Key Legal and Regulatory Information for Korean Companies Doing Business in the European Union

Creating Opportunities through the Korea-EU Free Trade Agreement

2012

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On July 1, 2012, the Korea-EU Free Trade Agreement reached its first anniversary. The Agreement created a plethora of new opportunities for both Korean and European businesses to profit from. It does not only eliminate duties on trade in goods, but it also goes further to cover a wide range of other areas of business interests such as services, investment, government procurement, intellectual property rights, and transparency in regulations.

The current global economic crisis makes it very important for Korean businesses in the EU to take advantage of the opportunities offered by the FTA. In the midst of the economic crisis, we witnessed a slight decrease in the two-way trade volume. However, the trade volume of goods covered by the FTA has increased significantly in both Korea and the EU. Taking into consideration the observations from many experts that current global economic difficulties will not disappear in the near future, it becomes even more important for Korean businesses in the EU to make full use of the FTA’s potential in their daily business.

In order to turn the opportunities provided by the FTA into real business successes, it is quintessential for businesses to have a thorough understanding of the EU business environment and its regulatory regimes. However, this is no easy feat given the volume of EU regulations and its complexity.

For this reason, I would like to sincerely appreciate the efforts by Covington & Burling LLP to publish this handbook. It provides a good overview of the range of EU regulations that affect Korean businesses wishing to operate in the Single Market. I hope it will assist Korean businesses in the EU to overcome the current economic crisis by making the best use of the opportunities provided by the Korea-EU FTA.

KIM Chang Beom
Ambassador of the Republic of Korea to the European Union
Brussels, September 3, 2012
CHAPTER 1
The European Union ("EU") is a political and economic union comprising 27 Member States. At its core is a single market in which goods, services, people and capital can move freely, and a common commercial policy vis-à-vis third countries. In addition, the EU enjoys vast powers across a multitude of policy areas such as economic and monetary affairs; competition and trade; environment; food, medical and chemical products; public procurement; intellectual property; data and consumer protection; and agriculture. Underpinning the EU's law-making and enforcement powers in these and other fields is a federal-like, institutional structure comprising the EU legislature and executive, EU courts, specialized committees and agencies, and Member States.

Korean and European businesses alike must have a good understanding of the EU's powers and its institutions if they are to optimize their opportunities in the EU market.

1. The EU’s Institutional Framework

The European Council comprises a President, currently Mr. Herman Van Rompuy, elected every 2.5 years, and the heads of State or governments of the EU’s 27 Member States. It drives the EU’s political agenda by setting the EU’s general political direction and priorities, and responding to important international events. Thus, while it does not legislate or initiate legislation, its decisions provide the international political and business community with important indications regarding the EU’s future initiatives, direction and thinking. The European Council meets twice a year, and whenever urgent questions arise that call for political leadership.

The Council of the EU ("Council" – not to be confused with the European Council above) together with the European Parliament constitute the EU’s legislature. As a general rule, they vote jointly on EU laws proposed by the European Commission. The Council also has a number of other key roles, including the development of the EU’s common foreign and security policy and concluding international agreements on behalf of the EU – indeed it was the Council that signed the Korea-EU FTA agreement on behalf of the EU. The Council comprises the government minister of each Member State responsible for the topic under discussion. Thus, the Council’s composition varies by topic and it sits in a total of ten configurations (e.g., for Competitiveness, Economic and Financial Affairs, Foreign Affairs, Transport, and the Environment). The Council is chaired by a rotating six-month Member State presidency, except for the Foreign Affairs Council which is headed by the High Representative of the Union for Foreign Affairs and Security Policy – currently Ms. Catherine Ashton.

The European Parliament shares legislative power with the Council in many areas. It therefore has substantial influence in determining the content of EU laws, and its support for or opposition to an EU legislative proposal may be make-or-break. Its 754 members ("MEPs"), which are affiliated to political parties (not national groups), are directly elected by the citizens of the EU’s Member States – whom they represent – for a five-year term.

The European Commission ("Commission") plays a number of crucial roles in the EU. It initiates and drafts EU legislation and, in some fields, it has important powers to “update” or amend legislation. In addition, it is charged with the enforcement of EU law vis-à-vis Member States, and it acts as
investigator and prosecutor sanctioning commercial entities for competition law abuses. It also investigates international trade law violations by foreign companies exporting to the EU (and will soon be responsible for imposing trade defense measures against exporters – a power currently exercised by the Council). The Commission is comprised of 27 Commissioners (one from each Member State assigned to a particular policy area) who are nominated by each Member State for a five-year period, and a President nominated by the European Council – currently Mr. José Manuel Barroso.

The EU also has a number of other important institutions (including the European Central Bank, the European Investment Bank and Investment Fund) that are beyond the scope of this booklet, as well as a number of specialized agencies that provide expert, independent information to feed into EU policymaking and/or ensure the consistent implementation of EU legislation, including the European Chemicals Agency, the European Environmental Agency, and the European Maritime Safety Agency.

2. Challenging EU Laws and Other Measures Before the EU Courts

The EU has two key judicial institutions: the General Court and the Court of Justice.

The General Court acts as a court of first instance with exclusive jurisdiction to hear actions for annulment of EU laws and other legally binding measures of the EU institutions, bodies, offices and agencies that are brought by individuals, companies, and other private organizations. Fairly strict standing rules apply for individuals and companies to be able to mount an annulment action, although those rules were slightly relaxed in 2009 increasing the scope for challenging EU measures in some circumstances (for additional information, see 3. To Go Further below). The General Court’s willingness to carry out a robust review of the legality of EU measures has increased in recent years reflecting the maturity of the EU and its institutions, and the increasing role of European human rights law.

The Court of Justice gives the final word on the meaning, scope and legality of EU law through appeals against rulings of the General Court – essentially on points of law, and in “preliminary rulings” in response to requests from national courts deciding legal disputes in an EU Member State on the interpretation of EU law.

The EU is also set to acquire three new specialized EU patent courts in Paris, London and Munich which would have exclusive jurisdiction to consider infringement and revocation disputes concerning the planned, new EU patent.

3. To Go Further

This Chapter outlines EU rules on customs, free movement of goods, trade defense and economic sanctions applicable to Korean companies exporting goods to the EU and/or doing business in the EU.

**WHAT TO WATCH FOR:**

- The amount of import duties, anti-dumping duties and countervailing duties as well as import VAT depends on the correct classification and valuation of the imported goods and the correct determination of their origin.
- Participation in trade defense investigations may be beneficial to Korean importers and grant them competitive advantage over other importers.
- Once Korean imports are in free circulation in the EU, they may move freely across the EU internal borders.
- EU sanctions regulations are revised frequently. Because the lack of compliance can result in criminal penalties, Korean companies doing business in the EU should follow these changes closely and always assess the impact on their business.

### 1. Customs

**KEY ISSUES:**

- The Korea-EU FTA resulted in substantial decrease of import duties applicable to Korean imports.
- Origin of Korean goods must be assessed in line with the detailed rules of the Korea-EU FTA.

**Introduction**

The basic EU customs legislation is contained in the EU Customs Code, the Code’s Implementing Regulation and the provisions of the Korea-EU FTA. Other key instruments include the EU Combined Nomenclature and the EU online customs tariff database (‘TARIC’), implementing the reduced or zero customs duties resulting from the Korea-EU FTA.

All substantive customs rules are adopted at the EU level. However, they are primarily applied and enforced by the Member States’ customs authorities.
What import duties and other import taxes can apply and how to determine their amounts?

Imports of goods into the EU from Korea are potentially subject to:

- Import duties;
- Anti-dumping and countervailing duties; and
- Import VAT.

Whether, and in what amount, these duties apply depends on:

- The classification of the goods under the Combined Nomenclature;
- The origin of the goods; and
- The value of goods or the quantity imported.

Classification

Any good imported into the EU from Korea must be classified in the import declaration according to the classification system provided for in the EU Combined Nomenclature (CN). The correct classification is important in order to determine:

- The rate of applicable import duty and import VAT;
- Whether anti-dumping or countervailing duties apply; and
- Whether Korean exporters can benefit from preferential tariffs under the Korea-EU FTA.

Example of Classification of a TV with an LCD Screen:

- **Section XVI** Machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles
- **Chapter 85** Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles
- **Heading 8528** Monitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus
- **Product Code 8528 72 40 00**
  - Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus
  - Other, color
  - Other
  - With a screen of the liquid crystal display (LCD) technology
Importers who are uncertain about the correct customs classification can request a ‘binding tariff information’ (BTI) from the competent customs authority. A BTI is legally binding throughout the EU for up to six years after the date of issue, unless revoked earlier. If the imported goods are as described in the BTI application, a BTI will protect the importer against a claim for higher import duties in cases where customs authorities disagree with the importer’s classification following importation.

**Origin**

Only imports which ‘originate’ in Korea and are accompanied by an ‘origin declaration’ can benefit from the reduced or zero import duties under the Korea-EU FTA. In addition, the goods have to be shipped directly from Korea to the EU. (Goods in a single consignment may be trans-shipped, stored and transited through a third country and remain eligible for preferential treatment only if (i) they are not released into free circulation in the country of transit or warehousing, and (ii) they do not undergo any operations other than unloading, reloading or operations to preserve them in good condition.) A product is considered as ‘originating’ in Korea if (i) it has been wholly obtained in Korea, or (ii) it has been sufficiently processed in Korea. (The different processing procedures normally have to be carried out either in Korea, though Korean producers can also use inputs originating in the EU — through a so-called ‘cumulation of origin’.) The criteria for determining 'sufficient processing' are product-specific and include:

- **Change of tariff heading.** *E.g.*, vacuum cleaners and other electromechanical domestic appliances will be ‘originating in’ Korea if they are made in Korea from local or imported materials of any other tariff heading.

- **Value added.** *E.g.*, a car will be ‘originating in’ Korea if no more than 45% of the value of the inputs to manufacture it has been imported from outside Korea.

- **Specific operations.** *E.g.*, monolithic integrated circuits will be ‘originating in’ Korea if the operation of diffusion, in which integrated circuits are formed on a semi-conductor substrate, takes place in Korea.

- **Combination of the above rules.** Certain operations are by definition considered insufficient to confer on products the status of originating in Korea. These operations include: change of packaging, simple painting, testing or calibrations, or simple assembly of parts of articles to constitute a complete article or disassembly of products into parts.

If importers are uncertain about the correct determination of origin, they may request a ‘binding origin information’ (BOI). This is similar to a BTI but is only valid for a maximum of three years.

In order to benefit from the preferential tariffs, Korean exporters must also (i) be approved by their customs authorities and (ii) issue an ‘origin declaration’. (Only exporters of consignments with the total value not exceeding €6,000 do not have to be approved.) Approved exporters must keep all documents confirming the origin of goods for a minimum of five years from the moment when they issue an origin declaration; they must produce them to the customs authorities at any time. The customs authorities will carry out regular controls on approved exporters.
Valuation

Import VAT and most customs duties are expressed as a percentage of the value of the imported goods, which must be declared on import.

As a general rule, the value of the imported goods is determined using the ‘transaction value’ method. This method calculates the value of the imported goods as the price paid or payable by a buyer to a seller for the imported goods when sold for export to the EU. There are specific grounds for exclusion of this rule. Where any grounds for exclusion apply, alternative methods must be used to determine the customs value — as set out in the EU Customs Code.

