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## WEEE and RoHS: First German Court Ruling Allows Enforcement Among Competitors

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More than two years after the first parts of the European Union's electrical waste legislation entered into force, the potential for enforcement actions has become an issue of increasing concern for producers who sell electrical and electronic products on the European market. With regard to the EU Directives on waste electrical and electronic equipment (WEEE) and the restriction on hazardous substances (RoHS), details are regulated by national law, and enforcement does vary between the EU Member States. Nonetheless, recent developments in the key marketplace, Germany, merit special recognition.

### **What's New in German Enforcement?**

As long predicted, WEEE enforcement does not focus solely on public authorities and customer relationships. First court rulings show that enforcement between competitors is an additional threat in the event of non-compliance. To this end, the Appellate Court of Düsseldorf recently held that producers can be sued by their competitors under the German law of unfair competition if they fail to fulfill the WEEE registration requirements. The same is likely to apply for violations of the WEEE marking and take-back obligations. Potential sanctions are severe: competitors could seek an injunction to prevent non-compliant producers from placing further products on the market, or even sue for damages. These sanctions are a possibility regardless of whether public authorities decide to pursue enforcement actions or impose fines.

It is important to note that this holding does not pertain to RoHS. The federal government has supported the view that violations of the RoHS requirements cannot be prosecuted under the German law of unfair competition. There are, however, no binding court decisions in this regard as yet.

### **Is This a Development Throughout the European Union?**

In the absence of detailed EU provisions on unfair competition, enforcement using unfair competition law will depend on the applicable national law. Some Member States follow a rather general approach in their law of unfair competition. Therefore, noncompliance with WEEE and RoHS provisions could **generally** result in claims of unfair competition, provided that any other

requirements of the local unfair competition law are fulfilled. However, some countries, such as the United Kingdom, allow for such actions by competitors only under very exceptional circumstances, and enforcement of environmental legislation is pursued largely through public authorities.

### **What Can My Company Do?**

A defense strategy against potential claims includes several key elements, both under the WEEE and RoHS regulations and the national laws of unfair competition:

**Review product analysis and applicability of WEEE and RoHS requirements.** Whether or not these laws apply to individual equipment is still subject to uncertainties. In the ambit of potential unfair competition claims, particular attention needs to be given to what your competitors have done with regard to similar equipment: Which products have they marked with the "wheelie bin"? Who has registered with the public authorities? In cases where some producers have treated their products as subject to these programs while others have not, individual producers might seek to pursue their competitors.

**Prepare necessary documentation.** In the event of actions from their competitors, producers will quickly need to provide proof of their compliance activities. It is, therefore, indispensable to have ready a summary of corporate compliance activities, as well as documentation of the WEEE and RoHS status of individual products.

Finally, legal actions could be used as a means to gain a competitive advantage against competitors whom you believe are not complying with WEEE or RoHS requirements. In most Member States, however, such actions will only be successful if the plaintiff is fully compliant with the legislation. Therefore, it is indispensable to double-check one's own compliance status and efforts before taking action against competitors.