

24 August 2009

**PROPOSAL FOR A DIRECTIVE ON THE RESTRICTION OF THE USE
OF CERTAIN HAZARDOUS SUBSTANCES IN ELECTRICAL AND
ELECTRONIC EQUIPMENT (ROHS) (RECAST) ¹**

COM (2008) 809 FINAL

***JOINT POSITION FROM DIGITALEUROPE, TECHAMERICA EUROPE AND
JAPAN BUSINESS COUNCIL IN EUROPE (JBCE)***

1- EXECUTIVE SUMMARY

- DIGITALEUROPE, TechAmerica Europe and JBCE strongly support the main underlying goals of the Commission's proposed revisions to the RoHS exemptions mechanism. In particular, we welcome the proposed expansion of the RoHS Exemptions criteria to allow for socio-economic aspects to be taken into account. We also support the Commission's proposal to harmonize the format for exemption requests;

- However, we express concern regarding some of the key proposals put forward, and believe the current text can be improved with a view to achieving the stated goals.
 - Member companies have been working with the existing exemptions mechanism for a number of years. Based on extensive experience with the process for handling exemptions under the existing Directive, we support exemptions to be reviewed and assessed periodically on a case-by-case basis. What has become critical for our global industry and its complex supply chain is to have better legal certainty, especially when an exemption is withdrawn, and a more timely and transparent decision-making process.

- At present, it is very difficult to predict how the proposed exemptions mechanism will operate in practice. If finally adopted, some provisions would exacerbate the legal

¹ This paper does not cover first periodical review of the existing RoHS Directive 2002/95/EC Annex

uncertainty which the proposal seeks to alleviate. There is also excessive procedural detail regarding many important items to be decided at a later stage;

- Although exemptions can be renewed, we understand that the proposed 4-year maximum validity limit could become the general rule. We are fully in favour of review periods to confirm the continued need of exemptions. However, until scientific evidence proves feasible substitute technologies have been invented and designed to work in manufacturing environments, no final sunset timelines should be fixed. The maximum validity limit and blanket timeframes for applications for renewals also raise significant legal uncertainty, and ignore the reality of specific investment and product cycles;
- In order to ensure greater legal security and predictability, we are proposing to define and introduce in the legal text a transparent procedure backed up by clear deadlines for all applications for renewals and decisions to either renew or delete exemptions. The assessment of exemptions and associated deadlines must be undertaken and defined on a case-by-case basis. All newly granted exemptions should at least be subject to a time-limited review process to be defined on a case-by-case basis taking into account all final RoHS exemptions criteria. The decision-making process should be carried out in a timely manner;
- All legal instruments (Commission Decisions) dealing with RoHS exemptions should specify (and amend the Directive so as to introduce) transitional arrangements to be defined on a case-by-case basis taking into account all final RoHS Exemptions criteria. We propose that during the lifetime of an exemption three sets of transitional arrangements are specified (“the review date(s)”, “the latest application date(s)” and finally “the sunset date”), and, where relevant, gradually evolve/be updated by the different Decisions affecting each exemption (all based on a case-by-case approach and the final RoHS Exemptions criteria);
- Applying concepts expressed in general and ambiguous terms, such as “in due time,” rather than helping to remove the legal ambiguities tends to exacerbate them. Industry needs legal certainty that a Decision on any application for renewal will be taken before an exemption reaches a potential expiry date. If applications are received by the deadline given, the exemptions concerned should remain valid until a decision is taken;

Once an exemption has been deleted, a minimum transition period of 18 months should be introduced so that manufacturers and their supply chains can make the switch to the substitute technology/application. Premature withdrawal of exemptions can have severe implications for Industry, customers, consumers and the society as a whole;

2- PROCEDURE AND CRITERIA FOR GRANTING EXEMPTIONS

DIGITALEUROPE, TechAmerica Europe and JBCE strongly support the main underlying goals of the Commission's proposals, namely reducing the administrative burden for both authorities and the applicants, speeding up the process and further increasing its transparency and legal certainty.

Our member companies have been working with the existing exemptions mechanism for a number of years. Based on extensive experience with the process for handling exemptions under the existing Directive, we support exemptions to be reviewed and assessed periodically on a case-by-case basis. What has become critical for our global industry and its complex supply chain is to have better legal certainty, especially when an exemption is withdrawn, and a more timely and transparent decision-making process.

