



Robert Schuman

*EU Environmental Law:
From Absence (1957)
to Sustainable Development (1992)
to Corporate Social Responsibility (2004)*

- Don C. Smith



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*EU Environmental Law:
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to Corporate Social Responsibility (2004)^ψ*

Introduction

While much global environmental leadership has traditionally originated in the United States, that is not necessarily the case today. In many instances that leadership has been assumed by the European Union, which has forged ahead on matters of environmental leadership. David J. Vogel, a University of California professor studying business and environmental regulation in the EU and U.S., has said, “If you compare EU [environmental] policy now, it looks a lot like America in the 1970s. In this new generation of environmental issues the EU is moving quite aggressively, while U.S. policy is stalemated.”¹

This leadership has, and will continue to, impact businesses all around the world not least of which are located in the U.S. In this regard, the EU has been characterized as having some of the most progressive,² strongest, and innovative³ environmental policies in the world. Moreover, the EU has been the leading proponent of international environmental measures such as the effort to reduce global warming. In summary, EU environmental policy has become “one of the best known aspects of the EU.”⁴

As a lawyer representing clients and interested parties who are either thinking about doing business in the EU, are already there,⁵ or are looking to expand there, it is not a question of whether EU environmental policy is right or wrong—it is simply a matter of understanding what is going on in the EU in order to effectively represent clients’ interests. This is more important today than ever before bearing in mind EU efforts in the context of promoting sustainable development.⁶ (For the purposes of this paper, the phrase “sustainable development” means meeting “the needs of the present without compromising the ability of future generations to meet

^ψ Paper presented at Conference, “European Union: Legal Developments” organized by the European Commission, University of Miami School of Law and Florida International University College of Law. February 20-21, 2004. Miami, Florida.

¹ Samuel Loewenberg, *Europe Gets Tougher on U.S. Companies*, N.Y. TIMES, 20 April 2003.

² Andrew Jordan, *Introduction: European Union Environmental Policy—Actors, Institutions, and Policy Processes*, in ENVIRONMENTAL POLICY IN THE EUROPEAN UNION 1 (Andrew Jordan ed., 2002).

³ Regina S. Axelrod and Norman Vig, The European Union as an Environmental Governance System, in THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY 72 (Norman J. Vig and Regina S. Axelrod eds., 1999).

⁴ Ken Collins, *Foreward*, MANUAL OF ENVIRONMENTAL POLICY: THE EU AND BRITAIN ix (Nigel Haigh ed., 2003).

⁵ In 1999, Europe purchased \$4 billion worth of goods made in Florida. THE UNITED STATES & EUROPE: JOBS, INVESTMENT & TRADE (European-American Business Council, 7th ed., 2001).

⁶ Don C. Smith and Malcolm Fergusson, *Sustainable Development Policy Implementation in the European Union*, ABA SECTION OF ENVIRONMENT, ENERGY, AND NATURAL RESOURCES CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT COMMITTEE NEWSLETTER 13 (June 2002).

their own needs.”⁷ In more practical terms “it means creating the conditions for long-term economic development with due respect for the environment”).⁸

This paper will consider EU environmental policy from several perspectives. First, in Section II a brief history of the evolution of the policy will be presented. In Section III the legal bases of the policy are identified. Section IV examines several key pieces of law that U.S. lawyers need to be aware of while Section V. focuses on future initiatives including proposed legislation. Section VI considers several upcoming issues deserving attention, Section VII provides concluding thoughts, and Section VIII includes a list of key EU resources.

Evolution of EU Environmental and Sustainable Development Policy

Despite the absence of environmental (or for that matter sustainable development) policy from the Treaty of Rome nor the suggestion that there were any limits to the “continuous and balanced expansion” expected to result from the establishment of a common market,⁹ EU policy has evolved to a point where at least in principle protection of the environment is on equal footing with economic development.¹⁰ However that evolution has taken place gradually since the founding of the European Economic Community in 1957.

The years between 1957 and 1972 have been characterized as the “dark ages”¹¹ since the period lacked anything that could be considered an environmental policy.¹² This began to change in 1972 when the heads of state and government declared that the European Community would embark on an environmental policy. Some have suggested that the most important reason for this declaration was not “rising green awareness or the salience of global environmental issues...” but rather that “widely differing national rules on industrial pollution could distort pollution...”¹³

During the course of the 1970s and until the mid-1980s environmental policy was slowly consolidated despite the fact that there was no mention of environmental policy in the EC Treaty. Nevertheless, the European Court of Justice issued various pronouncements reassuring that environmental policy could be undertaken. For example the Court held in 1983 that as one of the European Community’s essential objectives, environmental protection might justify certain limitations on the free movement of goods.¹⁴

⁷ WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE: REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT 8 (1987). This commission was chaired by former Norwegian Prime Minister Gro Harlem Brundtland, thus giving rise to the description the “Brundtland Commission.”