2. Free Movement of Goods in the EU

Introduction

Once imported into the EU and entered into free circulation, Korean goods may move freely across the EU internal borders. In particular, in line with the free movement of goods provisions of the Treaty on the Functioning of the EU (TFEU), EU Member States are prohibited from imposing any pecuniary restrictions (such as customs duties and charges having equivalent effect) or non-pecuniary restrictions (such as quotas and ‘measures having equivalent effect to quantitative restrictions’) on Korean imports.

Measures having equivalent effect to quantitative restrictions

Measures having equivalent effect to quantitative restrictions encompass “[a]ll trading rules enacted by Member State governments which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.”

These measures include import inspections and controls, national type approvals, labeling and packaging requirements, obligation to register imported vehicles, and all other measures hindering intra-EU trade, whether required by Member States’ regulations or an administrative practice.

Member States can only adopt such restrictions (i) where required by public interest and (ii) if these measures are necessary and proportionate to the objective pursued.

3. Trade Defense

**KEY ISSUES:**

- If trade defense measures are imposed on goods imported from Korea, these goods will become more expensive.
- Trade defense measures that are imposed on competing goods exported from other third countries will confer a competitive advantage on Korean exporters.

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1 Korean imports are considered to be in free circulation in the EU if (i) import formalities have been complied with, (ii) any customs duties or charges having equivalent effect payable have been levied, and (iii) these imports have not benefited from a total or partial drawback of such duties or charges.

Types of trade defense measures

The EU makes frequent use of (i) anti-dumping measures directed against dumped imports and (ii) countervailing measures directed against subsidized imports. These measures are usually imposed in the form of additional customs duties and generally apply for five years. However, EU producers can, and often do, ask the European Commission to investigate whether measures should be extended for a further five years to prevent the recurrence or continuation of the injurious dumping or subsidy. While anti-dumping or countervailing duties are adopted by the EU institutions, they are collected by the national customs authorities.

In addition, the Korea-EU FTA includes a bilateral safeguard clause which allows the EU to temporarily reintroduce customs tariffs in case of a surge in Korean imports. The details are set out in Regulation No 511/2011. The safeguard measures take the form of either (i) “freeze” of the currently applied tariff (i.e., suspension of any further reduction of the tariff as foreseen in the FTA), or (ii) increase of the tariff to the level applied before the entry into force of the FTA. The details are set out in a specific EU Regulation. The safeguards may be imposed for two years; exceptionally, they may be extended for additional two years.

At present, the EU imposes anti-dumping duties on Korean exports of iron and steel tube and pipe fittings, steel ropes and cables, and metal silicon. The measures imposed in the past targeted *inter alia* Korean DRAMs, polyester yarn and polyester staple fibers, and a range of consumer goods such as electronic weighing scales, hair brushes, or microwave ovens.

When can the EU impose trade defense measures?

In order to impose anti-dumping or countervailing measures, the EU institutions must find:

- Dumping and/or subsidization;
- Material injury suffered by the EU industry concerned;
- A causal link between the dumping and the injury found; and
- That imposing measures is not against the EU’s interest (i.e., the interest of other EU industries and of consumers).

In order to impose the specific safeguard measures, the European Commission must find:

- Increase in the volume of goods imported from Korea (either in absolute terms or relative to EU production) as a result of the reduction/elimination of custom duties;
- Material injury suffered by the EU industry; and
- A causal link between the injury suffered by the EU industry and the increase in Korean imports as a result of the reduction/elimination of custom duties provided by the Korea-EU FTA.
How can parties participate in the investigations and why is active involvement important?

No exporter is required by law to participate in a trade defense investigation and participation can be burdensome. However, if a Korean company has an interest in the outcome of a particular investigation, it should cooperate and actively participate in that investigation.

Participation can involve completing a questionnaire, commenting on certain documents adopted by the European Commission (the so-called ‘disclosure documents’), participating at hearings, and submitting evidence to the European Commission. Also, as these investigations tend to be somewhat politicized, Korean exporters should consider advocacy with the European Commission and relevant Member States’ governments.

4. Economic Sanctions

**KEY ISSUES:**

- There are a range of significant penalties that can apply when a company or individual violates the sanctions rules, including unlimited fines and/or imprisonment. In addition, companies violating sanctions provisions are exposed to significant reputational risk.
- Where a company violates sanctions rules with the consent or involvement of a director, manager or similar officer, these officers can be personally liable alongside the company.

**EU sanctions rules**

Korean companies established or doing business in the EU may be affected by the increasing number of economic sanctions which the EU imposes against certain countries.

The goal of these sanctions is to bring about a change in activities or policies in the targeted country, such as to prevent violations of human rights or international law or end policies that do not respect democratic principles. Given their different objectives, each sanctions regime differs in terms of the measures imposed. The EU sanctions measures may include, for example, import and export bans, investment restrictions, and the freezing of funds or prohibitions on doing business with certain designated individuals and entities. In some cases, it may be possible to obtain a license to engage in a business transaction that would otherwise be prohibited.

While sanctions are adopted at EU level (and often follow sanctions put in place by the United Nations), they are implemented and enforced by Member States.

Currently, the EU has economic sanctions in place against over 20 countries, with the most stringent regimes applicable against Iran and Syria. The EU also imposes sanctions against certain parties affiliated with terrorist organizations, irrespective of their country of origin.
Who is subject to EU sanctions rules?

EU sanctions rules apply on the EU territory, to any company incorporated or constituted in the EU; and any business done in the EU. Therefore, they will apply to any Korean company established in the EU and/or doing business in the EU. They will also apply to Korean nationals present in EU territory (in any of the 27 Member States).

5. To Go Further:

- Covington & Burling, E-Alerts on EU sanctions and export controls, available at http://www.cov.com
CHAPTER 3
Chapter 3  Competition Law

The Korea-EU FTA reflects the importance of free and undistorted competition in the trade relations between the two Parties. To that end, it foresees that Korea and the EU each maintain a competition regime that deals effectively with restrictive agreements, abuse of dominance and the review of mergers.

Articles 101 and 102 TFEU, as well as Regulation No 139/2004 are the pillars of EU competition law. Article 101 TFEU prohibits agreements or concerted practices that have the object or effect of impeding competition on a market within the EU. Article 102 TFEU prohibits dominant companies from abusing their market power. Regulation No 139/2004 provides the legal basis for merger control.

WHAT TO WATCH FOR:

- Strict rules on resale price maintenance and resale restrictions (territorial and customer) in distribution agreements.
- Price fixing, other hardcore restrictions and information exchange in agreements between competitors with far-reaching parental liability rules.
- Strict rules applying to dominant firms.
- Merger control jurisdiction based on turnover thresholds and national systems below the thresholds.

1. Distribution

KEY ISSUES:

- A number of territorial and price-related restraints on distributors are hardcore restrictions of competition. They are prohibited and subject to fines without any analysis of effects.
- Companies may not ban online sales, including through indirect means.
- The new regime for the distribution of cars and its potential impact on smaller car makers’ branding strategy.
- Many national competition authorities actively target vertical restraints.

The vertical rules in a nutshell

The EU competition rules on distribution seek to ensure that the flow of goods and services in the internal market and related price competition are unrestricted. The EU approach towards vertical restraints differs from that of many jurisdictions, such that contractual restraints on distributor activities that may be permissible elsewhere may not be permitted in the EU. Such differences reduce the scope for using a similar distribution template across multiple jurisdictions.
The rules applying to vertical restraints are developed in the so-called Vertical Block Exemption Regulation (VBER) and the accompanying Vertical Guidelines. The VBER creates a safe harbor for agreements when no party has a market share exceeding 30%. It also proscribes (“blacklists”) a number of restrictions that are considered “hardcore” impediments to competition, such as:

- Limiting a distributor's freedom to determine its own prices by setting a minimum or fixed resale price (so-called resale price maintenance or “RPM”);
- Restricting the territory where or the customer groups to whom a distributor may resell the supplier’s products.

Hardcore restrictions can be direct or indirect. “Indirect” means that a party is provided an incentive to engage in the prohibited conduct e.g., through discounts or rebates. Hardcore restrictions are subject to fines. Companies have some — albeit limited — flexibility to impose temporary territorial restrictions to test or launch new brands or new products in staggered stages or new markets. Suppliers are also free to pay distributors for promoting the products within an allocated territory or customer group as long as the supplier’s payment corresponds to the value of the promotional services provided by the distributor.

The flexibility that suppliers have to control the distribution of their products depends on the type of distributor used. There are three main options:

<table>
<thead>
<tr>
<th>Agency</th>
<th>Exclusive Distribution</th>
<th>Selective Distribution</th>
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<tr>
<td>Suppliers using so-called “true” agents are seen as the real seller, which gives the supplier considerable freedom to fix the price and other terms of sale. (&quot;True“ agents must not assume any commercial risks.)</td>
<td>Supplier may grant an exclusive territory (city, region, larger area) to a particular distributor. Supplier may allocate specific customers/accounts exclusively to a particular distributor.</td>
<td>Supplier sets qualitative (and quantitative) criteria on the basis of which it &quot;selects&quot; the distributors that are admitted to its distribution network. Distributors must be allowed to sell throughout the EU but only to end users and to other authorized distributors.</td>
</tr>
<tr>
<td><strong>Upsides:</strong> No competition exposure towards RPM and parallel trade.</td>
<td><strong>Upsides:</strong> Other distributors can be prevented from actively selling into those territories or to those accounts.</td>
<td><strong>Upsides:</strong> Sales to unauthorized dealers (so-called “grey dealers”) may be restricted.</td>
</tr>
<tr>
<td><strong>Downsides:</strong> The supplier must bear all material economic risks relating to the sale of the products. Agency relationships are expensive upon termination, with statutory indemnities for agents in all EU countries.</td>
<td><strong>Downsides:</strong> Unsolicited (passive) sales must always be permitted. RPM is not allowed.</td>
<td><strong>Downsides:</strong> RPM is not allowed. No restriction on reselling to authorized dealers.</td>
</tr>
</tbody>
</table>
Online sales

As a general rule, companies may not prohibit their dealers from selling via the Internet, including through indirect means such as requiring: that the distributor’s website cannot be accessed by customers living in a different country; that the distributor re-route customers from other territories away from its website; or that a customer transaction is terminated when his credit card details reveal that he does not live within the distributor’s territory.

Nonetheless, suppliers have some scope for avoiding that their dealers focus exclusively on online sales. For instance, suppliers can require their dealers (i) to have a physical store and to make a minimum number of sales via that store; (ii) to ensure that their websites meet reasonable qualitative criteria; (iii) to include links to other distributors’ or the supplier’s websites; (iv) not to actively sell into the exclusive territory of another distributor (e.g., by paying a search engine to display ads specifically targeting users located in that territory).

Online Sales: Still a Hot Topic

On October 13, 2011, the EU Court of Justice held that a provision in a selective distribution agreement directly or indirectly banning online sales generally violates EU competition law (Case C-439/09, Pierre Fabre Dermo-cosmétique).

Cars and car parts

From June 2013, the distribution of cars in the EU will be governed by the VBER and the Vertical Guidelines, together with sector specific Motor Vehicle Guidelines. Prior to that change, there were sector-specific rules for the distribution of cars. The change in regime increases the suppliers’ scope for requiring dealers to focus on their brand and not have multi-brand showrooms. Indeed, under the new regime, such restrictions are covered by the safe-harbor of the VBER as long as they do not exceed five years and the 30% market share threshold is not exceeded. Multi-brand showrooms could provide a stepping stone for smaller carmakers launching their products in Europe.

