

Update – UK Government Issues RoHS Regulations

October 2005

Speed read

The long awaited RoHS Regulations 2005¹ were finally issued in the U.K. on 20 October. The Regulations set strict new limits for permissible quantities of certain hazardous substances used in electrical goods. Primary responsibility for ensuring compliance will rest with you if you manufacture, re-brand, distribute, import or export electrical goods but component manufacturers also need to take care as the Regulations provide for criminal liability to be allocated across the supply chain to the maker of the non-compliant component.

The Regulations apply to products put on the market from 1 July 2006 and broadly reflect the draft RoHS Regulations which were issued for consultation in July 2004. Following a recent European Commission Decision² which amends the RoHS Directive, the Regulations set out the maximum concentration values (or **MCVs**) for lead, hexavalent chromium, mercury, polybrominated biphenyls, polybrominated diphenyl ethers and cadmium which you, as a “producer”, may include in electrical and electronic equipment placed on the market. The MCV itself is set at a limit of 0.1% by weight in homogeneous materials³ for each of the restricted substances except cadmium, where the maximum permissible level is 0.01% by weight in homogeneous materials. This means that you need to ensure that the MCVs are not exceeded in each homogeneous material which is part of the product.

The Regulations do not apply to (i) any spare parts which you may produce or obtain which are used to repair or to render suitable for re-use any electrical equipment put on the market before 1 July 2006, (ii) any of the specific applications of the substances benefitting from an exemption under the Regulations or (iii) equipment placed on the market before 1 July 2006, provided it is in compliance with any other relevant laws or standards.

¹ Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2005.

² 2005/618/EC.

³ According to the European Commission’s “Frequently Asked Questions” “homogeneous material” is a material which cannot be mechanically separated by cutting, grinding, unscrewing or subjecting it to abrasive processes. A plastic cover would, for example, be a “homogeneous material” if it consisted of one type of uncoated plastic.

Definition of Producer

The definition of “producer” in the Regulations does not fully reflect that adopted in the RoHS Directive. The Regulations no longer provide clarification that parties who are exclusively providing financing by virtue of a finance agreement shall not be deemed to be a “producer” (unless they are also acting as manufacturer, own-brand reseller or importer in their own right). This appears to be an oversight by the DTI.

Due diligence defence

The Regulations retain the defence of due diligence to the offences of (i) putting products on the market which exceed the MCVs, (ii) failing to comply with a request from the Secretary of State for technical evidence that products are in line with the MCVs and (iii) failing to keep this type of technical documentation for four years from the date on which your product was put on the market. To rely on the defence you will need to show that you took all reasonable steps and exercised all due diligence to avoid committing the offence. As part of the defence you can allege that the offence was committed by another person or was committed because you relied on information supplied by another person that the product was compliant. You will only be able to claim such reliance, however, if it was reasonable in all the circumstances to have relied on the information. Importantly, the supplier in these circumstances may face charges whether or not you have been prosecuted.

Those of you who distribute electrical goods or who manufacture products containing components supplied by third parties should, therefore, be taking steps to ensure, amongst other things, that you are properly and reliably informed about the content of the components and the products you receive. As there is no specific certification of compliance or labelling requirement under the Regulations, all parties to the supply chain should be providing evidence that relevant components/products comply. Furthermore, the Regulations expressly refer to steps you might reasonably have taken to verify the information provided. Consideration should, therefore, be given to the need for product testing to confirm the information stating the product is compliant.

Disclosure of Information

The Regulations have been brought within the ambit of the Enterprise Act which means that a regulator may not disclose information it obtains as part of an investigation without first obtaining your consent (unless the information is already in the public domain or required to be disclosed under a separate legal requirement). There is, however, a loophole allowing regulators to disclose information to the public and other regulators without your consent where the disclosure enables the regulator to carry out its functions. The extent to which regulators may be able to exploit this loophole in the event of a breach of the Regulations remains a grey area.

Exemptions

The applications of deca-BDE in polymeric applications and lead in lead-bronze bearing shells and bushes were exempted from the RoHS Directive by a Commission Decision⁴ published on 13 October this year. We understand that the Regulations had been drafted before this exemption was passed by the Commission which is why they do not contain the exemption. A further Decision⁵ was issued by the Commission on 25 October implementing the first set of exemptions⁶ that were agreed by the Commission’s Technical Adaptation Committee. Likewise, the Regulations do not include this set of exemptions either and will, therefore, need to be amended at a later date to take account of these and a number of further proposed exemptions.

Powers to serve notices

Where the Secretary of State (or any delegated enforcement agency) has reasonable grounds for believing that you, as a producer, have committed an offence under the Regulations, she may serve you with a notice requiring that your product complies within a specified period. To show your products comply, you may be asked to provide technical documentation on product contents which demonstrate compliance with the MCVs.

⁴ 2005/717/EC

⁵ 2005/747/EC

⁶ The first set of exemptions include the exemption relating to Flip Chip packages..

Some thoughts

The final Regulations do not contain any major new surprises and, at last, confirm the MCVs of the substances included in the RoHS Directive. As well as continuing to prepare for implementation through analysis of your products and reviewing compliance strategies to ensure that you are prepared by 1 July 2006, you will need to monitor the progress of proposed exemptions currently awaiting approval by the European Commission. You may also want to take steps to ensure that the due diligence defence can be relied upon if you receive products from further up the supply chain. Equally, if you are a component manufacturer, you will want to ensure that you are comfortable with the level of risk you are taking on under the terms of any compliance certification provided to your customers.

It is expected that the DTI's draft revised guidance on RoHS will also be finalised shortly. The DTI is more tight-lipped, however, on timing for the revised WEEE Regulations.

Key contacts

For further information or advice about these proposals feel free to speak to your usual contact at Allen & Overy LLP. Alternatively, please contact relevant members of the Global Environmental Law Group noted below who regularly advise on WEEE and RoHS matters.

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