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The EU's Ecodesign Directive: Do Expanded Anti-Circumvention Regulations Portend a New Frontier in Defeat Device Enforcement?

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Key Takeaways

- **What Happened:** Earlier this year, the European Commission adopted a series of amendments that expanded the scope of anti-circumvention provisions to ecodesign regulations for a number of product categories. Both the European Union (EU) Ecodesign Directive and the U.S. Appliance and Equipment Standards Program prohibit using defeat devices to circumvent prescribed test procedures to misrepresent a product's actual energy or water performance.
- **Who Should Care:** Manufacturers, importers, and authorized representatives who place covered products into the U.S. or EU markets. Products subject to regulation include external power supplies, dishwashers, washing machines, washer dryers, refrigerators, and freezers.
- **What To Do in Response:** Manufacturers, importers, and authorized representatives of covered products should assess their product development and certification processes to ensure they are adequately designed to diminish the likelihood of circumvention.

The EU's Ecodesign Directive and Its Anti-Circumvention Provisions

As part of its strategy to mitigate climate change, in 2007 the EU set a target of a 20 percent increase of energy efficiency in products, as compared to 2007 levels, by 2020. In 2018, the EU established the energy efficiency target for 2030 to a 23.5 percent increase compared to 2007 levels.

To accomplish these goals, in 2009 the EU issued an Ecodesign Directive that established a framework with which manufacturers of domestic, commercial, and industrial energy-consuming products must comply. The framework aims to reduce the amount of energy consumed by these

products. Over time, the Directive evolved to encompass not only energy-using products but also energy-related products and components as well.

The European Commission (EC) developed product-specific regulations that specify ecodesign requirements for the following:

- Servers and data storage devices;
- Electric motors and variable speed drives;
- Refrigerating appliances;
- Products with light sources and separate control gears;
- Products containing electronic displays;
- Household dishwashers;
- Household washing machines and household washer-dryers; and
- Professional refrigerated storage cabinets, blast cabinets, condensing units and process chillers.

The EC also developed and implemented regulations regarding standby, network standby, and off mode power consumption. These ecodesign regulations all include energy efficiency standards in addition to other measures. To ensure compliance throughout the EU, the EC established verification procedures, and Member States are responsible for establishing mechanisms for market surveillance and enforcement.

The standard EU anti-circumvention provisions impose liability on the manufacturer and importer for placing into the market a product designed with a defeat device, regardless of whether that defeat device was deliberate. Also referred to as defeat devices or cheat devices, software that misleads the regulators and consumers of a product's real-world performance by changing its performance specifically during a test of its standards is prohibited. In this regard, specific articles prevent introducing into the market products containing such defeat devices that are designed to circumvent energy and performance standards by detecting testing conditions and automatically altering the performance.

The latest amendments expand the scope of liability for selling defeat device-containing products. Whereas the majority of the prior regulations prohibited manufacturers and importers for placing into the market products designed to circumvent performance standards, the amendments now authorize imposing liability on authorized representatives too, as exemplified by the following:

The manufacturer, importer or authorised representative shall not place on the market products designed to be able to detect they are being tested (e.g. by recognising the test conditions or test cycle), and to react specifically by automatically altering their performance during the test with the aim of reaching a more favourable level for any of the parameters declared by the manufacturer, importer or authorised representative in the technical documentation or included in any of the documentation provided.

The amendments also address software updates in that they may not change a product's performance in a way that circumvents its energy and performance ecodesign requirements.

United States Appliance and Equipment Standards Program

In the United States, the Department of Energy (DOE) established a national program pursuant to the Energy Policy and Conservation Act to continuously improve energy and water conservation and performance standards for energy-consuming products. Covered products may not be distributed in commerce in the United States unless and until they have been tested and certified as compliant with applicable efficiency standards. Among other prohibitions and restrictions, manufacturers are prohibited from the "[d]eliberate use of controls or features…to circumvent the requirements of a test procedure and produce test results that are unrepresentative of a product's energy or water consumption…." 10 C.F.R. § 429.102(a)(3). The failure of manufacturers to meet required standards has led to numerous enforcement actions with penalties into the millions of dollars.

Compliance and Enforcement Risks

Manufacturers and importers of covered appliances, electronics, lighting, and other equipment can expect an increased focus by regulators on circumvention of energy efficiency standards and test procedures, both in the U.S. and EU. The constant tightening of efficiency requirements, and the resulting compliance pressure placed on manufacturers, coupled with the increased prevalence of sophisticated technology offering "smart" options and settings, raise the prospect that anti-circumvention enforcement will rise in the coming years. The Biden Administration has already signaled that it will place a renewed focus on energy and water efficiency, and the anti-circumvention provision could prove a powerful enforcement tool for DOE to use going forward.

As we highlighted in a prior alert, Stopping Aftermarket Defeat Devices for Vehicle and Engines is one of EPA's National Compliance Initiatives for FY 2020-2023. At the same time, EPA recently updated its enforcement policy for tampering and defeat devices. This comes on the heels of increased automotive defeat device enforcement, most notably with the Volkswagen "Clean Diesel" emissions proceedings. The Biden Administration may very well take its lessons learned in the mobile source arena and apply them to anti-circumvention enforcement in the energy-efficiency products space.

Notably, the EU anti-circumvention provisions impose broader liability than its U.S. counterpart does. The DOE regulation seemingly only applies to the manufacturer and prohibits the *deliberate* use of a defeat device. The EU anti-circumvention provisions not only apply to the importer and authorized representative, but also impose liability on the manufacturer, importer, and authorized representative for placing into the market a product designed with a defeat device, regardless of whether that defeat device was deliberate. Thus, in short, the compliance risks posed by U.S. and EU anti-circumvention regulations are significant, and entities should assess their product development and certification processes to ensure they are adequately designed to diminish the likelihood of circumvention.

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