A specific regulation governs the supply of auto parts, with a view to “protecting” independent repairers and spare parts suppliers vis-à-vis car manufacturers. Notably, these rules provide for independent repairers’ right to obtain technical information, prohibit suppliers from using warranties in a way that prevents consumers from using independent repairers, as well as from applying quantitative criteria to select repairers to join their after-sales network.
2. Collaboration Agreements

**KEY ISSUES:**

- Companies have great flexibility to enter into collaborative arrangements to enhance their economic activities.
- However, hardcore restrictions (e.g., limitations on output and sales, customer and territorial restrictions, price-fixing) must be avoided.
- The rules relating to these agreements may be difficult to navigate; companies should consult with competition counsel when they are contemplating extensive horizontal collaboration with another company.

Companies frequently collaborate for various business purposes. The Commission has acknowledged that horizontal cooperation arrangements may lead to substantial economic benefits. However, such arrangements may also raise competition concerns.

The Commission’s analysis of these arrangements takes into account the nature of the collaboration, as well as the companies’ market power in the market(s) concerned; whether the parties achieve a high commonality of costs; the information that will be exchanged in the context of the collaboration; and the benefits created by the collaboration. Concerns are more likely to arise when the collaboration involves joint selling than when it is limited to e.g., joint buying or production.

The Commission also provides guidance on potential competition concerns in the context of standard setting, an area that is attracting considerable attention. Standard setting agreements are unlikely to restrict competition where: (i) participation in the standard setting process is unrestricted, (ii) the procedure to adopt the standard is transparent, (iii) companies are not obliged to comply with the standard, and (iv) the standard is accessible on fair, reasonable and non-discriminatory terms.

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1 Under the R&D block exemption regulation, "R&D agreements" refer to agreements whereby the parties pursue the joint research and development of products or technologies and/or the joint exploitation of that research and development.

2 Under the Specialization block exemption regulation, "specialization agreements" refer to agreements providing for unilateral specialization (whereby one party agrees to stop the production of certain products and to purchase them from the other party, which is active in the same product market), reciprocal specialization (whereby two parties active in the same product market agree to stop producing different products and to purchase these from the other party), and joint production.
3. Abuse of Dominance

As Korean companies expand their business operations, they may have to deal with competition law considerations related to single-firm conduct, also referred to as abuse of dominance. Article 102 TFEU applies to a range of conduct aimed at maintaining or enhancing a company’s dominant position. A company is generally presumed to be dominant if it has a market share of 50% or more. As a practical matter, companies are well-advised to consider dominance issues when they have a 40% market share and there is a significant gap to their second largest competitor. The mere possession of such market power is however insufficient to trigger competition law liability. Article 102 TFEU only applies where there is “abuse” i.e., exclusionary or exploitative conduct:

- **Exclusionary conduct**: There is no exhaustive list of what can be deemed exclusionary action but common types of such conduct include exclusive dealings, tying and bundling, and predatory pricing. Exclusionary conduct can also take the form of refusal to supply in specific (and narrow) circumstances; the general principle is that also dominant firms remain free to decide with whom they want to deal. The Commission has issued Guidance on its assessment of exclusionary abuses. The Guidance is not binding and in some areas the law is in “flux” because the case law of the European Courts is stricter. This makes dominance issues complex to navigate.

- **Exploitative conduct**: Examples include charging excessive prices or imposing unfair trading terms. However, to date the Commission has been focusing its enforcement activities on exclusionary conduct.

In dominance cases, the Commission often accepts commitments as a remedy to the alleged infringement. In past cases, dominant firms have offered both behavioral and structural remedies.

4. Merger Control

- **Both acquisition of sole and joint control over (parts of) a business are reportable.**
- **The creation of a full function JV is reportable.**
- **Companies should avoid pre-closing joint activities.**
Foreign companies must be aware that physical presence within the EU is not required for the EU to have jurisdiction over mergers and acquisitions: “foreign-to-foreign” deals may have to be notified.

**The notion of “concentration”**

EU merger control covers the following transactions:

- Mergers between previously independent companies; and
- Acquisitions of durable control over (part of) another undertaking, by purchase of shares or assets, contracts or otherwise. Control refers to the possibility to exercise decisive influence over another company. Minority shareholdings are covered only to the extent that they give decisive influence over the target (e.g., because the remaining shares are widely dispersed, or the other shareholders have purely financial interests). Likewise, the EU merger control extends to acquisition of joint control. Joint control arises when the acquiring parties can veto actions pertaining to the target’s strategic commercial decisions, thereby creating a deadlock situation. Control is a question of fact. For borderline cases, the structure of the deal is key and companies should closely analyze it to determine whether an EU filing is required.

**Minority Shareholdings under the Commission’s Microscope**

In November 2011, the Commission launched a study on the economic importance of minority shareholdings to reflect on the potential need for policy developments. Jurisdictions like the UK and Germany have specific rules that provide for the review of minority shareholdings.

The creation of a joint venture (JV) is a concentration if the JV will be an autonomous economic entity (so-called full-function joint ventures). A JV is full-function if it operates on a market, performing the functions normally carried out by an undertaking operating on the same market. Further, a few Member States subject non-autonomous JVs to merger control, in particular Germany. A recent example is the German Federal Cartel Office’s review of the partial JV between General Motors and Peugeot Citroën for the purchase of car parts, whereby GM will acquire a 7% stake in Peugeot Citroën. Non-full function JVs are subject to Article 101 TFEU and the rules on cooperation agreements.

**Turnover thresholds**

Proposed concentrations have to be notified to the Commission only to the extent they have an EU dimension. EU jurisdiction is established on the basis of turnover. The combined worldwide turnover of all parties must exceed €5 billion and the EU-wide turnover of each of at least two parties must be over €250 million (there is no EU jurisdiction if each party achieves more than 2/3 of its EU turnover in the same EU country). If these thresholds are not met, a subsequent set of thresholds needs to be checked: an EU filing will be required if (i) the turnover of all parties exceed €2.5 billion; (ii) the turnover of all parties exceed €100 million in at least three Member States each; (iii) at least two parties each achieve more than €25 million of turnover in each of those three Member States; and (iv) two parties each have an EU turnover above €100 million (again, there is no EU jurisdiction if each party achieves more than 2/3 of its EU turnover in the same EU country).
If none of the above thresholds is met, companies may have to file their proposed transaction to national competition authorities (“NCAs”) that have their own thresholds. Certain national thresholds such as in Germany are relatively low and can thus be reached quite easily. While in most Member States merger notification is compulsory (provided all prerequisites are met), in the UK filing is voluntary.

Finally, companies should be aware that referral mechanisms can lead to the reallocation of their proposed deal between the Commission and an NCA or vice versa:

- The Commission can refer (parts of) a transaction to an NCA where that transaction threatens to adversely affect a market within that NCA’s Member State.
- An NCA can refer to the Commission a proposed concentration that does not meet the EU thresholds but affects cross-border trade within the EU and is liable to significantly impact competition within the NCA’s national territory.
- Parties can ask for referral to the Commission when they have to notify in three or more EU countries but they have no right to have the transaction reviewed by the Commission.

**The standstill requirement: no “gun jumping” allowed**

Proposed mergers must be notified before their actual completion and companies cannot close on the deal unless and until the Commission gives its green light. The Commission has been increasingly vigilant in ensuring that companies do not violate the standstill obligation. In 2009, it imposed a €20 million fine on Electrabel for failing to notify its acquisition of sole control over Compagnie Nationale du Rhône. NCAs are similarly watchful: in 2008, the German FCO imposed a €4.5 million fine on Mars for jumping the gun in relation to its acquisition of US rival Nutro. Companies must thus refrain from pre-closing activities that imply gun jumping, such as joint marketing activities (joint meetings with customers, etc.).

What Is the EU Substantive Test to Review Mergers?

EU merger control seeks to ensure that a proposed merger will not significantly impede effective competition in the EU market, in particular via the creation or strengthening of a dominant position. In most cases, merger control standards are similar to those in other jurisdictions such as the US. The EU analyzes unilateral and coordinated effects. However, merging firms should be aware that the Commission also scrutinizes closely vertical aspects of deals, in particular to ensure that there is no risk of input and/or customer foreclosure. Recent examples include the Intel/McAfee, Cisco/Tandberg and Microsoft/Skype mergers. In conglomerate-type deals, the Commission tends to focus on whether the merged entity will be able to use its market position to foreclose competitors by means of bundling or tying. However, most conglomerate mergers do not raise competition issues.
5. Cartels and Information Exchanges Between Competitors

**KEY ISSUES:**

- Cartel enforcement is a key priority at EU and national levels. All authorities apply a policy of zero tolerance.
- Exchanges of sensitive information between competitors may amount to a cartel.
- Companies may be liable for their subsidiaries’ anti-competitive conduct.
- Private antitrust claims are growing in Europe, thereby increasing companies’ exposure.

Cartels remain one of the Commission’s enforcement priorities and the regulator imposes very high fines (see figure below). There is no imprisonment sanction in the EU, but a number of Member States provide for jail sentences in cartel cases.

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Amount in € (adjusted for changes following judgments of the EU courts)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>Car Glass</td>
<td>1,383,896,000</td>
</tr>
<tr>
<td>2007</td>
<td>Elevators and escalators</td>
<td>832,422,250</td>
</tr>
<tr>
<td>2010</td>
<td>Airfreight</td>
<td>799,445,000</td>
</tr>
<tr>
<td>2001</td>
<td>Vitamins</td>
<td>790,515,000</td>
</tr>
<tr>
<td>2008</td>
<td>Candle waxes</td>
<td>676,011,400</td>
</tr>
<tr>
<td>2010</td>
<td>LCD</td>
<td>648,925,000</td>
</tr>
<tr>
<td>2009</td>
<td>Gas</td>
<td>640,000,000</td>
</tr>
<tr>
<td>2010</td>
<td>Bathroom fittings</td>
<td>622,250,782</td>
</tr>
<tr>
<td>2007</td>
<td>Gas insulated switchgear</td>
<td>539,185,000</td>
</tr>
<tr>
<td>2007</td>
<td>Flat glass</td>
<td>486,900,000</td>
</tr>
</tbody>
</table>

*Top-10 highest cartel fines since 1969*  
(last change: June 29, 2012, source: Commission website)

**From hardcore cartel to information exchange: the wide conception of competitor collusion**

Hardcore cartels where competitors fix prices, volumes or capacity are serious infringements of Article 101 TFEU. Companies do not need to engage in elaborate arrangements to be caught. Mere exchanges of sensitive commercial information among competitors may be sufficient regardless of the way such exchange takes place (over the phone, in in-person meetings). Exchanges of companies’ intended pricing
or output are treated as cartels. An isolated information exchange may be sufficient (see Case C-8/08, \textit{T-Mobile Netherlands}).

The exchange of other current or recent information on e.g., costs, prices, output, or demand may also infringe Article 101 TFEU insofar as it is likely to generate anti-competitive effects.

\textbf{Broad jurisdictional reach}

There is no “Bermuda” exception to the application of EU competition law. The Commission claims jurisdiction when an agreement is implemented within or produces effects within the EU. Thus, as soon as parties to a cartel sell their products to customers (including dealers) within the EU, Article 101 TFEU applies.