⁸ European Commission, GLOSSARY: INSTITUTIONS, POLICIES, AND ENLARGEMENT OF THE EUROPEAN UNION 65 (2000).

⁹ Nigel Haigh, *Introducing the Concept of Sustainable Development into the Treaties of the European Union*, in THE TRANSITION TO SUSTAINABILITY: THE POLITICS OF AGENDA 21 IN EUROPE 64 (Timothy O’Riordan and Heather Voisey eds., 1998)

¹⁰ Axelrod and Vig, *supra* note 3, at 72.

¹¹ Haigh, *supra* note 9, at 65.

¹² Haigh, *supra* note 9, at 65.

¹³ John Peterson and Elizabeth Bomberg, DECISION-MAKING IN THE EUROPEAN UNION 175 (1999).

¹⁴ Case 240/83, Procureur de la République v. Association de Défense des Brûleurs d’Huiles Usagées [1985] E.C.R. 531.

The Single European Act (SEA),¹⁵ which amended the EC Treaty and came into force July 1, 1987, represented a “watershed”¹⁶ development by providing a legal underpinning for the European Community’s already developing environmental policy. Nevertheless, the SEA did not amend the underlying objectives of the European Community, thus leaving untouched “a continuous and balanced expansion” of economic activities.¹⁷ This was set to change, however, in the Treaty on European Union, signed in February 1992, in which the concept of a “harmonious and balanced development of economic activities, sustainable and non-inflationary growth” became part of the EC Treaty.¹⁸ The final step in the introduction of sustainable development into the EC Treaty took the form of the Treaty of Amsterdam¹⁹ (ToA), which took effect May 1, 1999. While the ToA did not introduce new principles into the environmental or sustainable development fields, it consolidated what had been achieved in earlier treaties. The amended EC Treaty Art. 2 provided:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Article 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, ... sustainable and non-inflationary growth, ..., a high level of protection and improvement of the quality of the environment, the raising of standards of living and quality of life, and economic and social cohesion and solidarity among Member States.²⁰

The ToA required that sustainable development be taken into account in all EU activities,²¹ and it made clear that the overall aim of environmental policy “integration” into other policies was to result in sustainable development.²²

The Treaty of Nice,²³ signed in December 2000, made no major changes to the environmental or sustainable development provisions of the EC Treaty.²⁴ Most recently, the Draft Treaty Creating a Constitution for Europe²⁵ maintained the environmental and sustainable development policy objectives from earlier treaties.²⁶

¹⁵ Single European Act, 29 June 1987, O.J. (L169).

¹⁶ Elizabeth Bomberg, GREEN PARTIES AND POLITICS IN THE EUROPEAN UNION 36 (Routledge, 1998).

¹⁷ Haigh, *supra* note 9, at 64.

¹⁸ EC Treaty Art. 2.

¹⁹ Treaty of Amsterdam, 10 November 1997, O.J. (C 340); for full-text of Treaty of Amsterdam see <http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html>.

²⁰ EC Treaty Art. 2.

²¹ EC Treaty Art. 6.

²² Haigh, *supra* note 9, at 74.

²³ Treaty of Nice, 10 March 2001, O.J. (C 80); for full-text see http://europa.eu.int/eur-lex/en/treaties/dat/nice_treaty_en.pdf.

²⁴ David Wilkinson, Institute for European Environmental Policy, EU’s Treaty of Nice Leaves Environment Provisions Largely Unchanged (Dec. 14, 2000) (unpublished briefing paper, on file with the author).

²⁵ Draft Treaty Establishing a Constitution for Europe, 18 July 2003, O.J. (C 169) 1; for full-text see http://europa.eu.int/eur-lex/en/treaties/dat/nice_treaty_en.pdf.

²⁶ Clare Coffey, The Draft Constitution for Europe: Good News for the Environment? CORPORATE ENVIRONMENTAL STRATEGY: INTERNATIONAL JOURNAL OF CORPORATE SUSTAINABILITY 2-155 (2003); the draft constitution was not agreed in December 2003 European Council meeting and thus remains in abeyance at the date this paper is written.