In particular, we welcome the proposed expansion of the current RoHS Article 5(1)(b) and c) criteria for determining whether the restricted substances should be permitted in any particular specific applications to allow for socio-economic aspects to be taken into account. As long advocated by industry and described in the Commission's Impact Assessment, preparatory studies and extensive Industry contributions during the consultation process, business/commercial realities of manufacturers and potential associated impacts on customers, consumers and the society as a whole are currently under-represented in the RoHS exemptions mechanism. They should become an integral part of and be considered by decision-makers during the assessment process, so as to avoid adverse socio-economic impacts which might outweigh the environmental, health or consumer safety benefits caused by substitution. Each of the three pillars of the EU's Impact Assessment model (environmental, economic and social) must become an inherent part of the RoHS exemptions review process. By looking into detail at all environmental, economic and social impacts, the current mechanism will better align with the goals of Better Regulation, and its underlying Lisbon and Sustainable Development strategies. We also support the Commission's proposal to harmonize the format for exemptions' requests;

However, some of the main ideas put forward in the Proposal give us cause for concern, and believe the current text can be improved in a number of ways with a view to achieving the stated goals. At present, it is very difficult to predict how the exemptions mechanism will operate in practice. If finally adopted, some provisions would exacerbate the legal uncertainty which the proposal seeks to alleviate. There is also excessive procedural detail regarding many important items to be decided at a later stage through the Comitology procedure.

The paragraphs below provide an overview of perceived shortcomings and proposed changes:

- We feel it is important that the potential impacts of substitution on competition should be adequately addressed. Patents for substitute technologies should be freely available in the marketplace at reasonable cost, so as to avoid discrimination when an exemption is withdrawn, and guarantee the swiftest possible environmental solution. In addition, safety critical applications of products used in applications outside the scope of RoHS must be considered as their safety is directly impacted by exemption decisions relating to the Directive;
- The Commission has proposed a significant change to the current mechanism by introducing a 4-year maximum validity period for exemptions. Although exemptions can be renewed, there are indications that the 4-year maximum validity limit will be the general rule. We are fully in favour of review periods to confirm the continued need of exemptions for specific applications. However, until scientific evidence proves feasible substitute technologies have been invented and designed to work in manufacturing environments, no final sunset timelines should be fixed. The 4-year maximum validity limit and specified blanket timeframes for applications for renewals also raise significant legal uncertainties, and ignore the reality of specific investment and product cycles, thus creating an uncertain environment for product manufacturers owing to the risk that an exemption may be withdrawn;
- In order to ensure greater legal security and predictability, we are proposing to define and introduce in the legal text a transparent procedure backed up by clear deadlines for applications for renewals and decisions to either renew or delete exemptions to be defined on a case-by-case basis. The assessment of exemptions and associated deadlines must be undertaken and defined on a case-by-case basis. All newly granted exemptions should at least be subject to a time-limited review process to be defined on a case-by-case basis taking into account all final conditions set out in Article 5(1)(b). The decision-making process should be carried out in a timely manner:
 - All legal instruments (Commission Decisions) dealing with RoHS exemptions should specify (and amend the Directive so as to introduce) transitional arrangements to be defined on a case-by-case basis taking into account all final conditions set out in Article 5(1)(b). We propose that during the lifetime of an exemption three sets of transitional arrangements are specified and, where relevant, gradually evolve/be updated by the different Decisions affecting (renewing) each exemption (all based on a case-by-case approach and the final Article 5(1)(b) criteria):

1. The review date(s): always defined (and included in the relevant Annexes to the Directive) the first time an exemption is granted, and, where relevant, subsequently amended/updated every time it is renewed following a time-limited review process;
 2. The latest application date(s): always defined (and included in the relevant Annexes to the Directive) the first time an exemption is granted and, where relevant, subsequently amended/updated every time it is renewed;
 3. The sunset date: defined and included in the relevant Annexes to the Directive once a final Decision is taken to delete an exemption.
- All Commission Decisions “including” exemptions (i.e. giving new exemptions or renewing already existing ones; Measures/Decisions adopted in accordance with the amended Article 5(1)(b)) should specify transitional arrangements (and amend the Directive so as to introduce) indicating:
 1. The date(s) at which they will reviewed - or deleted (if a request for renewal is not submitted within the specified timeframes) - (“the review date(s)”), which should be established taking into account all final conditions set out in Article 5(1)(b); and
 2. A date(s) before the review date(s) by which applications must be received if the applicant wishes to renew and continue to rely on the exemption(s) after the review date(s) (“the latest application date(s)").

