AMDEA Consultation Response Form

Regarding

Implementation of the Restriction of Hazardous Substances in Electrical and Electronic Equipment (RoHS) Directive 2011/65/EU

Closing date for consultation: 6 July 2012.

Any questions on this response should be directed to:

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Consultation Response Form

Please tick one box from the list below that best describes you

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☑	Publish response and respondent's details
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General: In this reply

- "RoHS-1" should be read as "Directive 2002/95/EC"
- "RoHS-2" should be read as "Directive 2011/65/EU"
- "RAMS" should be read as "Regulation No 765/2008"
- "R n" should be read as "regulation n" etc.
- "msa" should be read as "market surveillance authority"
- GPSR should be read as the "General Product Safety Regulations – Statutory Instrument 2005 No. 1803"

Q1	Do you agree with the interpretation of Article 2.2?

A1 The subject Article in RoHS-2 requires that "Member States shall provide that EEE that was outside the scope of Directive 2002/95/EC, but which would not comply with this Directive, may nevertheless continue to be made available on the market until 22 July 2019". The majority of domestic appliances already fall within the scope of RoHS-1 and so newly into scope as regards AMDEA members are:

i) Appliances that were previously exempted by the different interpretation of what constituted an item of EEE – specifically as regards the meaning of 'dependent'. Examples include gas appliances with an electrical function such as gas cookers and gas boilers having electrical ignition & time clocks.

ii) Appliances that were previously exempted by the interpretation (based on the wording of the old WEEE/RoHS FAQ document) that equipment fitted within a 'fixed installation' were exempted (e.g. electric showers) whereas now the exemption is for 'large-scale fixed installation'.

iii) Cables and spare parts, which are now explicitly mentioned in Article 4(1) if they are for repair, reuse, or updating/upgrading the functionality of the EEE.

AMDEA agrees with the generalized wording of the introduction but has some concerns regarding the draft implementing Regulations, as listed below:

Crucially

The wording of Part 1 R 6(1) is open to interpretation because items i) and ii) above were only 'out of scope' of RoHS-1 according to non-statutory guidance. Perhaps a Schedule could be used to better define what is meant? As a very second-best information could be provided in the BIS Guidance document.

Also

- Part 1 – 5(1) and 5(2) are not mutually exclusive. Part 1 of Schedule 1 includes "Other EEE not covered by the above* - so it covers ALL EEE and is hence in conflict with Part 2 of Schedule 2. This loop should be broken by starting "Except as described in R 5(2), R 5(3) or R 5(4), these Regulations apply…" It would also be better if the Regulation were to swap R 5(2) and R 5(3) so that the two 'do apply' clauses are together, as are the two 'do not apply' clauses.
- For clarity the reference in Part 1 6(1) should link the term "the previous

Regulations" to footnote 24. Agreed.

In Schedule 1 Part 2 R (4)(a) and R 5(a), for the avoidance of any doubt it may be clearer to add an 'and' at the end of the line.

Q2	Do you agree the Regulations contain only what is necessary to meet the requirements of the Directive?

A2 This question is also addressed in answers A4 & A5.

AMDEA is aware that the present government favour 'copy-out' wherever possible. In this regards we fail to see why a number of definitions defined in the Directive have been re-defined in these Regulations (such as replacing "making available on the market" with "made available on the market", some (such as "homogeneous material" have been moved to the body of the Regulations. Other terms, such as "market surveillance" have been omitted entirely – it is presumed that the definitions of "availability of a substitute" and "reliability of a substitute" have been omitted because they have application only in relation to the procedures of RoHS-2 and not the way it is applied under UK law. We would like to see all terms used in the Regulations that come from the Directive to be unchanged from the Directive and if it is an issue to fill the start of the Regulation with so definitions we suggest that the relevant EU definitions be included in a Schedule.

Notwithstanding the above, it may be helpful to SMEs to point out that In a number of instances the obligations of authorized representatives, importers and distributors are replaced or supplemented by those pertaining to manufacturers. This should not be done by changing the definition but instead perhaps some note referring to the relevant Regulations, e.g. R 22(4)(a), R 28 & R 32, could be added?

AMDEA notes that Article 16(2) of RoHS-2 is included as R.9 except that it is formulated differently (two bulleted points) and has a comma missing after the word 'assessed'. Thus, in the BIS formation it seems that the only place that harmonized standards have applicability is when assessing compliance 3 and not when carrying out test and measurements. While formulating the paragraph in bulleted points may help understanding it seems like a more faithful transposition would be:

"(b) which have been assessed for compliance with the requirements of regulation 3,

in accordance with harmonised standards, the references of which have been published in the Official Journal of the European Union are presumed to comply with the requirements of regulation 3.."

If exact transposition is considered to be non-essential then the words *"which have been assessed for compliance with"* could usefully be replaced with *"which have been found to be compliant with"*. Just because a product or process has been assessed for compliance does not mean it complied.