Legal Bases of EU Environmental and Sustainable Development Policy

The legal bases for EU environmental and sustainable development activities lie in several provisions of the EC Treaty :

- EC Treaty Art. 2 provides in part, “The Community shall have as its task...[the promotion] throughout the Community a harmonious, balanced and sustainable development of economic activities...[as well as] a high level of protection and improvement for the quality of the environment...”²⁷
- EC Treaty Art. 3 provides in part, “...[T]he activities of the Community shall include...a policy in the sphere of the environment...”
- EC Treaty Art. 6 provides, “Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities...in particular with a view to promoting sustainable development.”²⁸

EC Treaty Arts. 174, 175, and 176 provide further explanation of how environmental policy is to be carried out. It is noteworthy that EC Treaty Art. 174 (2) explains that Community environmental policy “shall be based on the precautionary principle and on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”²⁹ The importance of the precautionary principle should be underscored since it provides that “governments should regulate industries when they pose risks to public health and the environment—even before all the data about the threat has been collected,” a policy principle that has left Bush Administration officials exasperated with the EU’s “better-safe-than-sorry approach to regulating everything from corn flakes to chemical plants.”³⁰

Specific EU Laws

The EU has adopted numerous laws promoting environmental protection in the context of sustainable development.³¹ This section will highlight a short list of laws of particular interest to U.S. lawyers.

²⁷ For full-text see http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html#anArt2.

²⁸ For full-text see http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html#anArt6.

²⁹ For full-text see http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html#anArt175.

³⁰ Samuel Loewenberg, *Precaution is for Europeans*, N.Y. TIMES, May 18, 2003. Mr. Loewenberg argues that the precautionary approach has led the EU to effectively ban genetically modified crops and US hormone-treated beef cattle. “But what looks like a question of safety to the Europeans often seems more like protectionism to the United States. The Bush Administration believes the precautionary principle is an unjustified constraint on business and does not even recognize the existence of the doctrine,” he writes.

³¹ For a listing of EU environmental measures, see http://europa.eu.int/eur-lex/en/lif/ind/en_analytical_index_15.html.

Directive on Packaging and Packaging Waste³²

In 1994 the EU passed legislation requiring establishment of waste packaging recycling targets and allocating recycling costs to packaging raw material suppliers, packaging manufacturers, and producers, distributors, and retailers of packaged goods—but not taxpayers or customers. The directive, which applied to any material used in the “containment, protection, handling, delivery and presentation of goods” covered three types of packaging: primary or sales packaging generally acquired by the consumer; secondary packaging, which is typically separated at the sales point by the retailer; and packing used in transport and to secure products in bulk.³³

The legislation originally established minimum—at least 25 percent—as well as maximum—65 percent—recycling targets (to be met within five years), the latter being predicated on requiring those Member States to have facilities to use their recycled products.³⁴ In December 2003, agreement was reached by the European Parliament and Council conciliation committee to increase minimum recycling standards for packaging waste from 25 to 55 percent³⁵ by 2008. The new directive, which also calls for recovery of 65 percent of waste packaging,³⁶ is likely to enter into force in spring 2004 and be transposed in Member State laws by fall 2005.³⁷

The directive is a good example of the EU “diffusing the relatively stringent state standards of some Member States [e.g., Germany] throughout Europe. Moreover, the decrease in some state standards as a result of the 1994 directive was modest.”³⁸

Directive on End-of-Life Vehicles³⁹

This directive, adopted in 2000, is aimed at reducing waste associated with the disposal of end-of-life vehicles.⁴⁰ It calls for automakers by 2006 to recycle or reuse 85 percent of an end-of-life automobile’s weight increasing to 95 percent by 2015. In addition, the directive requires

³² European Parliament and Council Directive 94/62/EC of 20 December 1994 on Packaging and Packaging Waste 1994 O.J. (L 365) 10; http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31994L0062&model=guichett; further explanation about the legislation can be found at <http://europa.eu.int/scadplus/leg/en/lvb/l21207.htm>.

³³ MANUAL OF ENVIRONMENTAL POLICY: THE EU AND BRITAIN 5.8-1,2 (Nigel Haigh ed., 2003).

³⁴ David Vogel, Michael Toffel, and Diahanna Post, *Environmental Federalism in the European Union and the United States*, in HANDBOOK OF GLOBALIZATION AND ENVIRONMENTAL POLICY: INTERVENTIONS OF NATIONAL GOVERNMENT IN A GLOBAL ARENA (Frank Wigen ed., to be published in 2004); it should be noted, however, that Greece, Ireland, and Portugal were given slightly lower targets.

³⁵ European Commission, Packaging Waste: Recycling Will be More Than Doubled, IP/03/1671 (2003); see http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1671|0|RAPID&lg=EN&display=

³⁶ *Fierce Indignation Over EU Packaging Law Deal*, ENDS DAILY (5 December 2003).

³⁷ European Commission, *supra* note 35.

³⁸ David Vogel, Michael Toffel, and Diahanna Post, *supra* note 34.

³⁹ European Parliament and Council Directive 2000/53/EC of 18 September 2000 on End-of-Life Vehicles 2000 O.J. (L 269) 34; full text can be found at http://europa.eu.int/lex/pri/en/oj/dat/2000/l_269/l_26920001021en00340042.pdf; further information can be found at <http://europa.eu.int/scadplus/leg/en/lvb/l21225.htm>.