The Commission should acknowledge receipt of each application for renewing exemptions, and the date of such application (which should correspond to the date of receipt of the application at the Commission) should be communicated by the Commission to the applicant. The above will give certainty to applicants and to authorities in planning the work necessary to process applications;

- The Commission’s proposal new Article 5(2) states that it “shall decide in due time” on any application for renewal that is submitted within the specified timeframes. Applying concepts expressed in general and ambiguous terms, such as “in due time,” rather than helping to remove the legal ambiguities tends to exacerbate them. Industry needs legal certainty that a decision on any application for renewal will be taken before an exemption reaches a potential expiry date, thus avoiding the situation/legal vacuum where an exemption reaches such date but a decision to either renew or delete the exemption has not been taken. All

newly granted and renewed exemptions should therefore always remain valid after the specified review date until a decision on the application for renewal is taken, provided an application was made to the Commission by the latest application date(s) at the very latest. If applications are received by the deadline given, the exemptions concerned should remain valid until a decision is taken even if this is after the review date. This should ensure that exemptions do not become invalid by default if the authorities have not taken a decision;

- Once it is established that all the final conditions set out in Article 5(1)(b) no longer apply for a particular exemption (of part of it), the Commission should adopt a Decision to (either totally or partially) “delete” it (Measures/Decisions adopted in accordance with the newly proposed Article 5(1)(c)). The Decision should specify the date at which the exemption will be finally deleted (“the sunset date(s)”). Once an exemption has been deleted a minimum transition period of 18 months should be introduced to allow for lead times for changing manufacturing cycles, product re-designs and necessary changes in the supply chain. Premature withdrawal of exemptions can have severe implications for Industry, customers, consumers and the society as a whole. The withdrawal of an exemption generally results in significant technical and structural changes for every company’s supply chain and manufacturing process. In particular cases, without allowing a reasonable transition time, industry would be forced to adopt abrupt and, possibly, drastic measures in order to ensure continued compliance. This situation may result in negative effects to society.

- In order to ensure all required legal adaptations to the newly proposed mechanism above/below, the Commission should adopt (in a timely manner) a Decision, through the comitology procedure, to update the current RoHS Annex (as amended by the forthcoming overall revision of existing exemptions) and include all applicable review, latest application and sunset dates of all existing exemptions.

3- PROPOSED AMENDMENTS

<p>Proposed Recast RoHS Directive (COM(2008) 809 final)</p>	<p>DIGITALEUROPE, TechAmerica Europe and JBCE Proposed Amendments</p>
<p>Recital 14 NEW</p> <p>Exemptions from the prohibition for certain specific materials or components should be limited in their scope, in order to achieve a gradual phase-out of hazardous substances in electrical and electronic equipment, given that the use of those substances in such applications should become avoidable.</p> <p>Article 5 Adaptation of the Annexes to scientific and technical progress</p> <p>1. The Commission shall, for the purposes of adapting the annexes to scientific and technical progress, adopt the following measures:</p> <p>(a) any necessary amendments to Annex II</p> <p>(b) Include materials and components of EEE in Annexes V and VI where either of the following conditions is fulfilled:</p> <ul style="list-style-type: none"> - their elimination or substitution via 	<p>Recital 14 NEW</p> <p>Exemptions from the prohibition for certain specific materials or components should be limited in their scope, and be subject to time-limited reviews whose periods and duration would be determined on a case-by-case basis, in order to achieve a gradual phase-out of hazardous substances in electrical and electronic equipment, given that the use of those substances in such applications should become avoidable.</p> <p>Article 5 Adaptation of the Annexes to scientific and technical progress</p> <p>1. The Commission shall, for the purposes of adapting the annexes to scientific and technical progress, adopt the following measures:</p> <p>(a) any necessary amendments to Annex II</p> <p>(b) Include materials and components of EEE in Annexes V and VI where one of the following conditions is fulfilled:</p> <ul style="list-style-type: none"> - their elimination or substitution via

