

RHOS Directive 2002/95 and the Waste electrical and electronic equipment, Directive 2002 /96 (article 9 thereof as amended by Directive 2003/108) as of June 2004 (“WEEE Directive”)

1. RHOS Directive (2002/95/EC)

Objective To approximate the laws of the Member States on restricting the use of hazardous substances in electrical and electronic equipment in order to contribute to the recovery and elimination of equipment waste and the protection of human health.

Requirement This Directive is required to be implemented by Member States by 13.8.2004 and will pursuant to Article 4, ban the placing on the EU market after **30.6.2006** of products containing more than agreed levels of **lead, cadmium, mercury, hexavalent chromium, polybrominated biphenyl (PBB) or polybrominated diphenyl ethers (PBDE)**.

Exemptions The annex to the Directive lists a limited number of applications of **lead, mercury, cadmium, hexavalent chromium**, which are exempted from the requirements of article 4(1). The Commission are required to consult the relevant stakeholders before amending the annex.

Item 10 of the annex states that the Commission shall evaluate in accordance with the procedure incorporated by article 7(2), as a matter of priority in order to establish as soon as possible whether the items below are to be amended being

- Deca BDE
- Mercury in straight fluorescent lamps for special purposes
- Lead in solders for servers, storage and storage array systems
- Network infrastructure equipment for switching signalling transmission as well as network management for telecommunications (with a view to setting a specific time limit for this exemption) and
- Light bulbs.

Further, article 5 provides that materials and components can be exempted from the substances restrictions contained in article 4(1) if their elimination or substitution via design changes or by materials and components is technically or scientifically impracticable or where the negative environmental, health and/or consumer safety impacts caused by substitution, are likely to outweigh the environmental, health and/or consumer safety benefits.

On the basis of this provision, the Commission has received from Member States and Industry additional requests for applications to be exempted (until 2010) from the requirements of the Directive including in relation to lead in solders to complete a viable electrical connection internal to certain integrated circuit packages (**Flip Chips**).

Further it has been announced that an independent technical study on the RHOS exemptions is likely to start on 1.7.2004.

Producer compliance. One of the key issues currently being discussed is compliance. Argument is currently being put forward by independent consultants for self-declaration as the simplest and most straightforward compliance regime, both for producers and enforcement authorities. Self-declaration would need to be supported by industry standards for compliance and supply chain reporting formats. Under self-declaration 1) all producers might be required to obtain assurances from all suppliers that materials components and equipment do not contain banned substances. Producers would then need to maintain records to show enforcement authorities in the event that a banned substance is found in the course of market surveillance. 2) Producers might be required to take reasonable steps to ensure that banned substances are not used. The extent to which analysis is used to check this, will depend on many factors including (a) the relationship with suppliers (b) the risk of a banned substance being present and (c) the quantity of products put on the market. The implementing regulations are expected to be published in July 2004.

2. WEEE Directive (2002/96 of the European Parliament and of the Council of 27/January/2003 on waste electrical and electronic equipment). It is required to be implemented by Member States by 13.8.2004. Because it is an environmental Directive and covers some devolved matters, it will be for the devolved administrations for Scotland, Northern Ireland and Wales to decide on the devolved matters implementation in their respective areas.

Business Sectors likely to be affected by this Directive include:

Electrical and Electronic Equipment (“EEE”) Producers (manufacturers) including importers and exporters
EEE Distributors (retailers and wholesalers)
Dismantlers who deal with WEEE
Secondary metal merchants who deal with WEEE
Shredders who deal with WEEE
Reprocessors who deal with materials from WEEE
Landfill operators

Article 1 Objectives sets out environmental objectives, being to prevent the generation of electrical and electronic waste and to promote reuse, recycling and other forms of recovery in order to reduce the quantity of such waste. The government has indicated it wishes to implement these objectives in a cost effective manner providing flexibility and choice for manufacturers and distributors.

