AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Feedback on the Commission roadmap on the RoHS review

AmCham EU speaks for American companies 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 and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2017, directly supports more than 4.7 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

American Chamber of Commerce to the European Union
Speaking for American business in Europe

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The American Chamber of Commerce to the EU (AmCham EU) welcomes the Commission's initiative to evaluate the performance of the Restriction of Hazardous Substances (RoHS) Directive. Our members have been implementing the directive since its inception in 2003, this has given them the practical experience in effectively evaluating which aspects of the directive have worked well and where improvements are needed. RoHS has in many regards met its policy objectives, however parts of the law would benefit from a review, while others should remain untouched. The following feedback has been split into the areas of evaluation outlined in the roadmap.

1. Effectiveness of RoHS 2011

RoHS is a clear example of what can be accomplished by leveraging the scale of the European Single Market. RoHS, and its concerns surrounding the electronics and electrical engineering (EEE) end of life risks, when not handled or disposed of properly, have had a profound effect on the product design of EEE in all categories. Producers of EEE have been substituting substances in their products for over 17 years in response to the signals sent by the RoHS 1 and RoHS 2 Directives. In addition, industry expert groups have been established to review adaptation to technical progress on an ongoing basis. The RoHS directives have also been particularly effective in setting a global reference point with similar laws being introduced in more than 40 jurisdictions outside the European Economic Area (EEA). However, it has also presented significant challenges for industry in order to manage misalignment of product exclusions and conformity assessments. The extra EEA dimension is an important consideration that is missing from the roadmap.

The radical change of scope in the 2011 RoHS Directive took years to implement effectively. It required an extensive post legislative scope review process, which concluded that only a new co-decision process in 2017 could fix some of the inconsistencies that emanated from the legislators' changes.

The AmCham EU believes that this should be a lesson for the future. Dramatic scope changes during the legislative process which are not impact assessed, harm EU legislation's effectiveness. Given that the full implementation of the revised scope only came into effect in July 2017, and these new categories of EEE are only just starting to experience the exemption process, reopening it once more in 2021 may not be wise.

The Commission should focus on priorities that have an impact on the effectiveness of RoHS in its 2021 review, such as exemptions and the substance methodology process, and to leave the law's scope untouched for the foreseeable future.

2. Efficiency of RoHS 2011

The greatest shortcoming of RoHS 2021 has been the RoHS exemption process.

RoHS continues to send the private sector a clear signal that EEE must avoid certain hazardous substances, unless an exemption is granted, if it wishes to access the European market. However, since RoHS 2, and the scrutiny of exemptions via delegated acts, this message has become diluted. Uncertainties around the exemption process, including the short duration of exemptions and the future methodology whereby new substances will be added to RoHS, make compliance challenging.

The renewal of exemptions since 2011 has been significantly delayed, creating unjustified doubts on the value of a given product or technology and its ability to access the Single Market in the future. Following this RoHS procedure is hardly efficient or effective, and greater predictability for the exemption procedure must be

required, while political considerations should be constrained to the necessary extent[1]. The procedure should be reviewed so exemption decisions are based on the best available evidence that pertains to the RoHS Directive's policy objectives.

Life-cycle thinking on the overall impact of an exemption should be a mandatory consideration in determining the duration of an exemption. Factors listed in Article 5(1) (a), such as availability of substitutes, socio-economic impact and impact on innovation, should not be applied inconsistently. Life cycle analysis should be holistic, including considerations such as the positive environmental impacts of energy efficiency gains or the use of recycled materials.

There is the need for robust assessments, and justifications for the continued use of RoHS substances in EEE. However, this does not explain the reasoning behind short exemption cycles, and the often misalignment with the lifetime of a product and long-term supply contracts. If an exemption procedure concludes that the total environmental, health and consumer safety impacts would not benefit from the substitution of an Annex 2 substance in a given EEE. Then this conclusion is likely to remain valid beyond a 3, 5 or 7-year exemption period (especially for EEE with long product life and development cycles). Recognition of this will reduce the burdensome repetition of administrative reports for both industry and EU authorities.

For example, the cost of complying with RoHS for B2B industrial products sold to industrial end-users is not proportionate to its benefit. RoHS has raised the administrative burden, and in focusing only on substance content, has raised a number of questions about these products' ability to provide higher reliability and durability in the industrial environment.

The Commission, and its consultants, should therefore investigate new models for the RoHS exemption process. An example of this could be an upfront certification for the life span of a product (of course requiring an update in case of changed chemical composition or in end of life handling), longer exemption renewal periods, or a fast-track exemption process for products which either benefit from an Ecolabel, or have been shown to be environmentally leading in their product category via Eco-design or other accredited life cycle assessment schemes.