<p>design changes or materials and components which do not require any of the materials or substances referred to in Article 4(1) is scientifically or technically impracticable;</p> <ul style="list-style-type: none"> - the availability and reliability of substitutes is not ensured, - the negative environmental health consumer safety or socio-economic impacts caused by substitution are likely to outweigh the environmental, health or consumer safety and/or socio-economic benefits thereof; <p>(c) delete materials and components of EEE from Annexes V and VI where the conditions set out in point (b) are no longer fulfilled.</p> <p>Those measures designed to amend non essential elements of this directive shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(2).</p> <p>2. Measures adopted in accordance with point b of paragraph 1 shall have a maximum validity period of four years and may be renewed. The Commission shall decide in due time on any application for renewal that is submitted no later than 18 months before an exemption expires.</p> <p>3. Before Annexes are amended, the Commission shall inter alia consult producers of electrical and electronic equipment, recyclers, treatment operators, environmental organisations and employee and consumer associations.</p>	<p>design changes or materials and components which do not require any of the materials or substances referred to in Article 4(1) is scientifically or technically impracticable;</p> <ul style="list-style-type: none"> - the availability and reliability of substitutes is not ensured, - the negative environmental health consumer safety or socio-economic impacts caused by substitution are likely to outweigh the environmental, health or consumer safety and/or socio-economic benefits hereof; <ul style="list-style-type: none"> - the substitution would have a negative impact on competition due to a limited availability of substitutes, intellectual property restrictions on substitutes, or otherwise as determined by the Commission. <p>(c) delete materials and components of EEE from Annexes V and VI where the conditions set out in point (b) are no longer fulfilled</p> <p>Those measures designed to amend non essential elements of this directive shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(2).</p> <p>2. Measures adopted in accordance with point b of paragraph 1 may be renewed on a case-by-case basis and shall be valid until the Commission decides to either renew or delete the exemption in the context of a time-limited review, provided</p>
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4. As long as materials or components are included in Annexes V and VI to this Directive, on the basis of Article 5(1)(b) of this Directive, those applications shall also be considered exempted from the authorisation requirements set out in Article 58(2) of the regulation (EC) No 1907/2006.

an application for renewal is submitted within the specified timeframes. Where relevant, measures adopted in accordance with point c of paragraph 1 shall maintain the effects of the deleted materials and components of EEE in Annexes V and VI for a strictly necessary adaptation period to be decided on a case-by case basis. A decision in accordance with point c of paragraph 1 will be required where a decision not to renew an exemption is made following an application for renewal.

(a) Whenever a decision is taken to include materials and components of EEE in Annexes V and VI it shall specify:

- the specific materials and components of EEE to be included in Annexes V and VI;
- if applicable, the amendment(s) to numberings in Annexes V and VI;
- transitional arrangements:
 - the date or dates at which the exemption(s) will either be renewed or deleted (hereinafter referred to as "the review date(s)"), which should be established taking into account all conditions set out in point b of paragraph 1;
 - a date(s) before the review date(s) by which applications for renewal must be received if the applicant wishes to renew and continue to rely on the exemption after the review date(s) (hereinafter referred to as "the latest application date(s)"); materials and components of EEE in Annexes V and VI shall remain exempted from the requirements set out in Article 4(1) after the review date(s) until a

decision on the application for renewal is taken, provided an application was made at least by the latest application date(s). Exemptions will be deleted from Annexes V and VI by the review date provided the latest application date has been reached and an application for renewal has not been made.

The Commission shall acknowledge receipt of each application for exemptions. The Commission shall assign a number to the application, which is to be used for all correspondence regarding the application until the review is deemed to be complete, and an application date, which shall be the date of receipt of the application at the Commission, and shall forthwith communicate that number and date to the applicant. Applications to include materials and components of EEE in Annexes V and VI shall contain the information defined in accordance with Article 6 following the regulatory procedure with scrutiny referred to in Article 18(2).

