

June 26th 2009

AmCham EU position paper on the revision of the RoHS Directive

The American Chamber of Commerce to the EU (AmCham EU) welcomes the new proposal from the European Commission and endorses the main objectives of this revision: improving the legislation with regard to implementation, enforcement and coherence. AmCham EU has actively participated in all stages of the stakeholders consultations preparing the revision of the Directive on “Restriction of Hazardous Substance” (RoHS). Although the Commission has produced a fairly balanced proposal, we believe there is still some room for improvement. AmCham EU is seeking to improve the text, ensuring that the requirements are clear and, therefore, easy to understand, communicate and implement.

1. Scope and definitions

Separate WEEE from RoHS scope

We welcome the “de-linking” of RoHS from the “Waste of Electronic Equipment” (WEEE) and defining a clear scope for RoHS. We are concerned however that the manner in which the 10 categories in Annex II are described leaves too much room for interpretation and this may lead to divergent interpretation of the scope in the different Member States. The current wording of the proposal does not clarify if the list in Annex II is exhaustive or not. We would like to see further clarification of the scope and status of the Annex II list, as it is the basis for consistent and harmonised implementation of the Directive across the EU.

Inclusion of other categories:

- Categories 8 and 9: The proposal to include categories 8 and 9 in the scope of RoHS in a staged manner is acceptable provided the current exemptions relevant for these categories continue to apply, new exemptions are granted as recommended by ERA, and that the substance scope is not extended. If categories 8 and 9 products are brought into the scope earlier, this would lead to massive product withdrawal from the EU market. This would have some very serious consequences, not only for categories 8 and 9 producers but also on user industries which are of key importance to the EU economy. The withdrawn products will still be available on other markets, which will impact EU innovation capacity putting the EU at a competitive disadvantage.

- Other categories: AmCham EU does not favor the extension of the scope to other categories of electrical and electronic equipment (EEE). The aim of the RoHS Directive is to reduce the content of hazardous substances EEE to contribute to the protection of human health and the environmental recovery and disposal of waste

electrical and electronic equipment. Any extension of the scope to new EEE should be based on proper assessment, including the evaluation of risks to environment and health and evaluation of the socio-economic impact.

Definition of "placing on the market"

We welcome the introduction of the definition “placing on the market” in art. 3 (f) and its consistency with definitions used in other pieces of Community legislation such as the New Approach Directives.

Definition of "homogeneous material"

We welcome the proposal to include a definition of homogeneous material in the text of the Directive, inspired by the European Commission’s FAQ definition. However the ongoing international standardisation work related to testing for compliance with the maximum concentration of values (MCVs) has indicated that the definitions are not suitable in all cases. Given the developing “RoHS-like” legislation across the globe, international standardisation can help to achieve clarity regarding the understanding of the requirements. In many cases (e.g. small components, ready-made assemblies), it is not possible to prepare samples on the level required by homogeneous material level requirements. In practice therefore, it is not always possible to test if the component level parts fulfil the definition requirements or not. Therefore the “homogeneous material” definition needs further review through the ongoing international standardisation work.

2. Substances covered

We wish to underline that any proposal concerning new substances covered by RoHS should be based on sound scientific evidence with due consideration of the availability of substitutes and the socio-economic impact. A proposal could only be acceptable provided substances are added after an adequate risk and impact assessment process. Substances identified in Annex III have not been subject to such an in-depth assessment and no sufficient scientific evidence has been presented. Therefore, we consider that the list in Annex III should not be the basis for an extension of substance scope.

The identification of new substances and their assessment should be done by using efficiently the existing systems, such as REACH which already provides a working regulatory tool. We welcome the reference to REACH established in Article 4(7). However, we believe that this reference is rather vague. We would prefer to see the detailed procedure established in a new annex to ensure certainty rather than having a “based on a methodology” approach.

AmCham EU believes that in general the restriction of any substance should take into account the following key items:

June 26th 2009
Revision of the RoHS Directive

- Global harmonisation of the legislation;
- Substance risk assessment;
- Clear identification of what substances are to be restricted;
- Clear identification of when the alternative technologies are proven and readily available;
- The appropriate time is given to allow the industry to transition;
- Materials that are not used or found in final products should not be included in the restrictions.