Moreover, there needs to be better time management of exemptions in the future. The Commission is currently struggling to handle the volume of exemption applications in due time. This raises the question of what will happen when the volume of these exemptions increases dramatically due to new substances being added to RoHS.

3. Does RoHS remain relevant?

The EU must be careful as it revises the RoHS 2 Directive so that the third iteration of RoHS does not create fundamental inconsistencies with the RoHS laws as applied in other regions of the world. This would send a muddled message to the industry and weaken the greatest strength of the RoHS directive, which is its ability to influence product design.

'The strength of RoHS has been its focus on substances which were present, and critical, in EEE. If the RoHS Annex 2 were to become a long list of indirectly relevant substances, companies planning their product design would receive less clear and effective substitution messages. This would make the law less relevant. RoHS-related substance studies should therefore focus on priority substances which are found in the final product,

[1] The debates surrounding exemption 39 were frustrating for the companies involved, counterproductive, and at odds with the purpose of the exemption process as laid out in the RoHS 2 Directive.

and be limited to those that have a measurable risk of exposure for users that are identified in a product life cycle assessment.

The approach of the RoHS directive has been so effective that it has been, and continues to be, adopted in jurisdictions around the world. This approach of 'copy-pasting' the law has not been without its problems in practice, with different certification requirements, exemptions processes and timelines having been introduced in a number of third countries. Yet, it seems clear that RoHS has been identified as an effective regulatory tool by over 40 countries around the world because it is a useful and effective means to a specific policy objective.

Managing the global impact of RoHS in the future will be essential. An example from which legislators could draw experience is the responsible minerals sourcing regulation. The scope of this legislation is global, covering all conflict-affected and high risk areas (CAHRAs). The Directorate-General for Trade (DG TRADE), the body responsible for the implementation of the legislation, has committed resources to dedicated outreach with the United States, China, India, United Arab Emirates, Colombia, Mexico, South Africa, Malaysia, Thailand and Canada. This ensures a continued line of communication and coherence.

Furthermore, a similar dedicated outreach for RoHS in critical global markets would be of added value. For the moment, the onus of managing the effective application of RoHS in third countries has been on the private sector, which has been a strenuous task. This would fit the EU's policy priority for open trade without sacrificing EU standards of 'harnessing globalisation in line with our values'. Such outreach will help the uptake of EU standards related to RoHS at the International Electrotechnical Commission (IEC) level. Additionally, collaboration with existing EU policy initiatives such as neighbourhood policy, driving alignment with EU norms as part of the accession process as well as EU foreign and trade policy could deliver positive results in critical markets.

4. Incoherence between RoHS and other EU and national laws

REACH and RoHS

The common understanding paper on REACH and RoHS was clearly a step in the right direction. Out of all the alternatives presented in this paper, AmCham EU believes that the best option would be, where possible, to align the synergies between RoHS and REACH restrictions. Specifically, when it is possible to give EEE products a derogation from REACH Restrictions so they can instead be regulated via RoHS.

Reflections such as these should become an essential part of the REACH RMOA process going forward, as well as integrated in the future methodology to add substances to RoHS. Unfortunately, and despite the common understanding paper, there are currently a number of cases where the same substances are being targeted under the REACH processes, while also being assessed for inclusions on the RoHS Annex 2 before a given REACH procedure is even finalised.

The recent proposal that the candidate listing of the four phthalates (DEHP, BBP, DBP and DIBP) be updated to reflect their identification as endocrine disruptors for the environment, did not include any reference to the RoHS obligations for these substances. Until now, the use of DEHP in medical technologies was exempt from the Authorisation requirement, because risks associated with substances that pose a human health hazard are already assessed by manufacturers under the sector-specific medical device/IVD legislation. Medical devices will therefore newly come into the scope of the authorisation requirement for the four phthalates[2].

[2] Medical devices manufacturers who are member of AmCham EU fear an insurmountable regulatory barrier by needing to successfully go through both REACH Authorisation and RoHS exemption processes to use the same substance in the same application. Proposed Sunset Date will be running in parallel to RoHS deadlines, ignoring the time and resources necessary

Substances undergoing REACH evaluation[3] or subject to REACH CLP process should not be considered under RoHS before the REACH process is finalised and the classification is confirmed. Instead, such consideration should be taken into account in an updated version of the common understanding paper.

Managing the REACH & RoHS overlap will become critical as RoHS adds substances to its Annex 2.
AmCham EU was and remains an active stakeholder in all consultations and meetings related to the preparation of the RoHS substance methodology[4]. Although progress was made during comprehensive stakeholder meetings, these have unfortunately been put on hold for years. A clear methodology will help identify and prioritise the substances relevant to electronic and electrical equipment, whose restriction could help achieve the Directive's objective of reducing hazardous substances in the electronic waste in an efficient and proportionate manner.