Article 2 Equipment covered. The Directive (Article 2, Annexes 1A and 1B) applies to the following categories of electrical and electronic equipment

- Large and small household appliances
- IT and telecommunications equipment
- Consumer equipment
- Lighting equipment
- Electrical and electronic tools (with the exception of large-scale stationary industrial tools)
- Toys, leisure and sports equipment
- Medical devices (with the exception of implanted and infected products)
- Monitoring and control instruments
- Automatic dispensers.

Equipment which is connected with the protection of the essential interests of the security of member states, arms, munitions and war material is excluded from the Directive.

On article 2, government proposals include

- to develop non statutory guidance on the scope of the Directive for businesses which it will publish alongside the draft implementing legislation which will be used to assist

with establishing **the status of grey area products ie those product where it is unclear whether they fall within the scope of the WEEE Directive.**

Article 3 on definitions sets out a number of basic definitions. Words used in the Directive, but not defined in article 3 are “**put on the market**”. The government propose to transpose the words “**put on the market**” so that putting on the market means **the initial action of making a product available for the first time on the community market with a view to distribution.**

Article 4 on Product design requires member states to encourage the eco design of electrical and electronic equipment in order to make it easier to dismantle, recover, reuse and recycle WEEE, its components and materials. The government proposes the use of non-legislative measures to be the most appropriate way to implement these provisions of the WEEE Directive and has asked manufacturers to come forward with initiatives for this.

The government also wants to pursue a policy course which can in due course take account of the development of the **EU Integrated Product Policy framework** and the **Energy Using Products Directive** which are expected to shape EU policy on product innovation and design in future.

Article 5 on separate collection, requires member states to have in place by 13.8.2005, systems for separate collection of WEEE from private households and from business users. Member States must also ensure that WEEE collected separately is transported to authorised treatment facilities and that recycling and reuse of whole appliances and its components should be optimised and prioritised. **Member States have also to deliver by virtue of article 5.5, a target of separate collection of WEEE from private households of at least 4 kg per head of population each year from 31.12.2006.**

On Article 5, government proposals include

- **that retailers** selling EEE would have a take back obligation which they could meet either by offering in store take back of equipment when selling like for like products or they join a retail sector compliance scheme with collective collection responsibilities which would accept all WEEE not just on a like for like basis.
- **that producers** should only have responsibility for financing collection of WEEE from civic amenity sites and other designated collection sites, such as the sites proposed by retailer take back compliance organisations as their collection networks
- **national clearing house**, the government’s preferred producer option is the establishment of a national clearing house (“**NCH**”) **funded by producers**, and that the **NCH** would allocate WEEE arising to producers based on their UK EEE market share. It is suggested that the clearing house could establish producers shares of the UK EEE market based on authorised data collected from them and calculate their WEEE obligations by tonnage on a monthly basis. Producers would then be responsible for the collection (from the designated central collection facility), the treatment and the recovery of the WEEE allocated to them.
- The **NCH** would need to have a register of all obligated businesses ie all producers (as defined by the Directive) who place EEE on the UK market.
- The clearing house would allocate each collection to an individual producer (or more likely groups of producers working together) who would have an obligation to collect within a set time frame (perhaps 48 hours). Alternatively the clearing house could operate a complete UK collection service itself funded as part of the producers registration fee.
- In its simplest form, the **NCH** would just provide an allocation service for WEEE and obligated businesses would be free to contract with the downstream industry in the

best way they saw fit to discharge their treatment and recovery obligations under the Directive.

Article 6 on treatment requires Member States to ensure that producer or third parties acting on their behalf set up systems to provide for the treatment of WEEE using the best available treatment, recovery and recycling techniques. Member state must ensure that authorised treatment facilities have a permit under articles 9 and 10 of the Waste Framework Directive (directive 75/442/EC).

