

The European Commission Proposes a Revision of the EU WEEE and RoHS Directives

On December 3, 2008, the European Commission released two proposals to amend the Directive on Waste Electrical and Electronic Equipment ("WEEE Directive")¹ and the Directive on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment ("RoHS Directive").² The proposals introduce changes to the two Directives that will significantly impact companies marketing electrical and electronic equipment ("EEE") in the European Union and the European Economic Area.

This note briefly reviews the main aspects of the proposed revisions and provides some suggestions for companies wishing to influence the legislative procedure for the adoption of the two proposals that will follow.

Scope of the WEEE and RoHS Directives

The proposals show the Commission's attempt to harmonize the scope of the national implementations of the WEEE and RoHS Directives across Europe.

First, the Commission proposes to define the scope of the two Directives in the RoHS Directive. The Commission's intention with this change is to limit Member State discretion to expand the scope of the WEEE and RoHS requirements, but it remains unclear whether this objective will be achieved.

Both revised Directives would continue to apply to EEE that falls within a list of categories. However, in contrast to the current situation, the list of categories would be included in Annex I to the RoHS Directive. Annex II to the RoHS Directive would also include a binding and slightly amended list of products falling within the categories listed in Annex I, which the Commission would be empowered to amend through comitology.

Second, the proposed revisions of the Directives also introduce changes for aerospace, transport, and military equipment. In particular, the proposals make clear that so-called "integrated equipment" and military equipment do not fall within the scope of the two Directives, but they also modify the terms of these exclusions. Integrated equipment is excluded only if it is "specifically designed as part of another type of equipment that does not fall within the scope [of the Directives]" and "can fulfill its function only if it is part of that equipment." The definition of military equipment is kept essentially the same, but now specifies that such EEE must be "necessary" for the protection of the essential interests of the security of Member States, "including" arms, munitions and war material intended for specifically military purposes.

¹ The proposed revised WEEE Directive is available on the Internet at: http://ec.europa.eu/environment/waste/weee/pdf/com_2008_810.pdf

² The proposed revised RoHS Directive is available on the Internet at: http://ec.europa.eu/environment/waste/weee/pdf/com_2008_809.pdf

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Third, the proposals also exclude from the scope of the WEEE and RoHS Directives EEE that is “not intended to be placed on the market as a single functional or commercial unit.”

Fourth, in effect, Member State discretion to enforce additional RoHS bans, requirements on EEE recyclability and reuse design, WEEE and RoHS marking and labeling requirements and other technical rules will also be limited by the new Regulation on the Application of Technical Rules.

The proposed revision of the RoHS Directive also copies the definitions of medical devices, in vitro diagnostic medical devices and active implantable medical devices of the Medical Devices Directive. These definitions will be important when applying the RoHS cut off dates for the different types of medical devices. In contrast to the proposed revision of the RoHS Directive, the proposed revision of the WEEE Directive makes clear that it does not apply to “implanted and infected medical devices.”

The proposed revision of the WEEE Directive grants the Commission the power to classify WEEE as private household WEEE or WEEE from users other than private households (“professional WEEE”) on the basis of the share of equipment sold to private households and businesses. This will have important implications for the purposes of allocating the financial liabilities for the different WEEE take back requirements.

Finally, if there were any doubts, the Commission resolves the REACH versus RoHS debate by making clear that the revised RoHS Directive shall apply without prejudice to Community legislation on safety and health, “on chemicals, in particular [the REACH Regulation]” as well as specific waste management legislation. RoHS is here to stay, and the REACH and RoHS will co-exist in parallel.

Introduction of Medical Devices and Monitoring and Control Instruments within the Scope of the RoHS Directive

The Commission proposes to progressively introduce electro-medical devices and monitoring and control instruments within the scope of the RoHS ban. In particular, the “placing on the market” of electro-medical devices containing RoHS banned substances would be prohibited as of the following dates: (i) January 1, 2014, for medical devices, and (ii) January 1, 2016, for in vitro diagnostic medical devices. Active implantable medical devices would continue to be excluded from the RoHS ban, but the Commission would be required to review their exclusion by 2020.