⁴⁰ MANUAL OF ENVIRONMENTAL POLICY: THE EU AND BRITAIN, *supra* note 33, at 5.12-1.

manufacturers to provide billions of euros to recycle pre-2002 cars while allowing cars built after 2002 to include a tax to fund the recycling effort.⁴¹

Directive on Waste Electrical and Electronic Equipment (WEEE)⁴²

In 1999 Florida businesses exported nearly \$525 million in electronic and electrical equipment goods to Europe.⁴³ Consequently (and assuming that number is even higher today) new legislation involving electrical and electronic waste equipment is likely to be of significant interest to those Florida businesses producing these types of goods.

In 2003 the EU adopted legislation, which must be transposed by Member States from 13 August 2004, mandating all Member States require manufacturers of a wide variety of electronic and electrical products to be responsible for the waste management and recycling costs of end-of-life products. This problem has been considered particularly vexing since an estimated 90 percent of this type of waste has historically been put in landfills or incinerated⁴⁴ and each European produces on average around 14 kilograms (about 31 pounds) per year of these wastes.⁴⁵ The European Commission's explanatory memo that accompanied the original proposal sheds light on the rationale for this approach:

Producers should take the responsibility for certain phases of the waste management of their products. This financial or physical responsibility creates an economic incentive for producers to adapt the design of their products to the prerequisites of sound waste management. Producers of electrical and electronic equipment design the product, determine its specifications and select its materials. Only producers can develop approaches to the design and manufacture of their products to ensure the longest possible product life and, in the event that it is scrapped, the best methods of recovery and disposal.⁴⁶

The law (along with the Restrictions of Hazardous Substances Directive—RoHS—explained below) has been characterized as “probably the most onerous legislation computer manufacturers and owners have faced.”⁴⁷ Specifically, the measure

⁴¹ Michael W. Toffel, *Closing the Loop: Product Take-Back Regulations and Their Strategic Implications*, CORPORATE ENVIRONMENTAL STRATEGY: INTERNATIONAL JOURNAL OF CORPORATE SUSTAINABILITY 2-162 (2003).

⁴² European Parliament and Council Directive 2002/96/EC of 27 January 2003 on Waste Electrical and Electronic Equipment 2003 O.J. (L 37) 24; http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_037/l_03720030213en00240038.pdf; an explanation of the legislation can be found at <http://europa.eu.int/scadplus/leg/en/lvb/l21210.htm>.

⁴³ THE UNITED STATES & EUROPE: JOBS, INVESTMENT & TRADE (European-American Business Council, 7th ed., 2001).

⁴⁴ European Commission, Commission Welcomes European Parliament Vote on Waste Electrical Equipment and the Restriction of Hazardous Substances IP/02/537 (10 April 2002).

⁴⁵ European Commission, Commission Welcomes Agreement on Waste Electrical and Electronic Equipment and the Restriction of Hazardous Substances IP/02/1463 (11 October 2002).

⁴⁶ European Commission, Explanatory Memorandum of 13 June 2000 to the Proposal for a Directive of the European Parliament and of the Council on Waste Electrical and Electronic Equipment and Proposal for a Directive of the European Parliament and of the Council on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment, COM(2000) 347 Final; see http://europa.eu.int/eur-lex/en/com/pdf/2000/en_500PC0347_02.pdf.

⁴⁷ *Dangerous Materials—And the Rules to Control Them*, FINANCIAL TIMES (4 Feb. 2004).

provides that manufacturers must recycle equipment bought before 2005. After that date, responsibility may be shared with end consumers.⁴⁸ In addition, product manufacturers are responsible for transporting the end-of-life products to treatment sites from collection points set up for household products.⁴⁹ The law requires that by 2006 Member State governments achieve a four kilogram per person collection of waste average, a 50 to 80 percent recycling rate and between 70 and 80 percent recovery of waste.⁵⁰ Finally, to ensure that potential “orphan waste” is covered, there is a requirement that producers establish a “financial guarantee” when a new product is brought to market.⁵¹

The WEEE and RoHS directives are likely to have effect beyond the EU and could very well “change the way computers are made around the globe.”⁵² For starters a company that follows trends in the technology industry has estimated that it may cost as much as \$50 per unit to recycle PCs.⁵³ On the other hand, perhaps the biggest impact of the WEEE could be the sudden rise in environmental concern by PC makers. For example, Hewlett-Packard chief Carly Fiorina has ordered the company’s engineers to re-examine how PCs are made with the aim of reducing environmental impacts,⁵⁴ a development very much like what the EU had in mind. As Margot Wallström, Environment Commissioner, has said, “This [legislation] will be an important incentive to producers to take the environmental consequences into account already when they stand around the design table.”⁵⁵

*Directive on Restriction of Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS)*⁵⁶

Florida businesses exported to the EU \$691 million in computer equipment and industrial machinery in 1999.⁵⁷ As such new EU legislation restricting hazardous substances in electronic and electrical equipment needs to be understood by Florida businesses operating in this sector.

