

Recycling of components: the clock is ticking

The European Commission's current environmental initiatives have significant implications for producers of electrical and electronic equipment (EEE).

Producers will soon become responsible for ensuring their products utilise environmentally sustainable product design and packaging. They will also be responsible for the reuse, recycling and recovery of waste.

Businesses should already be working towards being compliant and we summarise below the most important legal and procedural actions that they need to be taking to ensure that all EEE placed on the European market complies with the new regulations.

The RoHS Directive

One of the key EU initiatives is the 'Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment' (RoHS) Directive which aims to protect human health and the environment.

The initiative may be great news for environmentalists, but it is not so good for businesses as the Directive will have major cost implications. It will require businesses to adopt a more sustainable product design and life cycle analysis for EEE. This has huge ramifications, including the redesign of manufacturing equipment, phasing out the uses of restricted substances and increasing research and development. According to the DTi regulatory impact assessment, the cost to UK business is likely to be at least £150 million per year for the next 10 years.

The Directive will affect designers, producers, importers and purchasers of EEE. It may also have a material impact on investments and mergers and acquisitions in the electronics sector (because of the additional liability and due diligence requirements).

The Directive must be in force in all member states of the EU by 1 July 2006. The final form of the UK regulations and DTi guidance are expected imminently.

The WEEE Directive

The second key EU initiative (not covered in detail in this briefing) is the Directive on Waste Electrical and Electronic Equipment (WEEE). The WEEE directive

requires producers to arrange for the recycling and recovery of WEEE. Implementation of the Directive has been delayed because national authorities need to create appropriate collection schemes to manage the disposal and recycling of WEEE but well advanced businesses should be getting ready to comply with the Directive now.

What this means in practice

From 1 July 2006 a producer must not place new EEE on the market which includes banned hazardous materials in amounts exceeding the set maximum concentration values. Banned materials include lead, cadmium, mercury, hexavalent Chromium, PBB and BBDE flame retardants.

However, certain applications of these goods are exempt from the requirements.

Spare parts for the repair or reuse of EEE which were on the market before 1 July 2006 can still be produced so producers are likely to have to maintain separate production lines for pre-2006 and post-2006 EEE to ensure compliance with product guarantees and repair obligations for existing EEE.

EEE

Defined in the WEEE Directive, EEE is divided into 10 product categories including nearly all consumer and household items, from fridges, telephones and lighting equipment to toys, leisure and sporting equipment. Certain products are excluded, including munitions and filament light bulbs and medical implants.

Producer

A 'producer' must demonstrate compliance with the Regulations. A Producer includes own brand manufacturers, own label resellers and importers and exporters of EEE on a professional basis.

Businesses should already be working towards being compliant and we summarise below the most important legal and procedural actions that they need to be taking to ensure that all EEE placed on the European market complies with the new regulations.

The cost of non-compliance

The National Weights and Measures Laboratory will be responsible for the enforcement of the RoHS Regulations. It can issue a compliance notice if it has reasonable grounds to suspect non compliance with Regulations 7, 8 or 9. The notice requires the producer to comply with the RoHS Regulations and to provide satisfactory evidence of compliance.

Producers in breach of the RoHS Regulations will face a fine of up to £5,000 on summary conviction or an unlimited fine on conviction. Further, producers could be required to withdraw non-compliant products from the market.

Offences committed by a body corporate are also committed by the director, manager, officer or members of the corporate body if done with the consent, connivance or by the neglect of that director, manager, officer or members. **This could potentially mean personal liability for directors and company officers.**

A producer can protect itself if it takes all reasonable steps and exercises all “due diligence” to avoid committing an offence. In practice this will mean that the producer must be able to demonstrate adequate systems were in place to test EEE, maintain adequate records, and to have made proper enquiries of suppliers.

DTi guidance recommends that producers undertake their own analysis of material purchased from suppliers, or ask consultants to do so on their behalf. A producer can notify the Secretary of State of the identity of the third party whose act or default caused the breach and this person can be directly prosecuted. This means that component suppliers and sub-assembly producers can also be liable under RoHS Regulations, even if they are not in fact producers.

Recommendations for producers

In order to ensure compliance with the RoHS Regulations, producers should:

- obtain declarations from their suppliers and component manufacturers that EEE products do not contain banned hazardous substances
- perform tests on EEE products supplied to them
- include, in terms of purchase and supply contracts, contractual obligations on suppliers and component manufacturers allocating liability clearly for breach of the RoHS Regulations.

Key terms for your purchase contract

In order to ensure that your suppliers comply with RoHS, suppliers should provide necessary technical documentation and information, warranties that products and components supplied will comply with the RoHS Regulations, permit producers rights of audit and inspection of facilities to ensure compliance with the RoHS Regulations and grant producers an indemnity for any liabilities incurred as a result of the supplier or component manufacturer's failure to comply with RoHS Regulations

- review document management systems to ensure that the producer has or can collect adequate records to verify the source of components and compliance with RoHS and WEEE requirements
- increase research and development and review and update equipment to comply with the RoHS Directive
- agree who is responsible for the disposal and recycling of waste EEE to comply with the WEEE Regulations. The user will be responsible for the recovery, treatment and disposal of all electrical and electronic equipment put on the market before 13 August 2005. The only exception is if a business user is buying new ‘like for like’ replacement equipment. In this case, the producer will be liable for the costs of disposal, regardless of whether the producer sold the equipment that is being replaced. For EEE sold after 13 August 2005 the parties are free to contract as to who will be responsible for paying for the recycling of waste EEE once the purchaser has finished with it.

Recommendations for component manufacturers, suppliers and sub-contractors

In order to ensure compliance with the RoHS Regulations, component manufacturers, suppliers and sub-contractors should:

- include provisions in terms of sale and supply contracts, or obtain declarations from their suppliers and component manufacturers that sub-assemblies and products supplied to them do not contain banned hazardous substances
- review document management systems to ensure that they collect adequate records to verify the source of components and compliance with RoHS and WEEE requirements

- ensure that banned substances are not used in EEE and obtain declarations from suppliers of raw materials that substances supplied do not contain banned substances

- perform regular analysis of raw material supplied to them and regular analysis of EEE products produced by them

- include contractual provisions with customers allocating liability fairly under the RoHS Regulations. Suppliers can provide controlled access to necessary technical documentation and information, warranties that products and components supplied will comply with the RoHS Regulations and permit producers reasonable rights of audit and inspection of facilities to ensure compliance with the RoHS Regulations. As mentioned above, well advised producers will require an indemnity for any liabilities incurred as a result of the supplier or component manufacturer's failure to comply with RoHS Regulations.

Corporate investments and M&A risks

Legal due diligence on businesses with any connection with the manufacture, production, sale or import of EEE will become increasingly stringent. Well advised purchasers and investors in target companies will establish:

- the state of preparedness of target companies for the enactment of RoHS and WEEE Directives, including the appropriateness of the systems in place to demonstrate compliance and allocate risks between suppliers and customers

- the costs of ensuring that the target business will be compliant by July 2006 and the costs of updating quality control systems

- the risks and likely costs for businesses that are not compliant

- the risks to investor board representatives if the target company is in breach of the Directives, in view of the potential personal liability of directors, and the consequent cost of obtaining insurance cover to protect directors

- the effect of the RoHS and WEEE Directives on the value of the target or investee company.

Purchasers and investors may also require extensive warranties to be given by vendors, shareholders and/or directors of the target or investee business about its state of preparedness. Breach of these warranties may mean personal liability for shareholders and directors.

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