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**MEMORANDUM**

**From :** Jean-Philippe Montfort, Cyril Jacquet

**Date :** 4 July 2005

<p><b>Re:</b> QUESTION &amp; ANSWER ON THE "PUTTING ON THE MARKET" OF PRODUCTS COMPLYING WITH THE EU RoHS DIRECTIVE</p>
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**Purpose**

The purpose of this document is to provide regulatory guidance to industry as to the concrete application of Directive 95/2002/EC on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS).

More specifically, the RoHS Directive (Article 4.1) stipulates that "Member States shall ensure that, from 1 July 2006, new electrical and electronic equipment put on the market does not contain lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBB) or polybrominated diphenyl ethers (PBDE). National measures restricting or prohibiting the use of these substances in electrical and electronic equipment which were adopted in line with Community legislation before the adoption of this Directive may be maintained until 1 July 2006 (emphasis added)."

**Interpretation Guidelines**

The term "put on the market" is not defined in either the RoHS Directive nor in its "twin" Directive 2002/96/EC on the waste electrical and electronic equipment (WEEE).

A similar term, "placing on the market" is however used in many pieces of EU legislation, including for example, the Dangerous Substances Directive 67/548/EEC, as amended, whereby "placing on the market" is defined as "making available to third parties. Importation into the Community customs territory shall be deemed to be placing on the market for purposes of this Directive" (Article 2.1.e).

Also, this same term has been defined in the European Commission's "Guide to the implementation of directives based on the New Approach and the Global Approach" (also commonly referred to as the "Blue Book"). This Guide specifically applies to "new approach" and "global approach" Directives, which is not the case of the RoHS Directive.

However, the Commission often makes reference to this Guide in other fields than “new approach” and “global approach” directives, including in its “Question and Answers on the RoHS and WEEE Directives”. It is therefore reasonable to refer to this document, in the context of the RoHS Directive, although it is not binding and although the interpretation of EU law is a matter for national courts to decide (and not the Commission) under the control of the European Court of Justice.

The Commission Guide stipulates that “placing on the market” is the initial action of making a product available for the first time on the Community (EU) market, with a view to distribution or use in the EU. Making available can be either for payment or free of charge. It also specifies that a product is considered being made available for the first time on the EU market when it is transferred from the stage of manufacture with the intention of distribution or use on the EU market. Transfer is considered to take place either at the time of the physical hand-over of the good or of the transfer of ownership.

The Guide further provides that the placing on the market does not take place “where a product is transferred to a manufacturer for further measure (for example assembling, packaging, processing and labeling)”, which can be interpreted to mean that there is no placing on the market where a product (parts) is shipped to be assembled, etc. before being made available for sale.

Placing on the market would only happen when a finished product is finally and fully ready to be made available for the time. Although the definition of EEE in the RoHS Directive does not expressly exclude parts of equipment, it only refers to « equipment » which, in line with the Commission Guide, and as reflected in national interpretative guidelines, is generally interpreted to mean « finished equipment ».

Finally, the Guide specifies that the concept of placing on the market refers to each individual product, not to a type of product, nor whether it was manufactured as an individual unit or in a series.

### **Questions and Answers**

This section reproduces a series of specific situations identified by industry and our interpretation of the terms “putting on the market” in the context of these specific, concrete situations. Each situation is designed at addressing a particular issue and our answer to each question should not be considered as a stand alone legal opinion, but as providing regulatory guidance in addressing the specific issue at stake in that question, using our best judgment to provide what we consider is a reasonable interpretation of the law.

- 1. Company manufactures a product in a EU country, e.g. France, and exports it for sale to Germany on July 2, 2006. When is the product put on the EU market?**

The product is deemed to be put on the market either at the time of the physical hand-over or the transfer of ownership to the next customer in the view of its distribution. If the transfer of ownership or the physical hand-over take place on July 2, 2006, the product is deemed to be placed on the market on that date and must be RoHS compliant. When a product is in stock with the manufacturer or its authorized representative and not yet supplied for distribution or

use, it is not considered to be placed on the market at that time, unless the transfer of ownership of the product to the distributor or user has already taken place.