The placing on the market of monitoring and control instruments containing RoHS banned substances would be prohibited as of January 1, 2014, while that of industrial monitoring and control instruments would be prohibited as of January 1, 2017.

Spare parts for the repair or reuse of these types of equipment placed on the market before the specified dates would also be excluded from the RoHS restrictions.

The RoHS Banned Substances and the Possibility to Ban Additional Substances

The proposed revision of the RoHS Directive would maintain the ban on the placing on the market (after the specified dates for medical devices and industrial monitoring and control instruments) of EEE and spare parts for their repair or reuse if they contain cadmium, lead, mercury, hexavalent chromium, polybrominated biphenyls (“PBBs”), and polybrominated diphenyl ethers (“PBDEs”). Indeed, the proposal maintains the list of banned substances and their tolerated concentration limits, but now lists them in Annex IV to the RoHS Directive.

However, the proposal gives the Commission the power to ban additional substances following the methodology of the restrictions procedure of the EU REACH Regulation. In

particular, if a use of substance poses an “unacceptable risk to human health or the environment” the Commission may ban it after following “a methodology based on the process set out in Articles 69 to 72 of [the REACH Regulation].” This confirms that the REACH Regulation and RoHS Regulation will continue to co-exist in parallel, but that the data gathered and discussions under the REACH Regulation may prompt officials in the Directorate General for Environment to adopt additional RoHS restrictions.

The proposal also makes clear that substances listed in its Annex III -- Hexabromocyclododecane (“HBCDD”), Bis (2-ethylhexyl) phthalate (“DEHP”), Butyl benzyl phthalate (“BBP”), and Dibutylphthalate (“DBP”) -- are priority substances for the Commission to consider to subject to the RoHS ban. Not surprisingly, these substances are also listed in the REACH candidate list of substances of very high concern for authorization.

Applications Exempted from the RoHS Ban and Procedure for New Exemptions

The proposed revision of the RoHS Directive lists in its new Annex V most of the applications that are currently exempted. In addition Annex VI to the proposal also lists 25 additional exempted applications that will specifically benefit electro-medical devices and monitoring and control instruments.

The proposal adds new criteria on the basis of which the Commission may grant exemptions. In particular, it provides that exemptions may also be granted if “the availability and reliability of substitutes is not ensured,” and also includes “socio-economic” criteria when weighing the pros and cons of substitution.

The proposal also provides for an interesting interface between the REACH authorization procedure and the RoHS exemptions. It specifically provides that applications that are RoHS exempted are to be considered exempted from the authorization requirements of the REACH Regulation. Arguably, such exemption from the REACH authorization requirements would apply to the use of the substances during the manufacturing processes of such applications/components in the EU/EEA and not to the presence of the substances in the EEE because the REACH authorization requirements do not apply to substances contained in articles.

The parallelism between REACH and RoHS is also highlighted in the proposed rules on requests for RoHS exemptions. The proposal would empower the Commission to adopt specific formats and requirements for applications for exemptions, “including analysis of the alternatives and, if suitable alternatives are available, substitution plans.”

Exempted applications would “have a maximum validity of four years and may be renewed.” The Commission may decide to renew an exemption if an application is presented no later than 18 months before the expiration date.

RoHS Conformity Assessment and Increased Market Surveillance

One of the main innovations of the proposed revision of the RoHS Directive is the introduction of conformity assessment and marking requirements for manufacturers, importers, and distributors of EEE and of market surveillance and enforcement obligations on Member States.

Among others, manufacturers would be required to draw up the technical documentation and carry out the internal control procedure specified in Annex II to the Marketing of Products Decision. Manufacturers would also be required to draw up an EC declaration of conformity and affix the CE marking. They would also have to put in place procedures to remain in conformity, carry out sample testing of marketed EEE, and mark their EEE with a code identifying the appliance, and the name, registered trade name or trade mark and contacts of the manufacturers. CE marked EEE would be

presumed to be RoHS compliant.

Most importantly, manufacturers would also be required to withdraw or recall non-compliant EEE, and inform national authorities if the non-compliant EEE presents a risk.

Manufacturers would be entitled to appoint an authorized representative to comply with these requirements.