R.3 has the heading "Prohibition on the use of certain hazardous substances in EEE" and so we would expect a reference here to Part 3(2)(f), which provides the link to exemptions. A reference to Part 3 is contained in R.6 and yet the title of this regulation is "Exclusion until 22nd July 2019 for EEE outside the scope of Directive 2002/95/EC" – but we wish to emphasize that the exclusions should also be valid

for equipment inside the scope of Directive 2002/95/EC.

In relation to the above, AMDEA believes that it is important that the presumption of conformity when using harmonised standards applies equally to manufacturers and the msa. Ditto for methods that are used to determine concentrations of restricted materials, since these are called up in standards cross-referenced in the HS

R 8 does not seem to be a direct copy-out of Article 2(3) since the latter speaks of "the requirements of specific Union waste management legislation". Hence the UK Regs extends RoHS to cover not only "specific Union" legislation but to all Union waste legislation and UK waste legislation as well. It is suggested to comply copy out text from the Directive.

In a number of instances a Regulation starts with an unqualified 'You shall do x' but is then followed a few paras by a qualifying "You don't need to do x if…". Surely the first para should say "Unless as specified below you should do x". {It should be noted that the GPSR follows this approach, as do well written standards}. Specific examples are:

- R 5(1) - Surely this should start "Except as specified in 5(2) and 5(4)"
- R 9(1) - Surely this should start "Unless demonstrated otherwise…"
- {The above is not an exhaustive list.}

Q3	Requirements will come into place on the Directive implementation date (2 January 2013) as no transition period is provided for. How should the transition to conformity and marking requirements be managed?
A3	With particular regard to the environmental impact of non-compliance. The msa should provide targeted guidance on its web-site regarding the changes for a) those products already covered by RoHS-1 and b) those products newly coming into the scope of RoHS-2, including timescales. That guidance should first be distributed for comment. Naturally the msa will have finite resources for enforcement actions. The number of restricted materials and action values have not changed between RoHS-1 and RoHS-2 and so products within the scope of RoHS-1 should meet the technical requirements for RoHS-2, even if all the administrative requirements required by RoHS-2 have not been fulfilled. If the technical requirements under RoHS-1 have not been met then presumably the msa will already be pursuing the errant manufacturer. It is hoped that the UK msa will continue their pro-active but collaborative enforcement activities, particularly as regards manufacturers and importers of products that newly come into the scope of RoHS-2 on 2 Jan 2013.
Q4	Do you have any comments on the draft Regulations' interpretation of the obligations for the supply chain for CE marking or alternative proposals?
A4	Having alternative means of demonstrating compliance [e.g. in R 12(2)] is presumably intended to provide flexibility for manufacturers. However, we see a

number of problems with this approach:

- If a UK company uses a procedure different from Module A, will msa in other MSs accept this as meeting the obligations of RoHS-2, since the Directive doesn't give this possibility?
- It opens up the possibility for companies to use, and even require, third party certification where no such requirement exists in Module A.
- There is no requirement for these alternatives to be contained in 'CE marking' Directives and yet Regulation 13 states that they are suitable for CE marking under RoHS-2.
- While noting that the phrase "at least as stringent" is used in Article 7(C) of RoHS-2 we are concerned that reference to this as an alternative procedure could open up unnecessary discussions with the msa. Consequently we would welcome this being addressed in the BIS Guidance document (if not covered in the Commission FAQ).

Based upon the above we would prefer the options to be removed as they create uncertainty without providing manufacturers with any real benefits.

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Although AMDEA can see the logic behind Regulation 22(4) we did not find the corresponding text in Article 8 of RoHS-2 so we question if this represents 'gold plating'. We think that R 22(2)(b) should refer to R 21 in total, not just R 21(4). Furthermore, it seems that R 22(5) makes manufacturers liable even if their appointed authorised representatives fail to perform their contracted obligations correctly: this seems inequitable, beyond what the Directive requires and is likely to be un-enforceable if the manufacturer is resident outside the UK.

We do not believe that R 32(2) is correct as the obligations on distributors arise when '*making available on the market*' whereas the obligations on manufacturers apply when '*placing products on the market'*. Consequently R 32(2) should be deleted.

To improve clarity we suggest that R 34(1)(a) should refer to R 28 and R 32 since, in effect, R 34(1)(b) refers to R 22(4)(a).