\textbf{Enforcement activities}

The Commission relies to a large extent on its leniency program to detect potential cartels. It also carries out dawn raids at companies’ EU premises, whether \textit{ex officio} or following a leniency application. The Commission appears to take the view that it may compel an EU subsidiary to produce evidence of an alleged cartel located at its foreign (e.g., Korean) parent’s headquarters (at least where this information/evidence is ordinarily available to the EU subsidiary). To date, the EU Courts have not had the occasion to rule on whether the Commission is empowered to do so.

\textbf{Related companies and liability}

A parent company may be held liable for its subsidiary’s wrongdoings where it exercises decisive influence over the latter’s conduct. The Commission presumes that 100% ownership confers decisive influence over the subsidiary, and companies have rarely been successful in challenging that presumption before the EU courts. Companies should be aware that this presumption also applies where they hold the “quasi-totality” of the subsidiary’s capital (see Case T-206/06, \textit{Total and Elf Aquitaine} (appeal pending)). Parental liability has important implications, notably (i) it may lead to higher fines since the parent’s turnover will be the basis for the fine calculation, and (ii) it increases the risks of a fine uplift for recidivism. Similarly, companies taking part in a JV may be found jointly and severally liable for their JV’s anti-competitive activities (see Case T-314/01, \textit{Avebe}).

\textbf{Civil claims: the growing threat}

Companies doing business in Europe should be aware that private antitrust litigation is no longer a US phenomenon: civil claims have become a reality also within the EU. The Commission has been encouraging private parties to seek compensation before national courts for damages they may have incurred as a result of competition law infringements. Civil claims have been growing fast over the past years, and jurisdictions such as the UK, Germany and the Netherlands are emerging as plaintiffs’ preferred \textit{fora}. This growth has also triggered issues regarding the disclosure of leniency material submitted to EU or national competition authorities. In the landmark \textit{Pfleiderer} ruling in summer 2011, the EU Court of Justice determined that disclosure of leniency materials must be subject to a balancing exercise between plaintiffs’ interests in obtaining compensation, on the one hand, and the effectiveness of administrative enforcement (via preserving the attractiveness of leniency programs) on the other.

The Commission is concerned that companies may become more hesitant to seek leniency in the EU as a result of that ruling, or at least limit the amount of information they voluntarily provide. Therefore, it is preparing a legislative proposal to provide more \textit{ex ante} certainty as to the leniency materials that will be protected from disclosure to civil claimants. Companies should thus carefully monitor these pending developments and – to the extent they are or will likely become involved in such litigation – frame their litigation strategies accordingly.
6. State Aid

With the FTA, Korea and the EU each endeavors to avoid subsidies that distort competition in their bilateral trade, via the application of their competition or other regimes. In that respect, the EU has a legal framework for the control of state funding/support within the EU known as "State aid control". The purpose of the State aid rules is to prevent Member States from distorting trade and competition within the EU market - and, as a consequence, between the EU and other regions/countries - by granting advantages that favor an economic operator. Article 107 TFEU generally prohibits State aid, subject to various exemptions. Dealings between public entities and private operators do not constitute State aid if their terms do not go beyond those that a private investor, operating under normal market economy conditions, would find reasonable (so-called Market Economy Investor Principle).

The Modernization of State Aid Control

Commissioner Almunia has launched a vast reform to modernize the current State aid regime, to boost its effectiveness and re-focus enforcement efforts on subsidies to network industries and launch ex-officio investigations. Public consultations are already taking place in the context of this reform and the Commission plans to have the new modernization package ready at the end of 2013.

The State aid regime primarily imposes obligations on Member States, as they are required to notify the Commission of prospective aid schemes and cannot implement them without the Commission’s prior approval. State aid schemes may also be exempted. There are several exemptions relating to aid to small and medium enterprises, training aid, regional aid, environmental aid, research, development and innovation aid, inter alia. There are also exemptions for specific sectors such as maritime transport, air transport, and shipbuilding. The Commission is currently reviewing the existing framework for maritime and air transport.

State aid may be relevant to companies (including Korean companies) in that:

- They may be in a position to benefit from Member State funding, when the State behaves as a private investor or in the context of a State aid exemption scheme.
- They may perceive they are being hurt because a Member State provided funding to competitor(s). In that case, they can lodge a complaint to the Commission.

The Commission can order the Member State to recover aid paid, when it finds that such aid has not been duly notified or is incompatible with State aid rules. As a practical matter, a company will have to repay the unlawful aid that it received plus interests accrued thereon (e.g., a Korean company that received incompatible aid from an EU Member State will have to repay that aid with interests).

Note - Potential subsidies granted by the Korean state to Korean companies are addressed by the transparency and other trade mechanisms described in Chapter 2 EU Trade Regulation. As such, these subsidies do not fall within the remit of the EU competition authorities.
Trends: Hot Issues at the Intersection of Intellectual Property and Competition Laws

- Companies’ use of their intellectual property rights is on the Commission’s radar screen with:
  - A number of ongoing investigations under Article 102 TFEU in the mobile telephony sector relating to the enforcement of standards-essential patents;
  - An ongoing probe in the eBooks sector;
  - The Commission moving forward with its first investigations into reverse payment patent settlements in the pharmaceutical sector;
  - "We want to make sure with our control that Intellectual Property Rights are used to reward inventions and motivate innovation, not as tools to foreclose access or expansion in markets" (Commissioner Almunia, December 1, 2011).
- The Commission is in the process of revising its legal framework on technology transfers, and commissioned a study as well as conducted a public consultation in that respect. Potential issues of interest in relation to the present revision include patent pools, cross-licensing, and grant back obligations.

7. To Go Further:


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3 Technology transfer refers to an agreement whereby the licensor permits the licensee(s) to exploit its technology (patent, know-how, software license) for the production of goods and services.
CHAPTER 4
The Korea-EU FTA contains detailed provisions on patents, trademarks, designs, copyrights, geographical indications, plant varieties, and enforcement of Intellectual Property Rights (IPRs), but the FTA itself brings little change to the way IPRs are protected in the EU. The EU is committed to encouraging innovation and creativity for further growth and competitiveness through strong IPR protection. At the same time, the European Commission is very active in checking whether IPRs are not exercised in an anti-competitive way, in particular by companies enjoying a dominant position. In May 2011, the Commission announced plans for the EU’s future IP strategy. This “blueprint” announced several reforms which are now under way: unitary EU patent protection, modernization of the trademark system, geographical indications for non-agricultural products, multi-territorial copyright licensing, possible revision of the EU’s anti-counterfeiting and piracy rules, and a plan to introduce a new customs regulation for IPR enforcement. Korean companies may benefit from monitoring developments that are relevant to their business activities. Furthermore, as the EU’s IP regime is not yet fully harmonized, Korean companies must pay attention to IP laws not only at EU level but also at national levels in the EU Member States.

**WHAT TO WATCH FOR:**

- Possible changes in the EU patent litigation practice with respect to the proposed unitary EU patent system.
- Detailed provisions on seizure, injunctions and other enforcement tools in different jurisdictions.
- Antitrust enforcement targeting the abuse of IPRs.

**1. Patents**

**KEY ISSUES:**

- A European patent, granted by the European Patent Office (EPO), is a bundle of national patent rights to be validated in national patent offices.
- The proposed unitary EU patent system is likely to have a significant impact on companies’ patent filing and enforcement strategy in the EU.

**Patent protection in the EU**

A patent gives the patent holder an exclusive right to prevent others from using the patented invention without authorization for the life of the patent (usually 20 years from the filing date). Unlike trademarks or designs as explained below, it is not yet possible to obtain EU-wide patent protection with a “unitary” right. However, it is possible to apply for a European patent via a single administrative procedure operated by the European Patent Office (EPO) in Munich, Germany. Once a European patent is granted...
by the EPO, it becomes a bundle of national rights which need to be validated in the respective national patent offices. This may result in additional costs such as translating patent documents into national languages. Alternatively, patent applicants may choose the “international patent application” route administered by the World Intellectual Property Organization (WIPO) under the Patent Cooperation Treaty (PCT) by designating the EU Member States.

**The proposed unitary EU patent**

For several decades, the EU has tried to create a unitary EU patent i.e., a common patent that can be granted, transferred and enforced in a uniform way throughout the EU. In addition to the unitary EU patent regime, the creation of a common patent court called “Unified Patent Court” is now under consideration. The proposed EU patent system is expected to reduce patenting costs and to make pan-European patent enforcement easier.

Progress on both the unitary EU patent and the Unified Patent Court has been delayed by many political and institutional hurdles. However, the EU recently reached an agreement on the location of the Court, which had been one of the biggest stumbling blocks. The main characteristics of the proposed scheme are as follows:

- **Languages**: By maintaining the three official languages of the EPO (English, French and German), the unitary EU patent system would substantially reduce the burden of complying with translation requirements. In fact, Italy and Spain have opted out of the proposed unitary EU patent regime primarily because of their disagreement with this language scheme.

- **Costs**: The proposed system will considerably reduce patenting costs, in particular, for translation and maintenance fees. According to the Commission’s impact assessment report, the cost-saving effect of the unitary EU patent system is likely to be significant in comparison with other patent filing options (as an illustration, see table below).

<table>
<thead>
<tr>
<th>Patenting cost (amount in €)</th>
<th>European patent validated in 27 Member States</th>
<th>European patent validated in Germany, France, UK, Italy and Spain</th>
<th>Unitary EU patent covering 25 Member States + national patents Italy and Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Translation</td>
<td>23,375</td>
<td>3,910</td>
<td>5,610</td>
</tr>
<tr>
<td>Publication</td>
<td>2,987</td>
<td>308</td>
<td>308</td>
</tr>
<tr>
<td>Representation</td>
<td>5,750</td>
<td>500</td>
<td>500</td>
</tr>
<tr>
<td>Total</td>
<td>32,112</td>
<td>4,718</td>
<td>6,418</td>
</tr>
</tbody>
</table>

*Source: Commission website*

- **Unified Patent Court**: Consisting of a court of first instance and a court of appeal, the Unified Patent Court would have exclusive jurisdiction for enforcing European patents and future unitary EU patents. According to a 2012 political agreement, Paris, London and Munich would share main functions of the Court. Paris would be the seat, registry and central division of the Unified Patent Court; London would host chemistry (including pharmaceuticals) and “human necessities” cases; and Munich would deal with mechanical engineering cases.
2. Trademarks and Designs

**KEY ISSUES:**

- The Korea-EU FTA provides little change to the way trademarks are protected in the EU.
- Unregistered designs can be protected for three years from the date of public disclosure within the EU territory.

**Trademark protection in the EU**

A trademark is a sign – for example, words, logos, the shape of goods or of their packaging, or even sounds and smells – which can distinguish the goods or services of one entity from those of others. It is possible to obtain EU-wide trademark protection by:

- Registering a **Community trade mark (CTM)** with the Office for Harmonization in the Internal Market (OHIM) in Alicante, Spain; or
- Designating the EU when applying for an international trademark registration through the “Madrid system” administered by WIPO.

Additionally, the national trademark laws of all EU Member States have been harmonized by Directive 2008/95/EC.

