

EU ENVIRONMENTAL AND COMMUNICATIONS LAW UPDATE

29 July 2005

The EU Waste Electrical Equipment Directive: Enforcement Ahead

In less than a month, the 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. 13 August 2005 will be the cut-off date for a number of obligations in several Member States. Others, which have not yet adopted their national WEEE legislation, will follow shortly. 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. The RoHS Directive comes into force in July 2006, but companies need to prepare now for the phase-out of the six prohibited substances.

In this *Update*, we highlight the most important requirements of the WEEE and RoHS Directives 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 United Kingdom and France) have implemented or propose to implement the WEEE Directive.

Note that in some countries the deadline for initial registration has already passed or will be reached soon: Finland, Hungary and Ireland already require producers to register, with Austria, the Czech Republic and Luxembourg expected to follow by October this year at the latest.¹

I. Key Questions

A. What products are covered by the WEEE and RoHS Directives?

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 in the following ten categories:

- 1) Large household appliances;
- 2) Small household appliances;
- 3) IT and telecommunications equipment;
- 4) Consumer equipment;
- 5) Lighting equipment (with the exception of household luminaires and filament bulbs);
- 6) Electrical and electronic tools (with the exception of large-scale stationary industrial tools);
- 7) Toys, leisure and sports equipment;

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¹ Based on the Perchards Report, a survey on behalf of the British Department of Trade and Industry.

EEE producers have to register with the national authorities and provide periodic reports on waste management.

- 8) Medical devices (with the exception of all implanted and infected products);
- 9) Monitoring and control instruments; and
- 10) Automatic dispensers.

Both the European Commission and the Member States have prepared guidelines to assist producers in determining whether their products fall under the scope of the Directives.

B. Key requirements of the WEEE Directive

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

- **Registration.** EEE producers have to register with the national authorities and provide periodic reports on the quantity of EEE they put on the market and on how they have met their treatment obligations with respect to WEEE for which they are responsible.
- **Product design and identification.** Producers of EEE are 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 or the respective national cut-off date will have to bear a number of specified markings (identification of the producer, “recycling” symbol, indication that the product was put on the market after the cut-off date). 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 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. Requirements for both collection and treatment are so complex that most producers choose to cooperate with third-party waste service providers.

Some producers will decide to take back and treat their WEEE in a central EU location, a strategy that allows them to simplify the administrative procedures imposed on their customers and gives them access to used equipment that can then be refurbished. Establishing a central take-back system however raises a number of legal issues, notably those associated with the handling of hazardous waste and with the general EU legislation regulating the transportation of waste.

- **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

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purchased before and after 13 August 2005 (respectively, “historical” and “new” products) are different.

- *New products:* Each producer is 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 has 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. Requirements on manufacturers of “professional” equipment are less stringent: for instance, these manufacturers may pass on the costs associated with WEEE collection and treatment to their business users.
- *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 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 cut-off date. For the waste management of historical WEEE from professional or business users, most Member States have made use of the greater flexibility in allocating financial responsibility. Thus, professional users are often obliged to contribute to the cost of waste management.

C. 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.

While most Member States have adopted a broad legal definition of “producer,” under which they consider manufacturers, importers and resellers alike as “producers” for the same product (e.g., one as manufacturer, the other as importer), administrative implementation is becoming increasingly more pragmatic. A number of national authorities have indicated that they intend to hold only one entity responsible whenever several companies are involved in the supply chain and could qualify as a “producer.”

Who will be responsible may depend on the specific agreements between, for instance, the manufacturer and the importer of the products. Where there is a local importer, that company would generally be considered as the “producer.” This means that in certain cases and in some Member States, the manufacturer may not be directly subject to the obligations imposed by the WEEE Directive. Each manufacturer therefore needs to review its specific supply and sales agreements in light of the position adopted by the national authorities of the countries in which it sells its products.