The RoHS 2003 legislation prohibits certain chemicals including mercury, lead, and other heavy metals⁵⁸ from being used in electrical and electronic equipment beginning 1 July 2006, thus marking a major change for the computer industry in particular since personal computer components generally incorporate substantial amounts of hazardous substances.⁵⁹ One estimate

⁴⁸ *Id.*

⁴⁹ Michael W. Toffel, *supra* note 41, at 2-165.

⁵⁰ *New EU States to Get Two Years’ Grace on WEEE*, ENDS ENVIRONMENT DAILY (11 Feb. 2004).

⁵¹ MANUAL OF ENVIRONMENTAL POLICY: THE EU AND BRITAIN, *supra* note 33, at 5.14-4.

⁵² Fiona Harvey, *PC Makers Set to Face Costs of Recycling*, FINANCIAL TIMES (4 Feb. 2004).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵

⁵⁶ European Parliament and Council Directive 2002/95/EC of 27 January 2003 on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment 2003 O.J. (L 37) 19; http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_037/l_03720030213en00190023.pdf.

⁵⁷ THE UNITED STATES & EUROPE: JOBS, INVESTMENT & TRADE, *supra* note 43.

⁵⁸ European Parliament and Council Directive 2002/95/EC of 27 January 2003 on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment 2003 O.J. (L 37) Article 4; http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_037/l_03720030213en00190023.pdf.

⁵⁹ Fiona Harvey, *supra* note 52.

suggests that the cost of replacing these hazardous substances with other substances may cost \$10 per PC.⁶⁰

*Climate Change: Decision Concerning the Approval, on behalf of the European Community, of the Kyoto Protocol to the UN Framework Convention on Climate Change;*⁶¹ *Directive on Establishing a Scheme for Greenhouse Gas Emission Trading Within the Community*⁶²

The EU as well as Member States have been active in the effort to mitigate climate change.⁶³ The Kyoto Protocol to the UN Framework Convention on Climate Change⁶⁴ was ratified by the EU and its Member States on 31 May 2002.⁶⁵ Under the terms of the protocol, the EU committed to reducing its greenhouse gas emissions by eight percent between 1990 and 2008-2012.⁶⁶ As part of this effort, the EU approved an emissions trading scheme on 22 July 2003.⁶⁷ Under the scheme, which will begin in 2005 and involve about 10,000 power plants, oil refineries, paper mills, glass and cement operations, and steel factories, Member States will establish carbon dioxide limits and issue allowances as to how much companies are permitted to emit. Companies reducing emissions below the limits will be able to trade their allowances.⁶⁸

The scheme has been described as “one of the most far-reaching environmental policies that industry has ever seen.”⁶⁹ As a result, experts are advising that businesses required to make substantial reductions by 2008 need to undertake planning now since the failure to meet reduction limits will subject companies to higher costs either through fines or the need to buy additional emission permits.⁷⁰

Future Initiatives

There are two initiatives now under consideration that merit attention. One involves a major change in EU chemicals policy while the other deals with a major new topic, corporate social responsibility.

⁶⁰ Fiona Harvey, *supra* note 52.

⁶¹ Council Decision of 25 April 2002 on the Approval, on Behalf of the European Community, of the Kyoto Protocol to the UN Framework Convention on Climate Change and the Joint Fulfillment of Commitments Thereunder 2002 O.J. (L 130) 1; http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_130/l_13020020515en00010020.pdf.

⁶² European Parliament and Council Directive 2003/87/EC of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading Within the Community and Amending Council Directive 96/61/EC 2003 O.J. (L 275) 32; http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_275/l_27520031025en00320046.pdf.

⁶³ David Vogel, Michael Toffel, and Diahanna Post, *supra* note 34.

⁶⁴ See <http://unfccc.int/>.

⁶⁵ European Commission, European Union Ratifies the Kyoto Protocol IP/02/794; http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/794|0|AGED&lg=EN&display=

⁶⁶ European Commission, European Commission Stands Behind the Kyoto Protocol IP/03/1747; http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1747|0|RAPID&lg=EN&display=

⁶⁷ European Commission, Commission Welcomes Final Adoption by Council of Emissions Trading Directive IP/03/1073; http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1077|0|AGED&lg=EN&display=

⁶⁸ European Commission, Kyoto Protocol MEMO/03/154; http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/154|0|AGED&lg=EN&display=

⁶⁹ Vanessa Houlder, *European Initiative Could be World Trend-Setter*, FINANCIAL TIMES (16 Oct. 2003).

