2003) L 1

<sup>33</sup> OJ (2000) L 237

<sup>34</sup> OJ (1991) L 297

<sup>35</sup> OJ (2000) L 12

<sup>36</sup> C-379/98 (2001) ECR I-2099.

<sup>37</sup> C-302/86, (1988) ECR p. 4607.

<sup>38</sup> OJ (1998) L 204

<sup>39</sup> OJ (1995) L 321

<sup>40</sup> C-194/94 (1996) ECR I -2201

<sup>41</sup> C-443/98 (2000) ECR I-7535

iii. Article 90

Regulated sectors

- i. Article 176 (C-203/96 – *Dusseldorp*<sup>42</sup>)
- ii. Article 95(4-8) (interrelations between Member States and EC measures. Examples: Commission Decisions 1999/832 to 835<sup>43</sup> Commission Decision 2003/829/EC<sup>44</sup>; Commission Decision 2004/1/EC<sup>45</sup>);
- iii. Article 37 - no derogation possible (e.g. lead capsules, Reg 3280/92; sulphites in wine, reg. 1627/98)

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<sup>42</sup> C- 203/96 (1998) ECR I-04075

<sup>43</sup> OJ (1999) L 329

<sup>44</sup> OJ (2003) L 311

<sup>45</sup> OJ (2004) L 1