**Overview of CTMs**

<table>
<thead>
<tr>
<th>Geographical Scope</th>
<th>The entire EU (it is not possible to limit the scope of protection to certain Member States)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duration of Protection</td>
<td>For periods of 10 years with the possibility to renew indefinitely</td>
</tr>
<tr>
<td>Conferred Rights</td>
<td>An exclusive right to use the trademark and to prevent others from using without consent a similar mark for identical or similar goods/services in the EU</td>
</tr>
<tr>
<td>Enforcement</td>
<td>Enforcement against infringement by:</td>
</tr>
<tr>
<td></td>
<td>• Filing a suit at the CTM courts; or</td>
</tr>
<tr>
<td></td>
<td>• Filing a request for action with EU customs authorities to retain suspected counterfeit goods at the border</td>
</tr>
<tr>
<td>“Genuine Use” Requirement</td>
<td>In the absence of proper reasons for non-use, CTMs must be put to “genuine use” within a period of five years after registration at least in part of the Community (e.g., a single Member State or a part thereof). Otherwise, registered CTMs may face a revocation action by third parties.</td>
</tr>
</tbody>
</table>
The CTM registration process at OHIM

A CTM application can be filed with OHIM or national IP offices. If the examination and search results are positive, the CTM application can be published in the CTM bulletin.¹ Anyone, usually an owner of earlier similar or identical marks (CTMs, national or international marks valid in one or more Member States), can file an opposition with OHIM within three months of the publication of the CTM application. If no opposition is filed within this period, the CTM can be registered. According to OHIM, a straightforward CTM application, without any oppositions filed against it, can be registered within about 26 weeks. Any final decision by OHIM which has adversely affected one party can be appealed before OHIM’s Boards of Appeal. A Board of Appeal decision may be appealed before the EU’s General Court within two months from the notification of the decision. This court may confirm, annul or alter the Board of Appeal’s decision. A final appeal on the points of law of the decision of the General Court can only be reviewed by the EU Court of Justice. OHIM offers a mediation service in inter partes proceedings.

The CTM may be cancelled even after it is successfully registered. OHIM has exclusive jurisdiction with regard to revocation or invalidity actions directly filed with OHIM. CTM courts can also decide on revocation or invalidity if the issue is brought as a counterclaim in an infringement case.

The chart below shows a step-by-step process of a CTM registration.

Design protection in the EU

A design is the outward appearance of a product or part of it, resulting from the features such as the lines, contours, colors, shape, texture or materials, of the product itself and/or its ornamentation. In the EU, a design may be protected if it is novell and has individual character in the sense that an informed user would find it different from other publicly available designs. A design solely dictated by its technical functions is not protected. EU-wide design protection can be obtained by:

- A registered Community design (RCD) further to an application with OHIM or through an international application for a design in the EU via the “Hague system” administered by WIPO; or
- An unregistered Community design (UCD).

The national design laws of all EU Member States have been substantially harmonized by Directive 98/71/EC.

Overview of Community design rights

<table>
<thead>
<tr>
<th></th>
<th>Registered Community designs</th>
<th>Unregistered Community designs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Geographical Scope</td>
<td>The entire EU</td>
<td>The entire EU</td>
</tr>
<tr>
<td>Duration of Protection</td>
<td>Five years from the filing date; it can be renewed for periods of five years up to a maximum of 25 years.</td>
<td>Three years from the date on which the design was first made available to the public within the EU territory; within the first 12 months following the initial disclosure, it is possible to apply for an RCD.</td>
</tr>
<tr>
<td>Conferred Rights</td>
<td>An exclusive right to use and to prevent the making, offering, putting on the market, importing, exporting, using or stocking for such purposes of products incorporating the design, which do not produce a different overall impression.</td>
<td>A right to prevent the commercial use of the design only if the use results from copying.</td>
</tr>
<tr>
<td>Enforcement</td>
<td>Enforcement against infringement by:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Filing a suit at the Community design courts; or</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Filing a request for action with EU customs authorities to retain suspected counterfeit goods at the border.</td>
<td></td>
</tr>
</tbody>
</table>
The Community design registration process at OHIM

Registering a Community design with OHIM is not very different from registering a CTM with OHIM. An RCD application can be filed with OHIM or national IP offices. If the examination result is positive, it can be registered and published in the RCD bulletin. Unlike for CTM applications, OHIM does not provide a search for all RCD applications. Furthermore, there is no opposition procedure. According to OHIM, the whole RCD registration process can take approximately 8 weeks.

The chart shows a step-by-step process of an RCD registration.

Source: OHIM website

3. Copyright

Copyright protection in the EU

A copyright protects an expression of the author’s original ideas as an intellectual creation. Good examples are books and music. In addition to authors, performers also enjoy an exclusive right to prevent others from fixing their performance (e.g., by recording) without authorization. Computer programs and certain aspects of a database can also be protected by copyright so long as they satisfy the requirement of creativity.

Korea and the EU Member States are already members of several international agreements which ensure minimum standards of copyright protection. The EU copyright regime has been further strengthened and harmonized by legislative means such as directives and through extensive case law developed by EU and national courts.

Korean IT industries may benefit from monitoring recent developments on the European Commission’s proposed directive on “collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market.” The proposed framework aims to bring more transparency and efficiency in the rights management system. In particular, the new framework should facilitate multi-territorial and multi-repertoire licensing and distribution of musical works for online uses in the EU as well as the European Economic Area (“EEA” consisting of the EU Member States, Iceland, Lichtenstein and Norway).

4. Geographical Indications

Geographical indications protection in the EU

A geographical indication (GI) is a name or sign identifying a good as originating in a specific region or a country, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin. Due to the importance of its agriculture, foodstuffs, wine and spirits businesses, the EU took a special interest in protecting GIs during the negotiation of the Korea-EU FTA. The EU currently operates three GI protection schemes (see the table on the next page) to encourage diverse agricultural production, protect product names from misuse and imitation and help consumers by giving them accurate product information.
<table>
<thead>
<tr>
<th>GI</th>
<th>Definition</th>
<th>Logo</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protected Designation of Origin (PDO)</td>
<td>Covers agricultural products and foodstuffs which are produced, processed and prepared in a given geographical area using recognized know-how.</td>
<td></td>
</tr>
<tr>
<td>Protected Geographical Indication (PGI)</td>
<td>Covers agricultural products and foodstuffs closely linked to the geographical area. At least one of the stages of production, processing or preparation takes place in the area.</td>
<td></td>
</tr>
<tr>
<td>Traditional Specialty Guaranteed (TSG)</td>
<td>Highlights traditional character, either in the composition or means of production.</td>
<td></td>
</tr>
</tbody>
</table>

Up-to-date information on GIs protected in the EU is available at the following two databases:

- DOOR
- E-BACCHUS

**Examples of GIs in the EU**

- Gorgonzola, Feta, Queso Manchego, Roquefort (cheese)
- Bayerisches Bier, České pivo, Münchener Bier (beer)
- Prosciutto di Parma (ham)
- Bordeaux, Cava, Champagne, Chianti, Toscana (wine)
- Cognac, Irish whisky, Polish Vodka, Scotch Whisky, Vodka of Finland (spirit)

**5. Enforcement of IPRs**

**KEY ISSUES:**

- While a revision of the European patent enforcement system remains under discussion, patent infringement currently must be dealt with by national patent law.
- The European Commission is increasingly focusing on antitrust enforcement of potential abuse of IPRs.

Similar to IPR enforcement under Korean law, the EU provides for civil measures and criminal enforcement against IPR infringement. Border measures are also available against counterfeits or other suspicious goods by a request to the EU customs authorities.
Enforcement of Community IPRs

EU-wide legal remedies are available for CTMs and Community designs. Certain national courts and tribunals of first and second instances are designated by the Member States as CTM courts or Community design courts to deal with Community IPR issues. These Community courts have exclusive jurisdiction for *inter alia*:

- An infringement action;
- A declaration of non-infringement; and
- A counterclaim for revocation or for a declaration of invalidity in an infringement case.

Infringement of European patents

According to Article 64(3) of the European Patent Convention, any infringement of a European patent shall be dealt with by national law. This provision bears several important implications. For example, to seek an EU-wide injunction against alleged infringers, a patent holder must bring an action before the national court of each EU Member State. Therefore, in multi-jurisdictional patent disputes, there is a risk that national courts may reach different outcomes for the same matter.

Member States have different patent adjudication systems. Similar to Korea, Germany has a dual-track system of handling nullity and infringement proceedings separately. To invalidate a patent, a nullity action must be filed with the German Federal Patent Court in Munich. The parallel infringement action is usually stayed while the nullity action is ongoing. On the other hand, UK and French courts can consider both invalidity and infringement claims in one case.

Certain national courts are well known for their speed and expertise in handling patent cases. For example, the Düsseldorf District Court in Germany - a specialized court primarily dealing with patent infringement cases - hears on average 600 patent claims a year, which is probably the highest number of patent infringement cases in Europe. The first instance action usually takes about 1 to 1.5 years.

In addition, the opposition procedure before the EPO is often run in parallel with patent litigation in national courts. The opposition procedure before the EPO is a post-grant, contentious, *inter partes* procedure. Any person from the public may oppose European patents granted by the EPO.

Seizure and preliminary injunctions

Suppose that a Korean company participating in a trade fair in Europe suddenly discovers that a competitor’s products displayed at the fair appear to infringe its IPRs. Can the Korean company obtain a court order requiring the seizure of the infringing products? Or, in a reverse situation, when a Korean company is unexpectedly faced with seizure of its products and even assets because of an alleged infringement claim, what defenses are available to it?

Answers to these questions may be found in Directive 2004/48/EC (“Enforcement Directive”) which harmonizes rules on IPR enforcement in the EU Member States, including evidence, provisional measures, injunctions, damages and legal costs. The rules provided in the Enforcement Directive are transposed into the national laws of all Member States. Some important provisions are summarized below.

- **Civil search and seizure**: Section 2 of the Enforcement Directive provides that a party presenting "reasonably available evidence sufficient to support its claims" can be given access to evidence not yet in its possession concerning the infringement. Seizure or other provisional measures can be granted to preserve evidence even before the proceedings begin. Those measures can include not only the physical seizure of the infringing products but also of the materials used in the production
and/or distribution of these goods, and related documents. If the right holder demonstrates a risk of irreparable harm or of evidence being destroyed, provisional measures may be granted *ex parte*.

If the measures are subsequently revoked or no infringement is found, courts may order compensation for any injury caused by such measures.

- **Provisional and precautionary measures**: Section 4 of the Enforcement Directive states that an “interlocutory injunction” may be granted to prevent any imminent IPR infringement or to prevent the continuation of IPR infringement. An interlocutory injunction can also be used against an “intermediary”, such as an online service provider, whose services are used by a third party to infringe IPRs.

  Importantly, if the injured party demonstrates that the recovery of damages is likely to be endangered, the court may order the “precautionary seizure of the movable and immovable property” of the alleged infringer, including the blocking of his/her bank accounts and other assets.

**Antitrust enforcement relating to IPR issues**

The Commission recently opened several competition law investigations on the use of certain patents essential to implement a technical standard. The Commission also investigates other patent-related issues, *e.g.*, reverse payment patent settlements between a pioneer pharmaceutical company and a generic manufacturer.

*Note* — For further guidance on EU competition law, please go to Chapter 3 Competition Law.

