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The EU Waste Electrical Equipment Directive: New Challenges for Producers of Electrical and Electronic Equipment

A new EU Directive on waste electrical and electronic equipment (“WEEE Directive”) will impose new regulatory challenges and costs on producers, resellers, and importers of electrical and electronic equipment (“EEE”) in the EU. The Directive, to be formally implemented in EU Member States by August 2005, is likely to have a significant impact on companies’ cost structures and business strategies. A related Directive, Directive 2002/95 on the restriction of hazardous substances in electrical and electronic equipment (“RoHS Directive”), adds to the obligations of the WEEE Directive by banning the use of certain substances in electrical and electronic equipment sold on the EU market.

In this *Update* we highlight the most important requirements of the WEEE Directive and identify the key issues of which producers, resellers, and importers of electrical and electronic equipment should be aware. We also provide a more detailed review of how three key Member States (Germany, the UK, and France) intend to implement the WEEE Directive.

I. KEY QUESTIONS

A. What products are covered by the WEEE Directive?

The WEEE Directive imposes obligations and responsibilities on producers of a wide variety of products that require electricity to function. It applies to both consumer (“household”) and professional equipment. For example:

- IT and telco equipment (PCs, cell phones, printers, etc.);
- Consumer equipment (TVs, radio sets, etc.); and
- Large and small appliances (refrigerators, washing machines, vacuum cleaners, toasters, etc.).

A number of gray areas remain as to the product coverage scope of the WEEE Directive. For instance, large stationary industrial equipment and some “built-in” or permanently installed units

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requiring major dismantling for removal may be exempted. Harmonized guidelines on scope are being developed by the Commission and the Member States.

B. Which companies are affected by the WEEE Directive?

The WEEE Directive applies to all “producers” of electronic equipment. Producers are defined in the WEEE Directive as those companies that:

- Manufacture and sell EEE under their own brand;
- Resell EEE produced by other suppliers under their own brand; and
- Import or export EEE on a professional basis into a Member State of the EU.

C. Does the WEEE Directive impact non-EU companies?

Yes. The WEEE Directive applies to companies without regard to their location or nationality. Non-EU companies are generally subject to the regulation if they sell EEE in the EU under their own brand name. It remains to be seen whether, in implementing the WEEE Directive, Member States will hold all companies that fit the definition of “producer” jointly and severally responsible for compliance, or designate only one company as the “sole producer.” Similarly, the WEEE Directive fails to clarify whether manufacturers of components could be deemed “producers.”

II. KEY REQUIREMENTS OF THE WEEE DIRECTIVE

In implementing the WEEE Directive, EU Member States will impose new regulatory requirements on EEE producers in four key areas:

- **Product design and identification.** Producers of EEE will be obliged to pay greater attention to both product design and the manufacturing process to ensure that their products can be reused, recovered, or recycled. EEE sold after 13

August 2005 will have to be marked with a crossed-out waste bin symbolizing that the product is “put on the market” under the new WEEE Directive. Producers will also have to provide information to treatment facilities on components and materials contained in their products.

- **Collection of WEEE.** A key feature of the WEEE Directive is to establish a system for the collection, transportation, and treatment of WEEE from private households and other users. For example, the WEEE Directive mandates two alternatives for the free disposal of EEE for private consumers:
 - *Collection facilities:* Consumers will be able to bring their WEEE to collection facilities funded by producers.
 - *In-store take-back schemes:* Consumers will also be able to return their WEEE to a retailer at no cost when they purchase new EEE, as long as the waste equipment is of equivalent type and fulfilled the same functions as the new equipment.

While producers (or third parties acting on their behalf) also have to provide for the collection of waste from professional users, the WEEE Directive allows Member States to implement this through a fee-based disposal system.

- **Treatment and Recovery of WEEE.** Once collected, WEEE has to be treated in a special waste facility, unless the collected WEEE is reused as a whole. Member States are likely to oblige WEEE producers to establish systems using best available treatment, recovery, and recycling techniques. The WEEE Directive leaves it up to producers to set up systems individually or collectively.
- **Financing obligations.** In general, the WEEE Directive imposes the cost of collecting, treating, recovering, and disposing waste equipment on

an environmentally sound basis on producers of WEEE. However, the funding arrangements for products purchased before and after 13 August 2005 (respectively, “historical” and “new” products) will be different.