We would like to bring to your attention the risk of serious overlap between RoHS and other legislations, which will create additional burden for industry and increase the uncertainty regarding industry's legal obligations as well as potential conflicts between the outcomes of overlapping restrictions processes. In fact the following substances: DEHP, DBP, BBP, HBCDD have been suggested for restriction under RoHS and at the same time have been included in the first recommendation of priority substances subject to authorisation under REACH¹.

Decision on the authorisation of these substances in the context of REACH is expected to take place in 2010-2011² well before the end of the RoHS co-decision process. If REACH authorises these substances, they should not be assessed again under RoHS to avoid duplication and contradiction between the two legislations.

Another example of the unnecessary duplication of instruments is the proposal to assess and potentially include DEHP in the scope of RoHS. If such a review was to take place under RoHS this would be the fifth review of DEHP in consumer goods, including EEE, conducted under European legislation in recent years. Given the need for implementing legislation to be adopted, such reviews are all likely to have taken place before the RoHS review.

In 2008, the results of a decade long EU Risk Assessment³ conducted under the Existing Substances Regulation were published in the Official Journal. It stated that there is no need for further risk reduction measures related to the substance's presence in cable and wiring applications (its main use in EEE) at a Community or national level. In 2009, the European Commission is due to review current restrictions on DEHP in consumer goods under the terms of the Marketing and Use Directive/REACH restrictions process. In 2012, producers of DEHP are expected to have to apply for authorisation to prove that their uses of the substance are adequately controlled. In all uses that are not defended, producers and users are expected to have

¹ These substances are on the REACH priority list:

http://echa.europa.eu/doc/authorisation/annex_xiv_rec/annex_xiv_subst_inclusion.pdf

² Decision on inclusion of the substances in REACH Authorisation Annex XIV

³ See Official Journal of the European Union, 07.02.2008, Commission Communication 2008/C 34/01 and Commission Recommendation 2008/98/EC, L 33/8. The final consolidated version of the DEHP Risk Assessment is available at: http://ecb.jrc.it/documents/Existing-Chemicals/RISK_ASSESSMENT/REPORT/dehpreport042.pdf

to withdraw these uses from the market in 2013. In 2013, REACH article 69(2) foresees that the European Chemicals Agency shall review the use of substances under the scope of REACH authorisation for its use in articles (including EEE).

3. Exemption criteria and process

Exemption criteria

We welcome the new criteria for ensuring availability and reliability of substitutes as well as socio-economic benefits. Decisions on granting new exemptions should be made on the basis of balanced and proportionate assessment of the environmental, social and economic aspects. This assessment should take into account the amount of substance used in the equipment, the innovative nature of the application and its benefits to society. It is necessary for the decision-maker to take into account the following factors when considering granting or removal of an exemption:

- the large scale availability of a new technology to meet the volume needs of the industry;
- the necessary lead times for implementing changes in the manufacturing process to adapt to the new application, and
- the highly technical matters of supply chain management, product re-design and reliability analysis and requalification.

Exemption process

Regarding Article 5(2), AmCham EU believes that, as a general statement, legal certainty must be introduced for manufacturers and their supply chains in terms of the review process, extend or withdraw exemptions. This must be carried out in a timely fashion with appropriate transition periods to ease the adaptation of product, technology, manufacturing and legacy product roadmaps. At the same time this would facilitate the management of worldwide supply chains.

The review of exemptions along with their adaptation to technical and scientific progress must be undertaken on a *case-by-case* basis, as it is currently the situation with the review of existing exemptions. The intention to initially limit exemptions for a period of four years has to be revised and adapted to the needs of the involved technology aspects.

The reference “in due time” is too general and we fear that industry will not have a sufficient transition period to adapt the product and technology to their own roadmaps.

We are concerned that the time periods allowed will prove insufficient. If the EU Commission cannot do a full review and issue a decision in a short period of time (e.g. six months) industry will have insufficient time to respond.

A provision needs to be added specifically to address the transition period between the end of an exemption and the actual implementation of the decision. An adequate

June 26th 2009
Revision of the RoHS Directive

transition time provision (e.g. two years minimum) must be given to allow manufacturers to adapt, as the entire supply chain must requalify components/products. Safety critical applications of products used in applications outside the scope of RoHS must be considered as their safety is directly impacted by exemption decisions relating to the Directive.