⁷⁰ *Id.*

Registration, Evaluation, Authorization, and Restriction of Chemicals (REACH)⁷¹

In October 2003, the European Commission presented a proposal—which some have called “arguably the most significant piece of European environmental legislation for business in decades”⁷²—for a new EU regulatory framework for chemicals. Among other things, the proposal would “radically shift the burden of responsibility for assessing and managing chemical safety onto industry.”⁷³

The proposal, as currently written, would work in this manner:⁷⁴

- Importers and producers of more than one ton of a chemical they wanted to market would be required to register the chemical.
- Registration documents would include background on the “intrinsic properties and hazards of substances.”
- Chemicals clearly established as posing “unacceptable risks” would be banned or restricted.
- Hazardous chemicals would need “special authorization” before use.

Industry has had decidedly guarded reactions to the measure, which may involve testing 30,000 chemicals many of which have been in circulation for years. For example, industry estimates that implementation of the measure may cost more than \$7 billion.⁷⁵ Viewed from another perspective, the American Chemistry Council, a major trade group, characterized an earlier draft measure that is very close to the one actually proposed as reflecting the EU’s desire to “eliminate all risks from daily life.”⁷⁶

Corporate Social Responsibility

A topic of growing interest in the EU relates to “corporate social responsibility” (CSR), which the European Commission has defined as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”⁷⁷ In July 2002 the European Commission adopted a new

⁷¹ Commission proposal for a Regulation of the European Parliament and of the Council concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), establishing a European Chemicals Agency and amending Directive 1999/45/EC and Regulation (EC) {on Persistent Organic Pollutants} and a proposal for a Directive of the European Parliament and of the Council amending Council Directive 67/548/EEC in order to adapt it to Regulation (EC) of the European Parliament and of the Council concerning the registration, evaluation, authorization and restriction of chemicals of 29 October 2003 COM (2003) 644 Final; http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0644en.html.

⁷² *Reach: An Awkward Political Balancing Act*, ENDS ENVIRONMENT DAILY (29 Oct. 2003).

⁷³ *New EU Chemicals Plan Reaches Light of Day*, ENDS ENVIRONMENT DAILY (29 Oct. 2003).

⁷⁴ *A Bird’s Eye View of the Reach Regulation*, ENDS ENVIRONMENT DAILY (29 Oct. 2003).

⁷⁵ Samuel Loewenberg, *supra* note 1.

⁷⁶ Samuel Loewenberg, *Precaution is for Europeans*, N.Y. TIMES (18 May 2003).

⁷⁷ Commission Communication of July 2, 2002 Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development COM (2002) 347 Final; <http://europa.eu.int/eur->

strategy to “take forward the contribution of business to sustainable development.”⁷⁸ The rationale for the strategy, which envisions a voluntary program for companies, was explained as follows:

Many aspects of the business case [for CSR] are intuitive and relate to increased employee retention and motivation, better productivity, better relations with local communities and key stakeholders such as customers, business partners, and consumers. A business model integrating CSR can also be a source of innovation driven by quality, new commercial opportunities, competitive advantage, and a better brand image.⁷⁹

Subsequent to the announcement of the European Commission’s new strategy, the EU Multistakeholder Forum on CSR was established in October 2002.⁸⁰ The forum’s primary objectives are to improve knowledge about “the relationship between CSR and sustainable development (including its impact on competitiveness, social cohesion and environmental protection)” and explore “the appropriateness of establishing common guiding principles for CSR practices and instruments, taking into account existing EU initiatives and legislation and internationally agreed instruments such as OECD Guidelines for multinational enterprises, Council of Europe Social Charter, ILO core labor conventions and the International Bill of Human Rights.”⁸¹

Since the autumn of 2002, several EU developments have taken place:

- The Council adopted a resolution dated 6 Feb. 2003 welcoming the “voluntary” nature of what the Commission had proposed as well as supporting the Commission’s intent to integrate CSR into community policies.⁸²
- The Parliament in mid-May 2003 adopted a report⁸³ by Rapporteur Philip Bushill-Matthews calling for support of the Commission’s CSR efforts.⁸⁴
- The Multistakeholder Forum, in November 2003 at the halfway point of its tenure, remained divided on whether the EU should seek a voluntary or mandatory approach for CSR.⁸⁵

[lex/en/com/cnc/2002/com2002_0347en01.pdf](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/985|0|AGED&lg=EN&display=lex/en/com/cnc/2002/com2002_0347en01.pdf); http://europa.eu.int/comm/employment_social/social/csr/csr2002_col_en.pdf.