(b) Whenever a decision is taken to delete materials and components of EEE from Annexes V and VI it shall specify for each exemption:

- the materials and components of EEE to be deleted from the Annexes V and VI and/or, where measures have the effect of limiting the scope of an existing exemption(s), the required amendments to materials and components of EEE in Annexes V and VI;

– if applicable, the amendments to numberings in Annexes V and VI;

– transitional arrangements:

– the date(s) at which materials and components of EEE in Annexes V and VI will be deleted (the sunset date(s)) which, where relevant, shall guarantee a minimum transition period of 18 months for the appropriate qualification of substitutes with the requirements set out in Article 4(1) and the supply chains to orderly phase out the deleted materials and components of EEE; it shall be ensured that neither of the conditions set out in point b of paragraph 1 is still fulfilled.

3. Before Annexes are amended, the Commission shall inter alia consult producers of electrical and electronic equipment, recyclers, treatment operators, environmental organisations and employee and consumer associations.

4. As long as materials or components are included in Annexes V and VI to this Directive, on the basis of Article 5(1)(b) of this Directive, those applications shall also be considered exempted from the authorisation requirements set out in Article 58(2) of the regulation (EC) No 1907/2006.

Article 6

Implementing measures

The Commission shall adopt detailed rules for:

- applications for the exemption including a format and types of information to be provided when introducing those applications, including analysis of the alternatives and, if suitable alternatives are available, substitution plans as referred to in Regulation (EC) 1907/2006.
- Complying with the maximum concentration values of Article (4) (2)
- The implementation of Article 5(2), taking into account the need for legal certainty for economic operators pending a Commission Decision on renewal of exemptions.

Those measures designed to amend non essential elements of this directive shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(2)

Article 6

Implementing measures

The Commission shall adopt detailed rules for:

- applications for the exemption including a format and types of information to be provided when introducing those applications, including analysis of the alternatives and, if suitable alternatives are available, substitution plans as referred to in Regulation (EC) 1907/2006.
- Complying with the maximum concentration values of Article (4) (2)
- The implementation of Article 5(2), taking into account the need for legal certainty for economic operators **regarding review, latest application and sunset dates** of exemptions.

Those measures designed to amend non essential elements of this directive shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(2)

I. Indicative Structure for New RoHS Exemptions Annexes

No	Title	Review date	Latest application date	Sunset date
Exemption number	Description of Exemption	<p>Always defined (and included in the relevant Annexes) the first time an exemption is granted, and, where relevant, subsequently amended/updated every time it is renewed following a time-limited review process</p> <p>Measures/Decisions adopted in accordance with Article 5(1)(b)</p>	<p>Always defined (and included in the relevant Annexes) the first time an exemption is granted, and, where relevant, subsequently amended/updated every time it is renewed;</p> <p>Measures/Decisions adopted in accordance with Article 5(1)(b)</p>	<p>Defined and included in the relevant Annexes once a final Decision is taken to delete an exemption.</p> <p>The exemption will be deleted from the Annexes as of this date (where relevant, the date should guarantee sufficient transition time)</p> <p>Measures/Decisions adopted in accordance with Article 5(1)(c)</p>

DIGITALEUROPE, the organisation formerly known as EICTA, is the voice of the European digital technology industry, which includes large and small companies in the Information and Communications Technology and Consumer Electronics Industry sectors. It is composed of 61 major multinational companies and 40 national associations from 28 European countries. In all, DIGITALEUROPE represents more than 10,000 companies all over Europe with more than 2 million employees and over EUR 1,000 billion in revenues.

The Japan Business Council in Europe was established in 1999 as the representative organisation of Japanese companies operating in the European Union. Our membership consists of more than 60 leading multinational corporations that are active across a wide range of sectors, including electronics, automotive, and chemical manufacturing. The key goal of JBCE is to contribute to EU public policy in a positive and constructive way. In doing this, we can draw upon the expertise and experience of our member companies.

TechAmerica Europe (formerly AeA Europe) represents leading European high-tech operations with US parentage. Collectively we invest Euro 100 bn in Europe and employ approximately 500,000 Europeans. Our parent company, the TechAmerica (formerly AeA and ITAA), is the oldest and largest association in the US.