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

In principle, yes—the WEEE Directive applies to companies without regard to their location or nationality and non-EU companies are generally subject to the Directive if they sell EEE in the EU under their own brand name. It

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Each manufacturer needs to review its specific supply chain and sales agreements in order to determine compliance responsibility.

Application to non-EU companies is yet to be determined in some Member States.

depends on the individual Member State and its implementation of the Directive whether all companies that fit the definition of “producer” are jointly and severally held responsible for compliance, or only one company is designated as the “sole producer.”

However, an important exception to this principle is emerging. Some Member States will be refusing to register non-EU or non-national companies, meaning that national representatives will have to be appointed. In some rare cases, the national authorities may hold the end-user importing the products directly responsible for all the obligations imposed by the Directive, an interpretation which raises serious issues not only for the end-users, but also for importers and foreign manufacturers. Those foreign producers may find themselves at a competitive disadvantage compared to their EU competitors if they are obliged to pass on their WEEE obligations to their customers while their competitors are able to assume these WEEE obligations themselves.

E. What’s the timetable for the upcoming months?

13 August 2005 will be the cut-off date for a number of responsibilities imposed on producers. Some Member States are expected to have a fully operational system as of that date and to start registration as indicated above. Other Member States have yet to transpose the Directive or have granted additional grace periods to adapt to the new law. The German timetable provides a general idea of the sequence of upcoming events:

- July 2005: Online registration is available.
- 24 November 2005: Producers need to complete registration; providing financial guarantees for household EEE will be a precondition.
- 24 March 2006: Marking requirements enter into force, collection starts to operate and waste facilities must ensure specific treatment.

- 31 December 2006: Recovery targets enter into force.

II. 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. Subject to confirmation in the form of a Commission Decision, these maximum concentration levels should be 0.1% “by weight in homogenous materials” 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 bans. The list of exemptions is being revised by the Commission, with new exemptions expected shortly.

Although the substance bans only apply from 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 not only compliance with the substance bans imposed by the Directive, but also proper documentation of such compliance. A number of companies are already asking their suppliers to provide certificates of conformity to that effect.

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III. Implementation in Germany

The Act on Waste Electrical and Electronic Equipment (*Elektro- und Elektronikaltgerätengesetz—ElektroG*), which implements the WEEE directive into German law, came into force in March 2005.

Under the Act, existing public waste management companies will be responsible for the collection of all WEEE from private households. Such companies must accept WEEE at their collection facilities, sorted into five different product categories. In addition, retailers may voluntarily collect WEEE and return it to these facilities, where they will be picked up by producers or their representatives. Producers may also voluntarily establish individual or collective collection systems.

The centerpiece of the German implementation will be the establishment of a joint Coordination Office (*Ge-meinsame Stelle*), which is responsible for allocating and coordinating producers' obligations. The Coordination Office is organized by a foundation known as the *Elektro-Altgeräte Register* (EAR), and will act partly as a private entity and partly as an administrative body.

As a condition of continuing to sell in Germany, each producer must register with the Office and provide a guarantee showing that the management of all new household WEEE will be financed. Possible forms of guarantees include the use of recycling insurance policies or blocked bank accounts. In addition, 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.

The Coordination Office (EAR) also requires on-going compliance activities:

- Each producer must inform the Office regularly of the amount of EEE placed on the market. The Act requires such notification to be submitted on a monthly basis, but enables the

EAR and the producer to agree upon alternative arrangements.

- The EAR 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 such data, the EAR 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 placed on the market, broken down by respective product category (i.e., current share of sales). With regard to new WEEE, the producer may, alternatively, request the amount for which it is responsible to be calculated on the basis of a representative sample that determines its real WEEE share in the respective product category in any given year. Companies whose products are more durable than average in any given category should give particular consideration to this latter option.

As recently as last month, the EAR has established that it also register foreign companies. The EAR, however, strongly recommends that such foreign companies name a formal representative in Germany (e.g., an attorney or accountant) in order to ensure compliance with administrative orders of the register. In addition, the EAR urges such foreign companies to cooperate with a third-party waste service provider in order to ensure full compliance.