**6. To Go Further:**

- Office of Harmonization for the Internet Market (OHIM), [http://oami.europa.eu](http://oami.europa.eu)
- European IPR Helpdesk, [http://www.ipr-helpdesk.org](http://www.ipr-helpdesk.org)
CHAPTER 5
Free trade only exists when Korean businesses can actually access the EU market. Not only tariff barriers and burdensome custom procedures, but also technical regulations, standards, conformity assessment procedures, and restrictive government procurement rules restrict market access. Removing these barriers is part of the EU’s development strategy to boost trade within the EU, but also with third countries, as reflected by the Korea-EU FTA, which contains important mutual commitments in this respect.

The end of 2012 marks the 20th anniversary of the EU “single market” initiative, seeking to ensure free movement of goods, services, people and capital throughout the EU as easily as within a single country. The free movement of goods has been facilitated in two ways: (i) in many sectors, the EU Member States have adopted common rules, a process known as “harmonization”; and (ii) where common rules are not in place, Member States can follow the principle of mutual recognition. Therefore, the EU single market, which accounts for approximately 500 million consumers, can be easier to access than other overseas markets as many of the trading practices, regulations and standards apply throughout the EU. There remain, however, important differences in national rules.

- **Practical tool**: Trade statistics – Establish whether a particular EU market is worth targeting or not: [http://exporthelp.europa.eu/thdapp/comext/ComextServlet?languageId=EN](http://exporthelp.europa.eu/thdapp/comext/ComextServlet?languageId=EN)

### 1. Harmonized and Standardized Product Requirements

To make it easier for goods to move freely within the EU single market, EU Member States have adopted common – harmonized – rules, in particular in the higher-risk product sectors in order to minimize risks (e.g., to human health, the environment) and ensure legal certainty across Member States. Technical harmonization at EU level thus guarantees both genuine free movement of industrial products and a high level of consumer safety and environmental protection.

**New Approach** – Harmonization has mainly been achieved on the basis of the “new approach” harmonization method. The EU establishes concise essential quality and safety requirements for product categories (e.g., machinery) or specific technical aspects (e.g., electromagnetic compatibility) in directives, after which the technical details are worked out by the European
standardization bodies. The standards are voluntary, but products made in accordance with them enjoy a presumption of conformity with the essential requirements of the directives. This approach is based on self-certification by the manufacturer or, for more sensitive products, certification by so-called “notified bodies” and the marking of the products with the CE-mark.

**Sectors Harmonized in Line with the New Approach:**
- Medical devices
- Toys
- Machines
- Electrical and electronic equipment
- Information and telecommunication
- Air and rail traffic
- Pressure equipment, etc.

The main European standardization bodies are CEN (European Committee for Standardisation), CENELEC (European Committee for Electrotechnical Standardisation), and ETSI (European Telecommunications Standards Institute).

The CE marking indicates that products have been subject to a conformity assessment procedure and comply with directives’ essential requirements.

**Old Approach** – At the same time, a number of “old approach” harmonization directives and regulations remain in force covering a wide range of product groups, such as pharmaceuticals, foodstuffs, cosmetics, and motor vehicles. These sectors are nearly fully harmonized by detailed product specific legislation (for example, specific authorization procedures and safety requirements for particular product categories) and horizontal legislation applying to a wide variety of products. An example of horizontal legislation is the EU REACH Regulation on chemicals, which imposes disclosure and other detailed human health and environmental safety requirements on virtually all products marketed in the EU. (See Chapter 7 EU Environmental Requirements.) These old approach rules require frequent amendments that reflect technical and policy developments.
2. Mutual Recognition in Non-Harmonized Sectors

The “mutual recognition” principle seeks to guarantee free movement of goods and services without the need to harmonize national legislation. Some products (or some aspects of them) are not subject to EU rules and each Member State is free to apply its own “technical rules” about, for example, the weight, size, composition, labeling and packaging thereof. In particular, lower-risk sectors have generally not been subject to EU legislation.

- Regulation No 764/2008 reinforces the market access principle by various steps, including “product contact points” in each Member State.
- See: http://ec.europa.eu/enterprise/intsub/a12/

Trade in these non-harmonized sectors – which accounts for approximately half of the trade in goods within the EU – relies on the “mutual recognition” principle, under which products legally manufactured or marketed in one Member State should in principle be able to move freely throughout the EU, even when the product does not fully comply with the technical rules of the Member State of destination. The latter may refuse the marketing of a product only where it can show that this is strictly necessary for the protection of, for example, public safety, health, or the environment.

TRIS Notification – Pre-adoption Screening of National Technical Regulations

Directive 98/34/EC requires EU Member States to notify the Commission and each other of any draft “technical regulations” for products before they are adopted into national law, in order to enhance transparency and prevent introduction of unjustified technical barriers to trade. This tool - Technical Regulations Information System (TRIS) Notification - allows businesses to express their views during the drafting of national rules.

3. EU Public Procurement

KEY FACTS:

- The EU public procurement market is one of the most open in the world.
- The total purchase of goods, services, and works by public authorities in the EU is estimated at 18% of the EU’s GDP.

EU and international public procurement rules require open and transparent procedures, fair competition and non-discrimination, as well as effective remedies for unsuccessful bidders to challenge procurement decisions. The EU Procurement Directives (some of which are sector-specific, e.g., the Utilities Directive relating to the water, energy, transport and postal services sectors) each define the relevant contracting authorities or entities within their scope. Contracting entities for
the purpose of the Utilities Directive or the Defense Directive can also be private undertakings which operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

The Procurement Directives apply only to contracts with a value that exceeds certain thresholds set out in each Directive. To promote non-discrimination, transparency and competition, the Directives set out detailed rules regarding publication, transparency, contract documents, the criteria for selection of bidders, criteria for award of contracts, and technical specifications. For example, where technical specifications are formulated by reference to European or national standards, contracting authorities or entities may not reject a bid that does not comply with these standards if the bidder can prove that its solution satisfies the requirements in an equivalent manner.

## Objectives of the EU Reform of Public Procurement Directives (Expected by Mid-2014)

- Simplify current rules and procedures and make them more flexible;
- Encourage access to public procurement for SMEs through incentives to divide contract awards into lots and limits on financial capacity requirements;
- Facilitate qualitative improvements by ensuring greater consideration for social and environmental criteria, such as life-cycle costs;
- Combat conflicts of interest, favoritism and corruption.

Authorities have considerable discretion on how to apply the EU public procurement rules. For example, the Procurement Directives allow for five types of award procedures, i.e., an open procedure, restricted procedure, competitive dialogue, negotiated procedure, and design contest. In addition, the Procurement Directives only set minimum standards, and give Member States the freedom to provide for additional market openings. Therefore, national procurement laws still differ significantly, though they must always be interpreted in the light of the Procurement Directives.

## Zoom-in on the Korea-EU FTA:

- Korea and the EU already had mutual commitments on government procurement in the framework of the WTO Agreement on Government Procurement. In that context, both Parties agreed to apply substantially transparent and non-discriminatory procedural rules to award contracts for goods and services (including construction services) by public authorities.
- The Korea-EU FTA expands these mutual commitments to additional areas, which provides significant business opportunities in both regions: (i) public works concessions in the EU, and (ii) build-operate-transfer (BOT) contracts in Korea. Both parties have agreed to immediately and unconditionally accord national treatment and non-discrimination to the goods, services and suppliers of each other in these areas.

## 4. Remaining Barriers

Despite extensive EU harmonization and the application of the mutual recognition principle to non-harmonized sectors, some barriers to trade – in particular in the services sector – remain. For example, important challenges for Korean companies doing business in the EU may be:

- The non-harmonized and fragmented nature of national tax systems;
- Compliance with local language requirements in the 27 EU Member States;
- Required national approvals or licenses (*e.g.*, pricing and reimbursement for medicines);
- Difficulty in obtaining information on public tenders;
- Lack of mutual recognition of professional qualifications;
- Different national interpretations of the EU rules.
CHAPTER 6
Chapter 6  Data Protection

WHAT TO WATCH FOR:

- Compliance with principles of data processing.
- Information provision obligation.
- International data transfers.
- The future of EU privacy law: the General Data Protection Regulation.

Europe has a long history of protecting privacy rights of individuals and the current EU regulatory framework on data protection is often referred to as the most sophisticated and in many respects the most stringent in the world. In particular, because of the broad definition and interpretation of “personal data” under EU privacy law, virtually every company that is doing business in Europe is in one way or the other subject to the provisions of EU data protection law. Privacy considerations have to be taken into account whenever a company processes data of its employees, collects customer data, offers online services or products to EU consumers or transfers data of employees, vendors and customers from one subsidiary to another, especially if this involves cross border data flow from Europe to Korea and other countries outside the EEA. This means that even companies originating in countries with comprehensive privacy laws often inadvertently expose themselves to significant compliance risks.

1. Principles for Processing Data in Europe

KEY ISSUES:

- Data can only be processed if a company can rely on a “legal basis”.
- Purpose limitation: data must be collected for a specified and legitimate purpose (and used accordingly).
- Processing must be proportionate and not excessive.
- Data must not be retained indefinitely or for an overly long period of time.
- Companies must put in place technical and organizational measures against accidental, unlawful or unauthorized processing.
The EU data protection framework is mainly composed of two Directives: the General Data Protection Directive 95/46/EC, which establishes *general* rules applicable to all businesses throughout the EU, and the so called e-Privacy Directive 2002/58/EC, which sets forth sectoral rules and applies to personal data in the electronic communications sector.

Directive 95/46/EC establishes the basic principle that every “processing” of personal data by a company – or as the Directive puts it: by the “data controller” (*i.e.*, the entity which determines purposes and means of the processing) – must rely on a legal basis, a limited list of which is set forth in the Directive. Any piece of personal data that is collected needs to be able to be justified on an appropriate legal basis. The sharing of personal data with affiliates of the same corporate group is also subject to data protection rules and often requires the putting in place of a special processing agreement. International companies should take into consideration that EU law does not recognize a “corporate group privilege”, that is, even the transmission of data within one and the same corporate group and within one Member State (*e.g.*, from one legal entity of a company to another) requires careful handling under EU data protection law.

In practice, the most common legal basis which data controllers in the private sector rely on to process personal data are:

- The consent of the individual whose data is processed ("data subject");
- Processing is necessary for the performance of a contract to which the data subject is party; or
- Processing is necessary for the purposes of the legitimate interests pursued by the controller except where such interests are overridden by the interests of the data subject.

For international companies obtaining consent of the data subject often seems to be the simplest way to comply with EU data protection law, whereas in fact consent also has considerable downsides. To name only two, data subjects can withdraw their consent at any time and without any explanation, and therefore deprive the company of the possibility to further lawfully process the data. Second, Directive 95/46/EC requires the consent to be “freely” given. Especially in the employment context, EU regulators argue that employees can by no means provide freely their consent because they are in a relation of subordination and therefore normally have no choice but to provide their consent.

Moreover, international companies need to bear in mind that EU law not only sets requirements for the collection of data but also limits companies in how they subsequently can use even lawfully collected data. The use of the data is limited to the specified and legitimate purpose for which it was originally collected. Any further processing that is incompatible with those purposes renders the processing operation unlawful and may trigger interventions by EU regulators.

### 2. Information Provision Obligations for Companies

Another key component of Directive 95/46/EC is transparency. Accordingly, any collection of data and the subsequent processing of the data must be carried out openly and fairly. Companies are legally required to provide users with prior notice and sufficient information that must be “accurate and full”. Any failure to provide that information, *e.g.*, by providing inaccurate or incomplete information, renders the data collection and all subsequent data processing activities illegal.