Q5	Do you agree with the proposed enforcement regime's powers of entry and offences for non-compliance? Do you agree with the reversal of the burden of proof of establishing when it is "not possible" or "not warranted" to affix the CE mark at Regulation 37(5)?"
A5	Article 15(3) requires that penalties be proportionate to the risk and AMDEA view the best way of ensuring that the actions of an msa are proportionate, and seen to be so, is to include wording within the legal text, as is the case under the GPSR. Part 3 R 35 should contain the following (or similar) "An enforcement authority shall in enforcing these Regulations act in a manner proportionate to the seriousness of the risk. In this context, it shall encourage and promote voluntary action by economic operators. Notwithstanding the foregoing, an enforcement authority may take any action under these Regulations urgently and without first encouraging and promoting voluntary action if a product poses a serious risk." {Based on Part 3 –

R10(5) of SI 2005 No. 1803}. Note that the above is also in line with Article 18(4) of RAMS which states "Member States shall ensure that market surveillance authorities exercise their powers in accordance with the principle of proportionality".

Also from the GPSR, we recommend inclusion into the final RoHS Regulations a section on Co-operation between enforcement authorities {see GPSR R 38}. We envision this obligation would be fulfilled through participation in the RoHS ADCO.

While recognising that the Secretary of State will contract with the msa and the above two points could be part of that contract, this would not provide transparency nor a legal redress for economic operators should the msa not act correctly.

AMDEA believes that R 37 (and correspondingly R 39, R 41 etc.) should list the offences applicable to authorised representatives and/or R 37(1) should replace "… manufacturer…" with "… manufacturer or other economic operator taking on the responsibilities of a manufacturer…".

AMDEA does not see the need to reverse the burden of proof under R 37(5). Consider a situation where a company has been in dialogue with the msa regarding whether it is possible or warranted to affix the CE marking per R16(3) but no agreement is reached and so the only alternative is to resort to the Courts, why should the well-established principle of English law "innocent until proven guilty" be turned on its head? Surely it should be for the msa to demonstrate why, beyond reasonable doubt, their view is correct and the company's is incorrect?

AMDEA agrees with the defence of due diligence but suggests that the proposed text could be improved by replacing it with Regulation 29 of the GPSR, which have presumably stood the test of time. For instance, in the proposed RoHS Regulations R 43(1) starts "In proceedings for an offence…" whereas R 29(1) of the GPSR starts "Subject to the following provisions of this regulation, in proceedings against a person for an offence…". We would also like to point out in relation to the proposed R 43(4) that Article 16(2) of RoHS-2 provides for a presumption of conformity if materials, components and EEE comply with a Harmonised Standard and the Regulations should reflect this. [CENELEC have developed a standard, EN 50581, which addresses this matter under mandate M/499: this is expected to become a Harmonised Standard.]

AMDEA question whether R 44 is either correctly worded or is legally valid. It seems to suggest that a manufacturer of a component or part can be prosecuted even though the manufacturer (etc.) of the EEE containing those parts is not prosecuted. Also, some components (e.g. nuts, bolts) have application in both electrical and non-electrical products, how is the manufacturer of these parts expected to know their final usage, especially if supplied through a distributor. As written this regulation would seem to go beyond the scope of RoHS-2.

We question whether it is legally acceptable to serve documents by email or other electronic means, per R 45(1)(c), what does 'proper address' mean for 'electronic means' in R 45(4).

oOo

In relation to R 21(1)(a) the legislation should define a minimum time that can be set by the msa.

In relation to R 21(2) we have concerns that if the UK requires information to be in

English only that other countries may also require information only in their local language, meaning that manufacturers would need to translate all their technical documentation into 27 languages: this is not reasonable. This also goes beyond what is required by the Directive {Article 7(j)}, which is "the information and documentation necessary to demonstrate the conformity of the EEE … [shall be] in a language that can be easily understood by that authority". The requirement in law should not go beyond what is required in the Directive, which already give the UK msa the right to refuse to accept information in a language that they cannot readily understand.

Article 9(h) has the same requirements re translation for importers as it does for manufacturers in Article 7(j) whereas R 26(2)(b) is only applied when the importer has "reason to believe that any provision of these Regulations has not been complied with". AMDEA sees no basis in the NLF for imposing more stringent requirements on manufacturers as compared to importers and therefore suggests that the Regulations employ simple copy-out, in line with government policy.

AMDEA believes that the wording of R35(2) needs to be modified to improve clarity. Naturally the msa may need to sub-contract testing to a laboratory in order to fulfil its duties and AMDEA is certainly of the opinion that such an organisation would need to be certified to perform those tests by a national accreditation body under RAMS. But this is very different to the msa authorising 'any person' to exercise 'any of the powers … conferred on it by these Regulations" - for instance, the msa should not be able to delegate its powers to enter a premise to, e.g. Intertek.

Q6	Do you agree with the assumptions made in the Impact Assessment?