- *New products:* Each producer will be responsible for financing the operations relating to waste from its own products. The producer can choose to fulfill this obligation either individually or by joining a collective scheme but will have to guarantee that the management of all of its WEEE will be financed. This guarantee may take the form of participation by the producer in appropriate schemes for the financing of the management of WEEE, recycling insurance, or a blocked bank account. Collective financing schemes, for example a collective guarantee fund, are currently viewed as financially most effective.
- *Historical products:* All producers in the market when the cost of financing WEEE management is incurred must contribute to one or more systems to cover this cost. They contribute proportionately to their respective share of the market, by type of equipment. This means that current market participants will have to finance not only the waste management cost associated with their own historical WEEE, but also the cost associated with WEEE from producers that have exited the market or whose market share has declined by the cutoff date.

Member States will have greater flexibility in allocating the financial responsibility for the waste management of historical WEEE from non-private households. Non-private users are likely to be obliged to contribute to the cost of waste management with producers.

III. CLOSELY RELATED – THE ROHS DIRECTIVE

A Directive on the restriction of hazardous substances in electrical and electronic equipment (“RoHS Directive”) was adopted at the same time as the WEEE Directive. It bans the use of certain hazardous substances in electrical and electronic equipment sold on the EU market. The Directive establishes an obligation for Member States to ensure that new electronic equipment put on the market from 1 July 2006 onwards does not contain lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBB), or polybrominated diphenyl ethers (PBDE) over specified concentration levels. Current proposals set concentration limits of 0.1% by weight in homogenous material for lead, hexavalent chromium, mercury, PBB, and PBDE, and 0.01% by weight in homogenous materials for cadmium. A number of applications, notably lead used in certain types of solders and lead used in some steel and aluminum alloys, are exempted from the substance ban, subject to regular reviews of the feasibility of substitution. The first such review has been launched recently, with a public consultation during Summer 2004.

Although implementation is not required until July 2006, the RoHS Directive imposes wide-ranging requirements on EEE producers that may affect their production or supply processes. Producers of EEE should therefore ensure that they conduct an assessment of their supply chain and production processes to ensure compliance with the substance bans imposed by the Directive.

IV. IMPLEMENTATION IN GERMANY

The German Federal Ministry for the Environment published the draft law implementing the WEEE Directive on 25 February 2004. The draft contains the Act on Waste Electrical and Electronic Equipment (*Elektro- und Elektronikaltgerätegesetz – ElektroG*), which is to take effect before 13 August 2005. This legislative proceeding is under close scrutiny by numerous industry groups as well as local municipalities.

A. Key elements of the discussion draft

The draft provides that existing public waste management companies will be responsible for the collection of all WEEE from private households. They must accept WEEE at their collection facilities, sorted into six different product categories. In addition, retailers may voluntarily collect WEEE and return it to these facilities. Producers may also voluntarily establish individual or collective collection systems.

The centerpiece of German implementation would be the establishment of a joint Coordination Office (*Gemeinsame Stelle*) and a Central Registry (*Zentrales Register*). These institutions will most likely be organized by setting up a Foundation (*Stiftung*) which will partly act as a private entity and partly act as an administrative body (*Beleihung*). The predecessor of this entity, the *Elektro-Altgeräte Register* (E.A.R), is already established. The entity will be responsible for allocating and coordinating producers' obligations. Producers must inform the Coordination Office about the amount of EEE put on the market on a monthly basis. The Coordination Office will also receive data from the public waste management companies on the amount of WEEE that has been collected in the different product baskets. On the basis of this data, the Coordination Office will calculate the exact amount of WEEE that any individual producer must pick up from the collection facilities of the public waste management companies. Individual shares are generally calculated by determining the producer's share of all EEE put on the market, broken down by respective product category (*i.e.*, current share of sales). Concerning new WEEE, the producer may request that the amount it is responsible for is calculated on the basis of its share of WEEE in the respective product basket in the respective year (*i.e.*, its real WEEE share).