⁷⁸ European Commission, Corporate Social Responsibility: New Commission Strategy to Promote Business Contribution to Sustainable Development IP/02/985 (2 July 2002);

http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/985|0|AGED&lg=EN&display=

⁷⁹ *Id.*

⁸⁰ EU Multistakeholder Forum on CSR;

http://forum.europa.eu.int/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/csr%20ems%20forum.htm

⁸¹ *Id.*

⁸² Council Resolution of 6 February 2003 on Corporate Social Responsibility 2003 O.J. (C 39) 02;

http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/c_039/c_03920030218en00030004.pdf.

⁸³ European Parliament Report on 28 April 2003 on the Communication From the Commission Concerning Corporate Social Responsibility A5-0133/2003 Final; http://europa.eu.int/comm/employment_social/social/csr/sipade2.pdf.

⁸⁴ *European Parliament Plenary Round-Up*, ENDS ENVIRONMENT DAILY (14 May 2003).

Outside of Brussels, other related developments are also unfolding:

- In 2003 France implemented a decree mandating all listed companies report social and environmental information in annual reports.⁸⁶
- In August 2003 the Council of Bars and Law Societies of the European Union (CCBE), which represents more than 500,000 European attorneys through national bars and law societies, published CSR guidelines for European lawyers. According to the guidelines while responsibility for providing advice on CSR issues has not always been considered appropriate for the legal profession this should change. “Law is the codification of basic human values. The goal of CSR is to implement these values in corporations, thus CSR develops and functions in a legal framework. There is no other professional who both has such ready access to EU boardrooms, and enjoys legal privilege. As a result, advising on CSR matters should become an everyday matter for corporate lawyers.”⁸⁷
- In January 2004 U.K. charity Christian Aid released a report arguing that CSR is “unable to deliver on its grand promises” thus risking being “merely a branch of [public relations]” for businesses aiming to improve their image. Consequently, the group said “binding national standards” are necessary for CSR to fulfill its full potential.⁸⁸
- Also, in January 2004 Marilyn Carlson Nelson, chair and chief executive officer of Carlson Companies USA told the World Economic Forum that the phenomenon of investors factoring in a corporation’s CSR activities in investment decisions “has taken hold particularly in Europe and will, I believe, become of increasing important to mainstream investors in the U.S. and the rest of the world.”⁸⁹

Related Issues Worth Following

Environmental policy making is always subject to change or revision depending on the individuals and events at play at any particular time. Several issues worth bearing in mind in this regard are:

⁸⁵ *European CSR Forum Reaches Mid-Point*, ENDS ENVIRONMENT DAILY (20 Nov. 2003).

⁸⁶ *French Companies Required to Report on Sustainability Issues Beginning in 2003*, CORPORATE ENVIRONMENTAL STRATEGY: INTERNATIONAL JOURNAL OF CORPORATE SUSTAINABILITY 7-13 (2003).

⁸⁷ Council of Bars and Law Societies of the European Union, CORPORATE SOCIAL RESPONSIBILITY AND THE ROLE OF THE LEGAL PROFESSION: A GUIDE FOR EUROPEAN LAWYERS ADVISING ON CORPORATE SOCIAL RESPONSIBILITY ISSUES (Sept. 2003).

⁸⁸ *Charity Calls for Binding CSR Rules*, ENDS ENVIRONMENT DAILY (23 Jan. 2004)

⁸⁹ *Nearly Three-Fourths of CEOs See Increasing Interest in Corporate Citizenship*, CORPORATE ENVIRONMENTAL STRATEGY: INTERNATIONAL JOURNAL OF CORPORATE SUSTAINABILITY 7-2 (2003).

- Elections to the European Parliament take place in June. The Green Party, which currently controls 7.8 percent of the parliament's seats and aggressively promotes "green" issues, is likely to see that influence decrease with the arrival of new members of parliament from accession countries in Central and Eastern Europe where few, and perhaps no, Green members of Parliament will be elected.⁹⁰
- A new European Commission will take office beginning this autumn. The eventual make up of the personalities on the Commission will shed light on the relative importance of the Environment Commissioner in relation to his/her other Commissioners.
- Pascal Lamy, European Trade Commissioner, is studying a proposal calling for WTO trade rules to be amended to allow countries to curb imports from other countries not meeting the former's "collective preferences" on issues such as environmental policy.⁹¹
- Despite the EU's insistence that it stands squarely behind its Kyoto Protocol greenhouse gas emissions reduction targets, at least one Brussels official, Loyola de Palacio, European Energy Commissioner, has speculated that the EU may need an "alternative plan" regarding the reduction targets if Kyoto does not ultimately come into effect.⁹²
- The status of new genetically modified foods entering the EU remains unclear despite Commission assurances to Washington that the de facto six-year moratorium is set to end. On Feb. 18, a proposal to allow importing and processing of a genetically modified corn developed by U.S. industrial giant Monsanto was rejected by a committee of national representatives.⁹³ The proposal now heads for the Council, which has three months to accept or reject the proposal. If the Council fails to act, the proposal will be referred to the Commission.⁹⁴ Monsanto, in surely what can be characterized as understatement, said the failure to win a positive decision was disappointing.⁹⁵

Conclusion

Despite the halcyon days of the 1970s and 1980s when the U.S. enacted major pieces of environmental legislation and much of the world followed simply its lead, America no longer leads on many environmental policy fronts. Rather since the 1990s, and particularly so today, the EU has picked up the leadership mantle from the U.S. in many areas that are key to businesses—American or otherwise.