The required level of information always depends on the actual circumstances of the collection. As a rule of thumb, the less obvious or expected a collection of data is, the more detailed information must be provided. However, Directive 95/46/EC lists certain information which as a minimum must be provided to individuals. These requirements are shown in the box below.
In addition, the Article 29 Working Party – an advisory body at EU level which comprises all 27 national privacy regulators – has issued further guidance in this regard and recommends that companies also should provide precise information about the modalities of the transfer and its possible risks when the collected data is intended to be transmitted abroad.

Beyond the content of this information obligation, such notices also need to be presented in a clear and intelligible manner. If the data is collected online (e.g., in an online shop), EU regulators favor a multilayer notice with up to three layers in which more information is displayed. According to the regulators, this significantly enhances the clarity and legibility of the notice for users.

3. Data Transfer from Europe to Korea and Other “Third Countries”: a Real Compliance Challenge

**Minimum Information Requirements**

Companies that collect data must provide at least the following information to individuals:

- The identity of the controller;
- The purposes of the processing for which the data is intended;
- The recipients or categories of recipients of the data;
- The existence of their right of access to and the right to rectify their data.

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Beyond the content of this information obligation, such notices also need to be presented in a clear and intelligible manner. If the data is collected online (e.g., in an online shop), EU regulators favor a multilayer notice with up to three layers in which more information is displayed. According to the regulators, this significantly enhances the clarity and legibility of the notice for users.

Under EU law, the transfer of data to countries outside the EEA is subject to particularly strict rules. Directive 95/46/EC generally prohibits every transfer of personal data to third countries (i.e., a country outside the EEA) unless that country ensures an “adequate level of protection” for privacy rights. The decision whether or not a country offers an adequate level of protection can only be taken by the European Commission. In this case, the Directive’s restrictions on international transfer of personal data do not apply. The Commission adopted such decisions for a small number of countries only (e.g., Canada, Israel, Switzerland, and Argentina). To date, the Commission has not adopted a formal decision on Korea’s regulatory privacy framework, which means that the Directive’s restrictions on international data transfers remain in place for transfers between Korea and the EU.

However, if a country like Korea is not found to ensure an adequate level of protection, certain safeguards may permit the transfer of data. There are basically two different instruments that both expand the EU privacy regime to the data importer located in the third country: this can either be made by putting in place a special transfer agreement between the data exporter and the data
importer or by adopting companywide Binding Corporate Rules (“BCR”). The latter is a code of conduct which contains legally enforceable corporate rules for international transfers within the same corporate group. By contrast, a special transfer agreement can be concluded with any data importer in a third country (other subsidiary of the same group, service provider, etc.). In practice, many international companies opt for a transfer agreement instead of BCR and use one of the three templates issued by the EU Commission (so called “Model Contract Clauses”) which essentially cannot be changed but prevents companies from a lengthy approval procedure before the competent national regulator.

### Legitimizing Data Transfer by Adducing Adequacy

Transmitting personal data to Korea and other so called “third countries” requires additional safeguards such as:

- Binding Corporate Rules; or
- Special contractual provisions between data importer and exporter (especially the EU Model Contract Clauses).

### 4. Supervision and Enforcement

Non-compliance with the aforementioned EU data protection rules can result in severe consequences for companies. First, companies may face an intervention by the competent national Data Protection Authority, which under EU law are endowed with extensive rights to investigate and sanction possible infractions of EU privacy rules. In the past, flouting EU data protection rules could already induce regulators to impose significant financial sanctions which in the future, according to a current proposal of EU legislators, should be beefed up and empower regulators to levy fines up to 2% of a company’s annual worldwide turnover (for the most serious data protection breaches). Second, companies that are present in the European market should not underestimate reputational risks associated with the violation of EU privacy law. In recent years privacy infractions that were uncovered by the press or the regulators have attracted large media coverage. The European public takes privacy matters seriously and generally pays much attention to these issues.

### 5. The Future of EU Privacy Law: the General Data Protection Regulation

As alluded to above, the EU is currently reviewing the centerpiece of its regulatory framework. In January 2012, the Commission presented its proposal for a new General Data Protection Regulation, which is intended to replace Directive 95/46/EC, and which is now in the legislative process and subject to controversial discussions within the Parliament and the Council.

The new Regulation would be directly applicable in all EU Member States and thus address one of the chief criticisms of the existing EU data protection regime that EU Member States have often implemented the Directive in a divergent fashion. The Regulation would remedy this problem and establish a common set of standards applicable across the entire EU. As it seems now, the new Regulation will most likely follow the general approach of the Directive (e.g., as to restrictions on data transfers to third countries) but will also update and reshape the EU privacy landscape, especially as to the challenges of the Internet and the digital economy.
**Trends**

Although the current version will almost certainly undergo numerous changes throughout the legislative process, it seems for now that the new Regulation (which has more than 91 articles) will adhere to the general principles of the existing privacy regime, but will also include a number of new concepts:

- **Higher sanctions:** Along the same lines as sanctions for infringements of EU competition law, each competent authority would now have the power to impose administrative sanctions and levy fines up to 2% of an enterprise’s annual worldwide turnover;

- **Promote binding corporate rules and Model Clauses** by simplifying the approval processes;

- **Extra-territorial application** of EU privacy law to non-EU companies that “direct” their processing activities to data subjects residing in the EU or whose activities serve to monitor the behavior of data subjects;

- **Consent cannot be used as a legal basis** for processing personal data where “significant imbalance in the form of dependence between the position of the data subject and the data controller” exists (e.g., employment relationships);

- **New rights for data subjects:** draft proposal contains a heavily caveated “right to be forgotten” according to which a data controller must render inaccessible certain data.

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**6. To Go Further:**

- For more information on EU privacy law and to keep up with the latest developments in that area, see Covington’s up-to-date blog posts under: http://www.insideprivacy.com/international/european-union/
Chapter 7 EU Environmental Requirements

WHAT TO WATCH FOR:

- Updates of the EU REACH Candidate List of Substances of Very High Concern for Authorization.
- New and more stringent waste take back and chemical restrictions on electronic equipment.
- Upcoming requirements on energy efficiency, noise, and greenhouse gas emissions for vehicles, electronics and other specific categories of products.

Korean companies doing business in Europe must comply with all applicable EU environmental rules. In particular, goods marketed in the EU must comply with a wide variety of environmental product regulations, which can be classified into four broad categories:

- **Chemical requirements**, such as those under the EU REACH Regulation, CLP Regulation, Fluorinated Gases Regulation, and new Biocidal Products Regulation.


- **Energy efficiency and eco-design requirements**, such as those under the Energy Related Products Directive and the Energy Efficiency Directive.

- Environmental requirements for specific categories of products, such as **limits on noise and gas emissions** for vehicles, or **environmental quality and sustainability requirements** for fuel.

In addition, Korean companies manufacturing goods in the EU must comply with **industrial emission limits**, such as those of the new Directive on Industrial Emissions. Manufacturing plants in certain sectors, such as chemicals and heavy industries, and even airline companies flying to or departing from European airports are also subject to the **greenhouse gas emissions cap and trading** of the EU Emissions Trading System.
1. REACH Candidate List and Biocidal Requirements on Goods Marketed in Europe

**KEY ISSUES:**

- EU REACH restrictions and requirements on Candidate List substances and other dangerous chemicals apply to virtually all goods marketed in the EU.
- Manufacturers are expected to phase out Candidate List substances from the goods they market in the EU.
- Goods may also be subject to biocidal disclosure requirements if they are treated with or intentionally incorporate preservatives and other biocidal products.

**SVHC Candidate List substances in goods**

The EU REACH Regulation requires the European Chemicals Agency ("ECHA") to identify so-called Substances of Very High Concern ("SVHCs") and to list them in the so-called Candidate List of Substances of Very High Concern for Authorization ("Candidate List"). SVHCs may include Category 1A and 1B carcinogens, mutagens and toxic to reproduction substances ("CMRs"); persistent, bioaccumulative and toxic substances ("PTBs"); very persistent, and very bioaccumulative substances ("vPvBs"); and substances raising an equivalent level of concern.

**Updates to the Candidate List**

- The REACH Candidate List of Substances of Very High Concern for Authorization\(^1\) is updated at least in June and December of each year. It currently lists around 85 substances and it is expected to reach a few hundred within the next years.
- Companies may anticipate the new substances that are likely to be included in the Candidate List by regularly checking the registry of intentions and public consultations of the ECHA.

Virtually all goods in the form of articles (i.e., objects, such as electronics, paper, vehicle components) containing Candidate List substances in concentrations of above 0.1% are subject to stringent information and notification requirements. In particular, all companies supplying goods in the form of articles containing Candidate List substances in concentrations above 0.1% weight by weight must provide their professional customers (e.g., distributors) with sufficient information to ensure the safe use of the article, including at least the name of the substance listed in the Candidate List. This information must be provided no later than at the time the goods are supplied, and may be provided by different means, such as individual letters, material composition declarations, or online. The same information must also be provided free of charge to consumers within 45 days of their specific request.

Moreover, within six months from the inclusion of a substance in the Candidate List, companies marketing articles in the EU must submit a notification to the ECHA if: (i) their articles contain the substance in concentrations of 0.1% weight by weight or more; (ii) the substance is present in the

\(^1\) [http://echa.europa.eu/web/guest/candidate-list-table](http://echa.europa.eu/web/guest/candidate-list-table)
articles in quantities above one ton per producer/importer per year; (iii) the use of the substance has not already been REACH-registered, and (iv) environmental and human health exposure cannot be excluded.

Importantly, the use of most Candidate List substances during the manufacture of goods in the EU will also be subject to prior authorization requirements. In the longer term, the marketing of goods containing these substances will also be banned.

**New rules on goods with biocides**

A new Regulation on Biocidal Products also imposes disclosure and notification requirements on all goods that have been “treated with or intentionally incorporate” biocidal products (e.g., refrigerators with preservatives, anti-viral tissue papers, textiles with anti-odor properties). Korean companies marketing goods treated with or intentionally incorporating biocides must make sure that such biocides are approved in the EU and may also be required to label their products if this is required for the particular biocide, biocidal claims are made, or the use of the biocides may pose a human or environmental risk.

### 2. New Waste Take Back and Chemical Restrictions on Electrical and Electronic Equipment

**KEY ISSUES:**

- New CE marking and conformity assessment procedures under the RoHS Directive for electronic products marketed in the EU as of 2013. Companies must inform authorities if they become aware that their products are RoHS non-compliant.
- New RoHS chemical restrictions on electro-medical devices marketed in the EU as of July 2014.
- Many of the RoHS exemptions for specific applications will expire in the coming years.
- Possible additional RoHS restrictions on the use of HBCDD, DEHP, BBP and DBP in electronic products marketed in the EEA.
- Higher fees from electronic waste take back schemes across Europe as a result of higher recycling and recovery targets.
- Stricter controls on exports of electronic waste and used electronic products from the EU to third countries.