A6 Although the number of substances and the restriction levels are the same between RoHS-1 and RoHS-2 the requirement to prepare and maintain technical documentation and the associated declaration of conformity add costs that do not seem to be taken into account in the "Description and scale of key monetised costs" section. Of course most domestic appliances already have to carry the CE marking by virtue of one or more of the LVD, EMC or Ecodesign Directives, but these do not require compliance to be checked and monitored for every constituent component and component. Naturally this takes time and resource ≡ cost. Also seemingly not included are item i) through iii) described in A1. Not being financial experts, AMDEA is not able to provide a monetary value on these aspects.

Under "Other key non-monetised benefits by 'main affected groups" we do not understand the so-called benefits of 'harmonisation across the EU of enforcement and interpretation of requirements, compliance by CE marking and use of harmonised standards, costs avoided due to spare parts containing RoHS substances. Health benefit from reduction in use of hexavalent chromium, and two flame retardants. Significant environmental benefits from reduction in WEEE that includes 6 hazardous substances.' Since most of these 'benefits' are no different to those under RoHS-1.

Similar to the above, a number of the claimed benefits in the section "Evidence Base (for summary sheets)" seem to be unchanged between RoHS-1 and RoHS-2, leading to the conclusion that the supposed cost and benefits represent double-accounting.

Q7	Do you agree with the costs and benefits in the Impact Assessment? If not, please provide evidence of different figures.
A7	See A.6
Q8	Are there any examples of products you think may be ambiguous in meeting the exemptions?
A8	It is hoped that the Commission's FAQ document will provide the required clarification, but until it is published we cannot answer for certain either way.
Q9	Some products which were included in the original scope will now fall out of scope. Can you provide examples of products you believe might be affected?
A9	None known to AMDEA
Q10	Are there significant new products coming into category 11 you think we may not have captured in the impact assessment? This can be new items not in the other categories, or items falling in the scope of EEE from the new definitions.
A10	See A1.
Q11	Does the guidance provide sufficient information on the intention and application of the Directive and its proposed implementation?
A11	The NLF describes the various economic operators as though they were each a separate commercial enterprise, i.e. manufacturers made EEE but they did not distribute them or make them available to end consumers. In practice a company can manufacture its own products, it can import products made by others from outside the EU and it can distribute them down to end-consumer level. Therefore the guide should make it clear that a company can be subject to the requirements of a manufacturer, an authorised representative, an importer, and a distributor as these are, in effect, all discrete functions.
Q12	Are there specific additions or questions you have which might need to be added to the guidance?
A12	It is understood that the intent of the UK Guidance document is supplement rather than replicate the EU guidance. This should be explicitly stated as the beginning of the UK Guidance document together with a statement that if the two guidance documents differ in any way, the EU guidance takes precedence. It is also understood that the msa may also publish its guidance. It should be explicitly stated as the beginning of the UK Guidance document that if the BIS guidance document and the msa guidance differs in any way, the BIS guidance takes precedence. In this way we would have a hierarchy that was clear to all. It would make the guidance more readable if it contained a URL link to the EU

Guidance (when published). To aid readability a cross-reference to the topics included in the EU guidance would be useful; e.g. "Consumables – see Commission FAQ". It would also make the guidance more readable if the various sections were numbered and included in a table of contents.

The section "Enforcement" identifies the NMO as being the UK msa (except for Scotland). We understand this in relation to manufacturers, importers and authorised representatives but is it also the case for all obligations falling on distributors? Additionally, this section should make reference to, and include a link to, the compliance code that each UK msa must follow, in accordance with this government's policies.

Under "Offences and penalties" it should be clearly stated that these offences come under criminal law and so are enforced via the Courts, there are no civil penalties. {This is important as it is not the case with, for example, the Ecodesign and Energy Labelling Regulations, also enforced by the NMO.}

The consultation discussed the problem of when it is "not warranted" to affix the CE marking and proposes to shift the burden of proof to economic operators. While recognizing that legal precedent will ultimately determine what is meant by this phrase we suggest in the meantime that BIS provide guidance. We think that it is unreasonable for those who drafted the Directive to say, in effect, "we don't know what this term means and so we're passing the buck to industry by requiring them to prove their understanding through a Court of Law".

There is now a requirement for various economic operators to "keep a register" of non-conforming products. It would be useful to provide guidance on the sort of information to be kept in such a register. It is presumed that this 'register' is private and confidential to the economic operator concerned, except as regards the need to "keep distributors informed of these matters" – whatever that means. The confidentiality aspect should also be covered.

Regulation 40 provides for "Remediation orders" – the purpose, extent, etc. of these should be explained in the Guidance.

Q13	If you do not agree with the answers provided in the draft guidance, do you have evidence to suggest where a different approach might be justified?
A13	No comment.
Q14	Are there any other comments that might help make the guidance clearer?
A14	See A12.

Comments on the consultation document

Until 1 July 2016, Reuse of spare parts (recovered from EEE placed on the market before 1 July 2016) in auditable closed loop systems **are** exempt. The word "are" seems to be missing from the consultation document??