The reasons for the growing EU influence in environmental and sustainable development policies can be attributed to a number of factors. Clearly the provisions of the EC Treaty make clear that environment and sustainable development are priority matters. Bearing this in mind,

⁹⁰ *Greens Fear Enlargement Loss*, EUOBSERVER.COM (16 Feb. 2004); <http://www.euobserver.com/index.phtml?aid=14500>.

⁹¹ Guy de Jonquières, *Lamy Studies Radical Idea for Imports Veto*, FINANCIAL TIMES (6 Feb. 2004).

⁹² Joshua Levitt and George Parker, *EU Commissioner Under Attack on Kyoto*, FINANCIAL TIMES (17 Feb. 2004).

⁹³ *Ministers to Get More GM Food for Thought*, ENDS ENVIRONMENT DAILY (18 Feb. 2004).

⁹⁴ *Id.*

⁹⁵ *Divided EU Fails to Lift Biotech Crop Ban*, N.Y. TIMES (18 Feb. 2004).

Member States with “green” political leanings have successfully persuaded the EU to adopt legislation that, in general, strengthens environmental standards. In addition, the European Commission has committed itself as an institution to improved environmental quality. The European Parliament, which has groups inclined to support environmental and sustainable development issues, has garnered more power and influence through successive treaty revisions. And finally, environmental non government organizations have been effective in keeping environmental and sustainable development issues in full public view. Put simply, the EU has generally worked to raise environmental standards rather than reduce them.⁹⁶

As a consequence, it behooves American lawyers and law students to be aware of what is happening in the EU in terms of environmental and sustainable development law, proposed legislation, and significant activities and events. This is not to say that the U.S. has completely abandoned its leadership role or that the EU is now destined to lead forever more. But it is to say that being aware of what is happening in the EU, and what it may mean for those you represent, has become significantly more important.

Most businesses today aim to identify and manage risk to the degree possible. In the context of EU environmental and sustainable development initiatives, American businesses are indeed taking potentially huge risks if they fail to consider how EU initiatives may impact their business-as-usual practices.

Perhaps the clearest indication of this — at least from a legal professional’s perspective — is the Council of Bars and Law Societies of the European Union pronouncement regarding the rising importance of CSR:

CSR has increased in recent years as a result of the recognition of the essential contribution of business to social, environmental, and human rights progress, and because of pressure from consumers, investors, employers, governments, [non government organizations], and public opinion. A growing number of businesses already have CSR as a priority in their agendas. It is the lawyers’ role to assist their clients in positioning their business successfully in this new legal landscape.⁹⁷

⁹⁶ David Vogel, Michael Toffel, and Diahanna Post, *supra* note 34, at 18.

⁹⁷ Council of Bars and Law Societies of the European Union, *supra* note 87, at 13.

Key Resources

Books

- MANUAL OF ENVIRONMENTAL POLICY: THE EU AND BRITAIN (Nigel Haigh ed., 2003).
- Michael Decleris, THE LAW OF SUSTAINABLE DEVELOPMENT: GENERAL PRINCIPLES (European Commission, 2000); for full-text see <http://europa.eu.int/comm/environment/law/sustlaw.pdf>.

Journals

- BNA International Environment Reporter; <http://www.bna.com/products/ens/iner.htm>
- EUROPEAN ENVIRONMENTAL LAW REVIEW;
<http://www.kluwerlawonline.com/toc.php?mode=byjournal&level=2&values=European+Environmental+Law+Review>

News Services

- ENDS ENVIRONMENT DAILY; <http://www.environmentdaily.com/articles/>
- EurActiv.com; <http://www.euractiv.com/cgi-bin/cgint.exe?1&1000=1&tmpl=index>

Websites

- European Commission Directorate General Employment and Social Affairs Corporate Social Responsibility; http://europa.eu.int/comm/employment_social/soc-dial/csr/csr_index.htm
- European Commission Directorate General Environment Sustainable Development; <http://europa.eu.int/comm/environment/eussd/index.htm>
- European Commission Directorate General Trade Corporate Social Responsibility; http://europa.eu.int/comm/trade/issues/global/csr/index_en.htm
- European Commission Enterprise Directorate General Corporate Social Responsibility; <http://europa.eu.int/comm/enterprise/csr/index.htm>