On article 6, government proposals include

- to place an obligation in the regulations on producers of EEE to fund the treatment and recycling of household WEEE
- that the WEEE permitting requirements will be implemented through a new waste permitting regime
- that guidance on the best available treatment, recovery and recycling techniques and on the provisions of annex II (substances/components required to be removed from WEEE, how components have to be treated, and a requirement for the Commission to evaluate as a matter of priority whether the entries regarding, printed circuit boards for mobile phones, liquid crystal displays are to be amended) will be published

Article 7 on recovery requires member states to ensure producers or third parties acting on their behalf set up systems to provide for the recovery of separately collected WEEE, to ensure producers meet recovery targets by 31.12.2006 and to ensure that producers or third parties on their behalf, keep certain records.

On article 7, the government proposals include

- to place recovery and recycling/reuse (of components materials, substances) targets on the producers (or on groups of producers) of certain of the Annex I categories, responsible for placing them on the market and who are registered with the central registry
- the group of producers responsible for category 1 of Annex 1A (large household appliances) will be required by 31.12.2006 to jointly meet targets as set out below taking account of the provisions of articles 8 and 9 on financing (see below)
 - (a) at least 80% recovery and at least 75% component material and substance recycling or reuse by an average weight per appliance
 - (b) at least 75% recovery and at least 65% component material and substance recycling or reuse by an average weight per appliance
 - (c) at least 70% recovery and at least 50% component, material and substance recycling and reuse by an average weight per appliance
 - (d) at least 80% component material and substance recycling and reuse by weight of the lamps
- **if some producers choose to discharge their obligations individually, they will have to agree with the rest of the relevant group what the individual/recycling targets should be that they have to meet and they will have to prove that they have met their individual share of the recovery target.**
- as the Mayer Parry Recycling case (C –444/00) made clear that recycling only takes place when waste material undergoes reprocessing in a production process in order to produce new material or to make a new product, industry will need (in order to

measure achievement of the recovery and recycling targets) to demonstrate the amount of WEEE entering a facility which carries out recycling or recovery

Article 8 on financing in respect of WEEE from private households requires member states ensure that producers fund collection treatment, recovery and environmentally sound disposal of WEEE from private households deposited at collection facilities relating to the waste from their own products. For products put on the market before 13.8.2005 producers are required to finance operations related to historic WEEE proportionately according to their market share. Member states have the option of allowing producers to show consumers at the time of sale for a transitional period of 8 to 10 years, the costs attributable to handling (collection treatment and disposal) of historic WEEE (“ **a visible fee**”).

Article 8.2 requires that Member States ensure that each producer provides a guarantee when placing a product on the market showing **that the management of all WEEE will be financed**. The guarantee may take the form of participation by the producer in appropriate schemes for the financing of the management of WEEE, a recycling insurance or a blocked bank account.

Article 8.3 requires that producers supplying EEE over the Internet for example must comply with article 8 in the country where the purchaser of the equipment resides.

On article 8 government proposals include

- to place an obligation on producers of EEE to fund treatment and recycling of household WEEE deposited at collection points which they may discharge either individually in relation to their own products (for goods placed on the market after 13 August 2005) or via membership of a producer responsibility or compliance organisation.
- producers choosing to meet their obligation individually (own marque compliance) will be expected to report by independent audit of the WEEE whose collection treatment and recovery they are funding. This would be used to offset their estimated obligations.
- producer responsibility compliance organisations will have to take on legal responsibilities to discharge their member obligations.
- The government has not yet to reach a conclusion on whether to require or facilitate a visible fee. It will consider further representations.

Article 9 on financing in respect of WEEE from users other than private households, requires Member States ensure that **producers finance the costs for the collection, treatment, recovery and environmentally sound disposal of WEEE from products placed on the market after 13.8.2005 from non household users. Directive 2003/108** amending this article 9 provides that for WEEE from products put on the market before 13.8.2005 (historical waste), where it is being replaced by new equivalent products or by new products fulfilling the same function, **the financing of the costs shall be provided for by the producers of those products when supplying them**. Member States may as an alternative provide that users other than private households also be made, partly or totally, responsible for this financing.