It is crucial that the RoHS substance methodology is first finalised before assessing substances and their potential for restriction under RoHS. It is therefore concerning to see an assessment being launched for seven new substances to be restricted before the RoHS substance methodology has even been finalised. It is vital to note here that any additional substances restricted under RoHS will impact all of EEE, and will trigger substantial work for identifying necessary exemptions, the redesign of products and upon major investments in compliance programmes. Managing a rolling system of substances being assessed by REACH and RoHS in parallel will be a significant challenge in the future.

RoHS and eco-design
There is the potential for incoherence between product design policy and RoHS, since product design policy is based on life cycle product management whereas RoHS is not.

For products whose cradle-to-gate (raw material sourcing and manufacturing) environmental impacts are most significant, RoHS does not offer a full picture. Whereas RoHS has a single parameter focused on chemical composition, and policies with a true focus on product design which takes all stages of the environmental impact into account. This creates the potential for contradictions, whereby a technology can have the lowest impact on the environment and human health throughout its life cycle, yet could be excluded from the market by RoHS.

Product design policy achieves environmental goals by identifying environmental hot spots throughout the product life cycle, and subsequently enacts measures to address these while maintaining overall performance in other life cycle environmental impact categories. RoHS is currently not equipped to accomplish this.

RoHS and WEEE
The decoupling of the RoHS and WEEE Directives' scope has been a success, as both directives have very different policy objectives and mechanisms. Separating both laws has made things much easier, although differences in the interpretation of a number of key definitions remain problematic for implementation. The RoHS directive's strength is its Single Market legal base and its ability to leverage access to the Single Market. The WEEE directive, which focuses on national collections schemes, alternatively can work with an environmental legal base.

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for industry to comply with both sets of regulation. Having RoHS and REACH seemingly happening in silos creates legal uncertainty, and potential double regulations – irrespective of the common understanding paper.

[3] For example, the brominated flame retardant TBBPA (Tetrabromobisphenol A) is undergoing a REACH Substance Evaluation which ends in 2021, whilst at the same time being considered for inclusion into RoHS annex 2 without any reference to the REACH process. These dual processes are sending confusing signals to the market and undermine the goals and effectiveness of both pieces of legislation.

[4] Please see the full AmCham EU position paper here:
http://www.amchameu.eu/system/files/position_papers/env_final_pop_on_rohs_methodology_guidance.pdf

However, it must be stressed that a number of implementation problems with the WEEE directive stem from the differences in transposition among member states. It is impossible to leverage economies of scale beyond a single member state with WEEE, since all parameters on how WEEE is to be collected and treated are left to the member states to define with their eco-organisms.

RoHS can also have negative implications for global waste shipment. This issue is wider than the EU alone, and is linked to the Basel Convention. Certain third countries, which are eager to find reasons to stop shipments of goods, have been known to use RoHS and refuse to acknowledge its exemptions, resulting in sufficient grounds to refuse access to a certain international market (See section above on relevance for more on RoHS in the world).

RoHS and circular economy

RoHS is a law whose philosophy and purpose dates back to the early 2000s. As such, RoHS is a law meant for the linear economy. Its focus is on preventing waste phase risks by imposing chemical content product design requirements. The concept of repair as produced, opens the door to more circularity within RoHS. Yet it can be difficult to adapt the RoHS Directive's philosophy to certain circular economy business models.

For example, remanufacturing, is an exchange business. Customers return products or components that have reached the end of their lives to the original manufacturer, and get a remanufactured one in return. Remanufacturing restores these products or components to their original, or higher specifications, allowing them to serve another lifecycle. This is advantageous to both customers purchasing remanufactured products and to the environment. Other approaches like repair, refurbish, re-use, or 'up-cycling' should also be taken into account as they benefits both customers and the environment. As a result, the linear focus of RoHS in chemical content alone could, in the case of many B2B products, not be compatible with these business models.

5. EU added value

RoHS is a clear example of what can be accomplished by leveraging the scale of the Single Market. RoHS, and its concerns surrounding EEE end of life risks, when not handled or disposed of properly, has had a profound effect on the product design of EEE in all categories. It is clear that nothing on this scale would have been possible with only the accumulation of national initiatives.

In a possible new relationship between the EU and the UK, AmCham EU is keen to ensure alignment with the RoHS Directive as far as possible, and ensure the long-term legal certainty for the business community as soon as possible. This includes the recognition of CE marking for products placed on the UK market. Moreover, AmCham EU would be eager to ensure that the UK's leadership, knowledge and expertise on RoHS since its inception continues to help shape this important piece of global regulation for the coming years.