Korean companies marketing goods in the EU must comply with so-called environmental producer responsibility obligations. These include restrictions on the chemical composition of their products and obligations to pay for the take back of the waste of their products. For example, companies marketing electronic products must make sure that these comply with the chemical restrictions of the Directive on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS) and also comply with the registration, labeling and waste take back requirements of the Waste Electrical and Electronic Directive. As of 2013, these two directives will be replaced by new RoHS and WEEE Directives, which will impose stricter requirements and apply to all electrical and electronic equipment (unless explicitly exempted).
**RoHS chemical restrictions**

The new RoHS Directive will continue to ban electronic products containing more than 0.1% of lead, mercury, chromium hexavalent, PBBs and PBDEs, or more than 0.01% of cadmium. These restrictions will also apply to electro-medical devices as of 2014. Importantly, the Directive also empowers the Commission to restrict the use of additional substances, and in particular to assess as a priority restrictions on the use of HBCD, DEHP, BBP and DBP.

The new RoHS Directive continues to empower the Commission to grant exemptions for specific electronic applications of the restricted substances. The Directive currently lists over 30 exemptions, but at least 12 of these exemptions will expire within the next three years.

Importantly, the new RoHS Directive imposes new CE mark and conformity assessment procedures to show compliance. These include an obligation on producers, importers and distributors of electronic products to inform European national authorities if they become aware that a batch of their electronic products is RoHS non-compliant.

**EU Producer Responsibility Legislation**

Many other products marketed in the EU are subject to waste take back and chemical restrictions similar to those of the RoHS Directive and the WEEE Directive for electronic products. For example, companies marketing vehicles must make sure to comply with the chemical restrictions and waste take back requirements of the End of Life Vehicles Directive. Similarly, companies marketing products containing batteries must make sure to comply with the requirements of the Batteries Directive. All companies marketing products in the EU must also ensure that the packaging of their products complies with the Packaging and Packaging Waste Directive.

**WEEE waste take back requirements**

The new WEEE Directive increases the collection, recovery and recycling targets on waste from electronic products. This is likely to result in increased fees of the waste take back schemes across Europe of which electronic producers are members. Producers will have to continue to register and join take back schemes in each Member State but the new Directive allows them to have authorized representatives to comply with the WEEE requirements in each Member State.


**KEY ISSUES:**

- The European Commission is empowered to adopt energy efficiency and eco-design requirements on a wide variety of products that consume or affect the consumption of energy.
- The EU is considering stricter limits on gas and noise emissions from vehicles.
Rules on energy-related products

The Directive on Energy Related Products empowers the Commission to identify specific categories of products that consume or affect the consumption of energy and to impose energy efficiency and eco-design requirements on them. On this basis, the Commission has already adopted requirements on a variety of electrical appliances (e.g., dishwashers, lighting, washing machines, set top boxes, electric motors) and is expected to adopt requirements on many more products.

New environmental requirements on vehicles

A Regulation on Performance Standards on Passenger Cars 2009 sets mandatory CO2 emission reduction targets for new cars. The fleet average to be achieved by all new cars registered in the EU is 130 grams of CO2 per kilometer (g/km) by 2015, and 95 grams of CO2 by 2020. In addition, the EU is currently considering adoption of legislation that would reduce noise from vehicles by around 25%. The proposal would reduce the noise limit values by 4 dB(A) for passenger cars, vans, buses and coaches and 3 dB(A) for trucks within four years from its adoption.

Trends in EU Environmental Legislation

Korean companies marketing products in the EU should closely follow:

- Upcoming EU green government procurement and eco-label initiatives that may significantly restrict access to a significant sector of the European market; and

- Upcoming EU carbon footprint labeling schemes, which are likely to put at a disadvantage goods shipped into Europe from remote countries.

Korean companies should also monitor closely EU discussions to include the shipping sector in the EU Emissions Trading System.

Note – Manufacturers marketing non-compliant goods in the EU may face fines and even criminal liability in the different Member States. Many national enforcement authorities are also empowered to block the marketing, and order the withdrawal and destruction of non-compliant goods.

4. To Go Further:

- Peter Bogaert & Candido García Molyneux, “Upcoming EU Requirements on Goods Treated with Biocidal Substances,” EuroWatch (8/15/2011)
1. Product Safety

Consumer products marketed in the EU must be safe. Producers and distributors are required to notify the competent authorities if a product poses a risk to consumers when used under normal and reasonably foreseeable conditions. Some hazards are evident, like a defective car, others may be less obvious, such as contamination of food through the packaging. The national authorities will take appropriate measures to ensure safety for the consumers and can, for instance, mandate public warnings, or a withdrawal or recall of the products concerned.

If the product poses a serious risk, the Member States have to inform the Commission through the RAPEX (rapid exchange) network and the Commission publishes weekly RAPEX notifications lists with specification of the brand and a summary of the facts. More than 2,000 notifications are made per year.

Korean companies should be mindful of the safety exchange mechanism in the EU as it may severely affect operations and the reputation in the entire EU even though safety incidents occur in only one or a few Member States. Companies may need strategic advice on how to react if safety issues arise and, especially, whether a notification to national authorities is required.

2. Unfair Commercial Practices

Directive 2005/29/EC prohibits the use of unfair commercial practices in business-to-consumer transactions. For instance, it prohibits misleading advertising about the nature, composition, origin or price of a product or the use of aggressive practices, such as harassment, coercion or undue influence. Member States typically adopted similar regimes for business-to-business practices. A specific example of protection against misleading claims and advertising, but also of protecting traditional products, are the rules on geographical indications (such as Camembert and Champagne).

1 http://ec.europa.eu/consumers/dyna/rapex/rapex_archives_en.cfm
The rules governing unfair commercial practices normally grant standing to competitors, consumers, and consumer associations to seek damages or injunctions. There may also be criminal enforcement in some Member States.

Some rules can be very specific (and maybe perceived as surprising). For example, in the EU it is generally prohibited to use advertising to encourage children to buy or persuade their parents to buy the advertised products. Some Member States, such as Germany, are particularly active when it comes to enforcement. It is often worthwhile to check with experts whether a commercial practice could present any issues.


The Korea-EU FTA also requires the parties to protect geographical indications against any use that constitutes an act of unfair competition (Article 10.21).

### 3. Contracts

Various EU directives set out specific rules governing the formation and content of contracts between businesses and consumers. Some rules only apply to particular sectors (e.g., financial services), but others cover all kinds of consumer contracts. The following are noteworthy examples:

- Consumers generally have an unwaivable right to withdraw from contracts that were concluded by means of distant communication such as telephone, Internet, or teleshopping. According to Directive 2011/83/EU, which is to be transposed into the national laws of the Member States by 2013, consumers have to exert that right within 14 days.

- Businesses that conclude contracts with consumers via electronic means have to provide consumers with technical information such as: the different steps to follow for the conclusion of the contract; technical means to correct input errors; and the languages available to conclude the contract. Also, the business must acknowledge the receipt of the order without undue delay.

- Directive 2011/83/EU further improves consumer protection in B2C situations. For example, it aims to increase price transparency (total price of goods and services need to be disclosed in advance) and obliges businesses to reimburse payments (including delivery costs) to consumers who have withdrawn from a distance contract within 14 days.
Trends

The EU legislature has always put a premium on protecting consumers and there are no signs that this will change in the future. In its proposal for the Consumer Program 2014-2020, the European Commission envisages a financial envelope of €197 million to support its policy objective to “place the empowered consumer at the center of the internal market.” Among other things, the program pursues the following objectives:

- To consolidate and enhance product safety through effective market surveillance;
- To improve consumers’ education, information and awareness of their rights, and to provide support to consumer organizations;
- To support enforcement of consumer rights by strengthening cooperation between national enforcement bodies and by supporting consumers with advice.
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>BCR</td>
<td>Binding Corporate Rules</td>
</tr>
<tr>
<td>BOI</td>
<td>Binding Origin Information</td>
</tr>
<tr>
<td>BTI</td>
<td>Binding Tariff Information</td>
</tr>
<tr>
<td>CEN</td>
<td>European Committee for Standardisation</td>
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<tr>
<td>CENELEC</td>
<td>European Committee for Electrotechnical Standardisation</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice in the EU</td>
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<tr>
<td>CN</td>
<td>EU Combined Nomenclature</td>
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<tr>
<td>CTM</td>
<td>Community Trade Mark</td>
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<tr>
<td>DOOR</td>
<td>Database of Origin and Registration</td>
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<tr>
<td>ECB</td>
<td>European Central Bank</td>
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<tr>
<td>ECHA</td>
<td>European Chemicals Agency</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<tr>
<td>EIB</td>
<td>European Investment Bank</td>
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<tr>
<td>EIF</td>
<td>European Investment Fund</td>
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<tr>
<td>EMSA</td>
<td>European Maritime Safety Agency</td>
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<tr>
<td>EPO</td>
<td>European Patent Office</td>
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<tr>
<td>ETSI</td>
<td>European Telecommunications Standards Institute</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>GC</td>
<td>General Court</td>
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<tr>
<td>GI</td>
<td>Geographical Indication</td>
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<tr>
<td>IPR</td>
<td>Intellectual Property Right</td>
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<tr>
<td>MEP</td>
<td>Member of European Parliament</td>
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<tr>
<td>NCA</td>
<td>National Competition Authority</td>
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<tr>
<td>OHIM</td>
<td>Office for Harmonization in the Internal Market</td>
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<td>PCT</td>
<td>Patent Cooperation Treaty</td>
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<tr>
<td>PDO</td>
<td>Protected Designation of Origin</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>PGI</td>
<td>Protected Geographical Indication</td>
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<tr>
<td>RCD</td>
<td>Registered Community Design</td>
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<tr>
<td>REACH</td>
<td>Registration, Evaluation, Authorization and restriction of Chemicals</td>
</tr>
<tr>
<td>RoHS</td>
<td>Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment</td>
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<tr>
<td>SVHC</td>
<td>Substances of Very High Concern</td>
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<tr>
<td>TARIC</td>
<td>The EU online customs tariff database</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>TRIS</td>
<td>Technical Regulations Information System</td>
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<tr>
<td>TSG</td>
<td>Traditional Specialty Guaranteed</td>
</tr>
<tr>
<td>UCD</td>
<td>Unregistered Community Design</td>
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<tr>
<td>VBER</td>
<td>Vertical Block Exemption Regulation</td>
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<tr>
<td>WEEE</td>
<td>Waste Electrical and Electronic Equipment</td>
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<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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About Covington & Burling LLP

Founded nearly a century ago in Washington DC, Covington is recognized today as a leading international law firm with more than 800 lawyers practicing in Beijing, Brussels, London, New York, San Diego, San Francisco, Seoul, Silicon Valley, and Washington. We practice as one firm and regularly field teams with lawyers from several offices.

Our Brussels office, established in 1990, brings excellence, creativity, and practicality to our representation of clients in Europe. Our Brussels office now comprises more than 40 professionals representing at least 12 nationalities and fluent in 15 languages. We are consistently ranked very highly among Brussels firms, and we are especially well known for our EU and international trade, competition, intellectual property, government affairs, regulatory, and litigation expertise.

Moreover, Covington has been working extensively with leading Korean companies for decades. To better serve these companies, we have recently applied to open an office in Seoul. The initial focus of Covington’s Korean foreign legal consultant office will include advising Korean companies on US and EU laws in the areas of international trade and customs law and policy, antitrust and competition law matters, intellectual property, and regulatory practices. Together with our new Seoul office, the dedicated Korea team in our Brussels office form an integral part of Covington’s rapidly expanding Korea practice in the EU.