For other historical waste, the financing of the costs shall be provided for by the users other than private households.

On article 9, government proposals

- to place an obligation on producers of electrical and electronic equipment to fund treatment and recycling of non household WEEE which they may discharge either individually in relation to their own products or via membership of a producer responsibility compliance organisation.

- **in the light of Directive 2003/108, to require business end users to pay for the treatment of their WEEE where it is not taken back and replaced like for like.**
- **are unlikely to require financial guarantees from business to business sales. In the event of a producer leaving the market, the final responsibility will be placed on the last owner as at present.**

Article 10 information for users (private households)

Article 10 requires that member states ensure that users of EEE in private households are given the necessary information about (a) the requirement not to dispose of WEEE as unsorted municipal waste and to collect such WEEE separately (b) the return and collection systems available to them (c) their role in contributing to reuse, recycling and other forms of recovery of WEEE (d) the potential effects on the environment and human health (e) the meaning of the symbol shown in Annex IV. Member States are also required to ensure that producers mark electrical and electronic equipment put on the market after 13.8.2005 with the crossed out wheelee bin.

On article 10, Government proposals include

- all retailers should as part of their legal take back obligation either, as appropriate, provide customers with information on their own in store take back arrangements or if a member of a retailer take back compliance scheme, signpost customers to information on their collection network in particular their nearest local facilities for returning WEEE.
- that producers mark equipment put onto the market after 13.8.2005 with a **crossed out wheelee bin** shown at Annex IV of the Directive in line with article 10.3 and to make available information, for examples on websites or in leaflets on the scope for recycling of their products. **In exceptional cases where this is necessary because of the size or the function of the product, the symbol shall be printed on the packaging, on the instructions for use and on the warranty of the electrical and electronic equipment.**

Article 11 information on treatment facilities requires member states to ensure that producers provide reuse and treatment information for each type of new EEE put on the market within one year after the equipment is put on the market.

On article 11, government proposals include

- that all producers should have an obligation to respond to reasonable requests from recycling, reuse and refurbishment organisations and others for information about the design, composition and ease of dismantling of their products.
- to place an obligation on producers to mark their electronic and electrical products to identify themselves **in line with article 11** and taking into account of the expected development of a European standard by CENELEC. The government intends to require producer marking on the basis of the European standard once this is clear. **It does not propose burdening/confusing manufacturers with any specific interim marking in advance of introducing the European standard, if this is delayed.**

Article 12 information and reporting requires member states to establish and maintain a register of producers of electrical and electronic equipment and ensure they report data on products they put onto the market and that member states make arrangements to collect and report data to the Commission, on quantities of waste equipment, collected and recovered.

On article 12 government proposals include

- the establishment of a UK wide register of producers before placing electrical or electronic products on the UK market.
- producers will be required to register as a condition of placing EEE on the UK market.
- the government is considering annual registration by producers but to require initial registration between 13.8.2004 and 30.6.2005 and a discounted registration fee for those businesses doing so promptly- perhaps before 31.3.2005.
- producers subsequently placing products on the UK market for the first time should register before placing their goods onto the market.
- producers would be required as a condition of registration for the period 1.1.2005 to 31.12.2005 and at subsequent annual registrations to submit data (to be defined by the Government) which would enable their market share to be calculated. This would initially provide the basis for calculating individual producers financing responsibilities for historic WEEE treatment. The government is considering what data should be required from producers as a condition of registration. The government proposes to calculate producers market shares on the basis of sales revenue.
- distance sellers (e.g. internet sellers) should be required to register

Paul Foley
Canary Wharf,
London
pf@paulfoley.co.uk

Paul Foley
International Financial
Services Centre, Dublin
pfoley@mckr.ie

© Paul Foley 2004 – all rights reserved