IV. Implementation in the United Kingdom

The United Kingdom has yet to adopt its WEEE legislation, which will take the form of the *Waste Electrical and Electronic Equipment (Producer Responsibility) Regulations* and non-binding *Guidance*. The Regulations and Guidance should be adopted later this summer. The Government has recently indicated that only the marking obligations would apply as of 13 August 2005; other requirements would only take effect as

Germany urges foreign companies to cooperate with a third-party waste service provider in order to ensure full compliance.

UK legislation is to be passed later this summer.

of January 2006. Below is an overview of what is known of the United Kingdom's proposed approach, based on the Government's July 2004 draft Regulations and further clarifications provided by the Government in recent months.

The UK Government had initially proposed creating a "National Clearing House" that would be responsible for the registration of producers and allocation of collected household WEEE to them. The Government now proposes a simpler approach, under which each producer would be required to register with one of the Environment Agencies (there is one such agency each for England/Wales, Scotland and Northern Ireland). Where a producer meets its obligations through a compliance scheme, the scheme would take care of registration on behalf of its members. Each producer would have to report to the DTI the amount and number of units of EEE put on the market in a reference period, distinguishing between household and professional EEE. The DTI would then establish an allocation of WEEE to producers based on these reported market shares. The exact procedure for and details of allocation are yet to be worked out following further consultations with producers and other interested parties.

Importantly, it appears that the Regulations will not apply to companies that are established outside the United Kingdom. Foreign producers will have to await further guidance from the UK authorities as to how they should proceed in order to ensure that they comply with UK law. It is also not yet clear which entity will be responsible for compliance where several companies meet the definition of "producer" for a given product.

With respect to financing, producers supplying new equipment to business users to replace similar original equipment purchased before 13 August 2005 will have to finance the costs of treatment, recovery and sound disposal of the replaced equipment (whether or not they supplied the original equipment). If the business user is not making such a "like-

kind" replacement purchase, then the business user will be responsible for these costs. Producers will also be responsible for financing the collection and recovery of EEE put on the market after 13 August 2005, except where the producer and the business user have agreed otherwise.

V. Implementation in France

The French Government adopted its WEEE legislation on 20 July 2005 in the form of a Decree transposing both the WEEE and RoHS Directives.

All EEE producers will have to register with a Central Registry run by ADEME (the French Environment Agency). Similar to the UK, it has been suggested that non-EU companies would not be able to register.

The Decree provides for the take-back of household WEEE at the point of sale by distributors and for the establishment of separate collection systems by local authorities. These systems are to be financed by EEE producers through coordinating agencies of which they will become members. 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. Producers may also decide to establish their own separate collection systems, subject to Government approval.

Producers will discharge their obligations concerning the removal, treatment and recovery of household WEEE collectively, by adhering to (or creating) either recovery organisations or by establishing individual treatment schemes. Producers establishing individual recovery schemes will have to provide a financial guarantee.

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

A French Decree was adopted on 20 July 2005.

individually or through a collective recovery 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 producer and customer have agreed otherwise.

VI. Practical Implementation: To Do List

The following factors are key to preparing for WEEE and RoHS compliance:

- **Review your product inventory:** Which products are covered?
- **Determine the responsibility of your company:** Based on the specific supply chain, are you (or your subsidiaries) considered to be a producer in the individual Member States?
- **Share responsibilities with distributors and customers:** Is it economically

and legally feasible to share certain obligations with other parties?
Has your company drafted the appropriate contractual language?

- **Ensure legal compliance:** Are you aware of the specific obligations that arise for your company, both under the Directive as well as the individual national laws? Have you assigned all respective responsibilities—internally or in cooperation with third parties?
- **Consider alternative means to ensure compliance:** Does it make business sense to finance compliance through a collective organisation or is it more advantageous to undertake WEEE collection, treatment, disposal and recycling through an individual scheme, which may or not involve third parties as sub-contractors?

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