B. Key legal and economic issues in the further legislative process

There are still controversial issues that require further discussion in the legislative process, *i.e.*:

- **Number of product categories.** The current draft provides for six different

product groups (the prior working draft provided for seven so-called "baskets"). However, public waste management companies have argued that it is possible for them to collect WEEE only in five different product "baskets" because of limited personnel, space, and financial resources.

- **Calculation methodology for new WEEE.** It is not yet clear how producers will be able to demonstrate their specific share of WEEE for purposes of calculating the waste tonnage they are responsible for. Otherwise they will be subject to the market share calculation methodology based on sales of new EEE.
- **Form of financial guarantee.** The current working paper provides that the producer must provide a guarantee to the Central Registry showing that the management of all new WEEE that could be used in private households will be financed. The exact form of this guarantee is not yet specified. Parts of the industry led by a major trade association are currently developing a collective guarantee fund, which will be open for all producers concerned.

V. INTENDED IMPLEMENTATION IN THE UK

The UK Department of Trade and Industry (DTI) in November 2003 published a consultation paper setting out how the UK proposes to implement the WEEE Directive. Over 200 industry stakeholder responses are currently being considered prior to publication of a draft implementing Regulation, expected shortly. The Regulation will also be accompanied by a draft set of non-statutory guidelines covering technical issues.

A. Key elements of intended implementation

Similar to the approach being adopted in Germany, the UK Government has signaled that its preferred implementation option is a national producer-funded clearinghouse that will coordinate the collection of WEEE for treatment. Such a clearinghouse would coordinate the free

collection of private household electrical and electronic waste from civic collection facilities and other designated central facilities.

Key features of the UK proposal include the following:

- **Producer cost allocation.** While the Government has invited proponents of the clearinghouse option to come forward with proposals for a fair cost allocation process, it is likely that each producer's cost contribution will be established on the basis of its share of total tonnage for the UK (new) EEE market. All producers will be obliged to register in the scheme and then contract with treatment facilities and recyclers who would later confirm tonnages recovered and recycled against the producer's individual recovery targets. Interim registration for producers could commence as early as August 2004 with the possibility of an early registration discount. All producers will be obliged to register by June 2005.
- **Collections.** The clearinghouse will coordinate collections and deliveries nationwide by individual producer (or groups of producers working together) who would have an obligation to collect waste within a set time frame. Alternatively, the clearinghouse may itself choose to operate a UK collection service funded by producer registration fees. Either way, it is expected that the actual collection and carriage of WEEE would be outsourced.
- **Recycling funding.** The UK proposes to place an obligation on producers to fund the recovery and recycling of WEEE from central collection facilities (e.g., municipal collection sites or major retailer take-back facilities). However, the Government wishes to provide producers with flexibility in discharging their recycling obligations. For example, producers could have the option either to directly recover and recycle their own products or to join a compliance organization that would fulfill these obligations.

- **Retailer obligations.** The UK's plans differ from the intended German scheme concerning retailers' take-back obligations and local authority collection involvement. Under the UK's proposal, EEE retailers will be free to either offer an in-store WEEE take-back service when selling like-for-like products, or to join a retail sector compliance scheme with collective collection responsibilities (which would accept all consumer WEEE; not just like-for-like products). As part of the Government's consultation, retailers were invited to come forward with a more detailed proposal of how a competitive and efficient nationwide scheme could be established.

B. Key legal and economic issues in the further legislative process

General implementation option. While recognizing various alternatives, the consultation paper only explores the clearinghouse option in any level of detail. However, two alternatives are also noted:

- a structure like the Dutch *De Nederlandse vereniging Verwijdering Metalektro Producten* (NVMP) scheme which would involve a visible fee on individual products funding a central organization which arranges collection, treatment, and recovery of WEEE from municipalities or retailers; and
- a system of tradable notes for the recycling of WEEE, whereby producers would have to meet their obligations by buying sufficient recycling notes from recyclers as evidence of having discharged their obligations.

Responses to the UK Government consultation have raised a number of issues, including:

- **Calculation of market share.** While a producer's market share will be the basis for calculating producers' financial responsibilities for historic WEEE treatment, industry stakeholders took

issue with the proposal to determine market share by sales revenue. Rather, an approach based on the basis of product weight was favoured.