To avoid a distortion in the marketplace and the unnecessary withdrawal and scrapping of products, the transition period should allow under certain technical, social and economic conditions certain products and technologies which do not benefit of the exemption any more to still be placed on the market. This will allow for the gradual withdrawal of products not covered by exemptions and will lead to a smooth transition path for all players of the supply chains. It will also encourage the introduction of new products and technologies without shortening the useful life of products for which the cost of conversion is economically and socially unreasonable. It will prevent the need to scrap entire systems simply because certain parts within the system are not available in sufficient volumes to economically justify conversion of the parts. The transition period should take the industry response time and the societal cost into consideration. This process would also be in alignment with the “End of Life Vehicles” (ELV) Directive (“new type approved”).

Without allowing a reasonable transition provisions, industry would be forced to adopt abrupt and drastic measures in order to comply with the legislation. This situation will result in many negative effects to the society. The following list summarises such effects:

1. Shortages in the marketplace: this includes unavailability of certain services to consumers to the reconversion necessity and technical feasibility.
2. Untimely withdrawal and scrapping of products that are still useful
3. Very costly product conversions due to unreasonable time, resource, cost and product re-qualifications required
4. Shortening of the useful life of products and increase in unjustified substitution costs
5. Scrapping entire systems simply because certain parts within the system are not available in sufficient volumes to economically justify conversion of the parts

AmCham EU proposes the following new provisions and improved wording of Article 5 (2) at the Commission's proposal COM(2008)809:

Addition of: *“Whereas (new)exemption expiry in part or in phased manner may allow for an adequate transition time for the continuation of an exemption for products first put on the market prior to the effective date of the exemption expiry. Such adequate transition times shall be intended for products from the same line, type make or model that contains the component or material products that a manufacturer (or a prior manufacturer) of the product first placed on the EU market, prior to the effective date of withdrawal of an applicable exemption. This must be documented and such documentation must be made available upon request by an EU member state.*

Whereas (new)“Adequate transition time” refers to sufficient time for industry – including the supply chain – to ensure compliance with an applicable exemption after the exemption’s expiration date, taking full account of technology, cost and viability criteria for the substitution of the product and socio-environmental benefits.”

Amendment to Article 5(2): Measures adopted in accordance with point b of paragraph 1 shall have a **minimum** validity period of four years and may be renewed **on a case-by-case basis**. ~~The Commission shall decide in due time on any~~ An application for renewal ~~that is~~ shall be submitted no later than 18 months before an exemption expires. **The Commission shall decide on whether to renew the exemption within 6 months of receipt of the application. If the Commission does not decide within the 6 months, the exemption shall be automatically extended for a time period equal to the delay beyond the 6 months to guarantee the industry 12 months to transition in the event that the exemption is not renewed.**

When a decision has been taken to withdraw an exemption, a sufficient transition period should be introduced to minimize impact on current products and focus application of the new technical requirements on future products. This transition period should be considered on a case-by-case basis and be assessed on technological development, social, economic and environmental impacts.

4. CE marking

AmCham EU supports the move from the European Commission to add the CE marking to the RoHS Directive. This will help to ensure compliance to the Directive and a level playing field within the industry. However, the new conformity assessment provisions need more clarity and precision to avoid imposing disproportionate administrative/financial burdens on industry. This means it needs to be clear enough so all competitors interpret the conformity assessment requirements in a similar manner.



June 26th 2009
Revision of the RoHS Directive

AmCham EU stresses the importance of global coherence and harmonisation of different national labelling schemes with the aim of moving towards a worldwide label.

RoHS compliance should be based on control of sourcing and supply chain processes, not on testing. Description of processes forms the basis of the technical documentation.

RoHS compliance should be looked at as a "quality control" process and testing at the "end" cannot ensure compliance.

EMC and safety compliance assessment is very different from the RoHS compliance assessment. The final performance or compliance of the product is dependent on the design and manufacturing of the product. Whereas for RoHS, if you start with compliant materials and use compliant processes, no matter how the product is designed it will always be compliant.

Moreover, there is no one "test" for RoHS compliance, whereas for EMC and safety there are test at the product level.

Again, AmCham EU believes that the current drafting for CE marking wording is not appropriate for RoHS. In looking at the EU Conformity Assessment modules (Module A, etc.), none are 100% appropriate for RoHS. With that in mind a new module should be defined for this type of requirement.

* * *

AmCham EU speaks for American business committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU & US positions on business matters. Total US investment in Europe amounts to \$700 billion, and currently supports over 4 million jobs.

* * *