Interestingly, the proposal would also require all economic operators to identify, upon the request of enforcement authorities, any economic operator who has supplied them or to whom they have supplied EEE.

The proposed revision of RoHS Directive would also require Member States to carry out market surveillance in accordance with Market Surveillance Regulation.

Increased WEEE Collection, Reuse, Recovery and Recycling Targets

The proposed revision of the WEEE Directive would increase the Directive's collection, reuse, recovery and recycling targets. In particular, the proposal would impose by 2016 a collection target of 65% of the average weight of EEE placed on the national market during the two preceding years. The proposal also defines "collection" and "separate collection" in line with the New Waste Directive.

The proposal also introduces targets for reuse, on which it puts great emphasis, introduces recovery and recycling targets for electro-medical devices, and increases the recovery and recycling targets for all other types of EEE. In particular, large household appliances and automatic dispensers would be subject to targets of (i) 85% for recovery, and (ii) 80% to be prepared for reuse and recycling. IT and telecommunications equipment and consumer equipment would be subject to targets of (i) 80% for recovery, and (ii) 70% to be prepared for reuse and recycling. In turn, small household appliances, lighting equipment, electrical and electronic tools, toys, leisure and sports equipment, medical devices and monitoring and control instruments would be subject to targets of (i) 75% for recovery, and (ii) 55% to be prepared for reuse and recycling. These targets would have to be calculated on the basis of the WEEE that is separately collected and sent for treatment.

Harmonization of WEEE Registration and Other Requirements

The proposed revision of the WEEE Directive attempts to harmonize the nightmare of national registration and reporting requirements that currently apply under the national WEEE rules. Thus, the proposal requires Member States to establish registers of producers of EEE and, although unclear, provides that it would be sufficient to register in that Member State where the producer is established. The registers would be "inter-operational to exchange information" on the reporting requirements and fees that reflect the producers' activities across all other Member States. The registries should also allow the transfer of money related to the intra-Community transfers of EEE or WEEE.

The proposal also seems to suggest that the financing obligations would fall on the producer (or importer) that first places the EEE on the EU/EEA market and not on the different distributors that may market it in the different Member States.

Financing of the WEEE Requirements

A significant amendment of the proposed revision of the WEEE Directive is that it would allow producers to impose a "visible fee" on EEE sold, reflecting the costs of collection, treatment and disposal of the WEEE.

Increased WEEE Enforcement and Controls of Shipments of WEEE

The proposed revision of the WEEE Directive would also require Member States to carry out appropriate inspections and monitoring to verify compliance with the requirements of the Directive. It also allows the Commission to adopt additional rules on inspections and monitoring.

In particular, the proposal puts great emphasis on the inspection of shipments of WEEE to third countries in accordance with the Waste Shipment Regulation. Furthermore, it requires those wishing to ship used EEE to third countries to prove that the materials are not waste in accordance with the procedures of Annex I to the proposed revision of the WEEE Directive.

The Legislative Procedure that Will Follow

The proposed revisions of the WEEE and RoHS Directives must now be reviewed and adopted by the European Parliament and Council through the so-called "co-decision procedure." This procedure will allow the Parliament and Council to amend the proposals and typically takes at least 18 months. This period is not likely to start until after the Summer of 2009, when the European Parliament is expected to start its new Parliamentary term.

This legislative procedure will provide producers with opportunities to influence the final texts of the Directives. Manufacturers should consider approaching Member States and Members of the European Parliament with constituencies where they have significant operations. In particular, they should start building relationships with key members of the European Parliament's Environment and Industry Committees.

During the legislative procedure, the following are likely to be the most controversial issues:

- The relationship between the REACH Regulation and the RoHS Directive and whether the latter should be repealed.
- The cut off dates of the RoHS bans on medical devices and monitoring and control instruments.
- The list of RoHS banned substances and the introduction of additional substances.
- The procedure to grant RoHS exemptions.
- The emphasis on reuse, with possibly some proposals to further force producers to ensure that their EEE can be reused.
- The new collection, reuse, recycling and recovery targets and their dates.
- The harmonization of the WEEE registries and other reporting and marking obligations.
- The controls on the shipments of EEE/WEEE to third countries.
- Conformity assessment, monitoring, and enforcement.

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