- **Harmonized technical guidance.** The UK is proposing to develop technical guidance criteria for its regulation through discussions and agreement with other Member States. Stakeholders supported such a proposal and urged the Government to ensure that a harmonized EU-wide approach is adopted, particularly in respect of critical elements such as which products fall within the scope of the WEEE Directive.
- **Definition of producer.** The UK proposes to clarify the term “put on the market” in the definition of “producer” in the WEEE Directive so as to ensure that distance sellers based outside the EU are caught by the definition.
- **Visible fees for historical WEEE.** Most respondents favored the use of a “visible fee” on historic, as opposed to new, WEEE so that the cost would be borne by consumers.
- **Product re-use.** Of the Government’s alternatives on how best to promote re-use of WEEE, respondents favored the option of requiring producer responsibility compliance schemes, as a condition for being registered, to set out how the producer intends to encourage product re-use.
- **Product design.** The UK’s approach for encouraging product eco-design is non-legislative. It will be implemented through the setting up of a business forum to develop voluntary best practices and set product standards.

VI. INTENDED IMPLEMENTATION IN FRANCE

The French Government has recently circulated a new version of its Draft Decree to implement the WEEE and RoHS Directives. This follows the publication of earlier drafts and consultations that

were held within a working group representing producers, processors, and waste collectors. It is expected that the Decree will be adopted during the summer or fall of 2004.

A. Key elements of the intended implementation

- **Collection and take-back.** The Draft Decree provides for take-back of household WEEE at the point of sale by the distributor and for the establishment of separate collection systems by the producers and local authorities. Producers will contribute to these collection systems by joining coordinating agencies, which will have to be approved by the Government. Coordinating agencies will compensate the local authorities for the WEEE collected on the producers’ behalf. Producers will also have to establish collection points for WEEE not taken back by the distributors or collected through the separate collection systems managed by local authorities.
- **Treatment and recovery.** Producers will discharge their obligations concerning the removal, treatment, and recovery of household WEEE collectively, by adhering to (or creating) recovery organisations. For equipment put on the market after 13 August 2005, they may also elect to discharge these obligations individually by setting up their own treatment and recovery system. The financial responsibility of any given producer contributing to a recovery organisation will be calculated by determining the producer’s share of all EEE put on the market during the year, broken down by respective product category.
- **Non-household WEEE.** For non-household WEEE, producers will be responsible for the collection and treatment/recovery of EEE put on the market after 13 August 2005, although in that case the sales contract may provide that the customer will be responsible for treatment of the resulting WEEE. Producers will be able to discharge their obligations with respect to professional

WEEE either individually or through a Government-approved organisation. Users will be responsible for the treatment and recovery of non-household WEEE put on the market before 13 August 2005, except where the sales contract provided otherwise.

- **Central Registry for producers and distributors.** All EEE producers will have to register with a so-called Central Registry and provide proof of participation in a collective treatment organisation or proof of Government approval of their individual treatment scheme. Distributors will also have to register and provide information on the type and quantity of EEE sold – this goes beyond the requirements of the Directive. Distributors selling EEE from a non-registered producer will be deemed to be the producer of the concerned EEE for the purposes of the Decree.

Finally, visible fees will be allowed for a transition period.

B. Key legal and economic issues in the further legislative process

The Draft Decree recently released by the Environment Ministry leaves some important issues unanswered:

- **Modalities for collective schemes.** The Draft Decree provides that collection coordination agencies and treatment organisations will have to submit commitments as to how they will meet the obligations imposed by the Directive and the Decree. These commitments will include, inter alia, the terms of agreements between the organisation and

the producers and the modalities for the producers' financial contributions to the organisation. It remains unclear whether existing compliance organisations (such as SCRELEC, the organisation in charge of used batteries and accumulators) will be involved in these collective schemes.

- **Compensation paid by producers to local authorities for separate collection of WEEE.** It is not yet clear whether local authorities will collect all WEEE not taken back by distributors or how compensation for collection costs will be calculated. The Draft Decree provides that the compensation mechanism will be set in the collective organisations' commitments and approved by the Government, but establishes no guidelines in this respect.
- **Central Registry.** The Government has yet to decide which entity will be in charge of keeping the registry, and on what terms.

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