**2. Company manufactures product X in the US and imports it into a EU country prior to July 1, 2006, e.g. on May 1, 2006. When is the product put on the EU market?**

The Product is considered put on the market on May 1, 2006. Products originating from non-EU countries are considered to be placed on the Community market when they pass EU customs, i.e. when they are released by EU customs authorities, following the completion of customs formalities in respect of the importation and the payment of any duties legally due. The person responsible for the placement of the product on the EU market is the person holding the title of the products at the time of the release by the customs authorities.

Therefore, if the product is imported into the EU on May 1, 2006 with the intention of distribution or use, it does not need to be RoHS compliant at that time nor when subsequently transferred to other Member States after that date.

**3. Company transfers product X from the US to a EU MS, e.g. France, on May 1, 2006 for further assembly. Company then exports the product to another MS on August 1, 2006. When is the product put on the EU market?**

The product is considered put on the EU market on August 1, 2006. While importation is placing on the market, a product is not considered to have been placed on the market when it is transferred to a manufacturer for further assembly, processing, packaging or labelling, (nor when it is held by customs, when is to be exported to a third country, or if it is to be displayed at trade fairs, exhibitions or demonstrations). Consequently, if product X is imported into the EU but still requires final assembly, packaging or labeling, it is not deemed to be "put on the market" at importation but only when it will then be made available to a third party for distribution or use, i.e. in this case on August 1, 2006.

**4. Company X sells a component part to Company Y on 15 June 2006. Company Y incorporates the part into its equipment, which it then sells to its customer on 1 September 2006. When is the equipment placed on the market?**

An electronic equipment is placed on the market on 1 September 2006, i.e. when the equipment itself is made available for distribution or use. Parts of electronic and electrical equipment are not considered electronic and electrical equipment for purposes of the RoHS Directive. When a product (parts) is transferred to another operator for further assembly, processing, packaging or labeling it is not yet placed on the market. It is the responsibility of Company Y to ensure that the finished equipment put on the EU market complies with the applicable EU regulations.

- 5. Company manufactures product X outside the EU. The invoice between Company and its company-owned distributor and/or an independent distributor states that title passes to the buyer when the product reaches international waters. Who places the product on the market and is it placed on the market when it reaches international waters or when it clears customs in the EU country?**

Products originating from non-EU countries are considered to be placed on the Community market only when they are released by EU customs authorities, following the completion of customs formalities in respect of the importation and the payment of any duties legally due. The person responsible of the placement on the market is the person holding the title of the products at the time of the release by the customs authorities.

As a consequence, electrical and electronic equipments imported from non-EU Countries are not considered placed on the EU market when they reach international waters or enter EU waters. They are placed on the EU market when they pass customs in the EU country of importation.

It is only if the electrical and electronic equipment passes EU customs before 1 July 2006 in view of its distribution in the EU, that this product does not need to be RoHS compliant at that time, nor when further transferred into other Member States after that date.

- 6. Company imports product X from outside the EU solely for demonstration purposes. Does import of the product for this reason only constitute placing on the market?**

No. According to the Guide, a product is not considered to have been placed on the market when it is to be displayed at trade fairs, exhibitions or demonstrations.

- 7. Company manufactures product X outside the EU. The EU-based end customer is responsible for importing the product through customs. Who places the product on the market?**

The person responsible for the placement on the market is the person/company who holds the ownership of the goods when they pass customs. The EU-based end customer who imports the product therefore is the entity placing the product on the EU market.

- 8. If Company applies stainless steel cladding in its warehouse in an EU Member State, will the modified products:**
- a) Be considered placed on the market once they have been transferred to the next customer in the supply chain?**
  - b) Be considered placed on the market once they have been transferred to another physical location?**
  - c) Be considered placed on the market as soon as the stainless steel cladding has been fitted?**

The answer is a)

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The electrical and electronic equipment on which stainless steel cladding has been applied will be considered put on the market only when it is transferred to the next customer in the supply chain with a view to distribution or use. Application of stainless steel cladding or transfer to another location, alone, would not constitute putting on the market because the products at that time are not “made available” for distribution and because we understand that in these hypotheses, there is not yet a physical hand-over or transfer of ownership for purposes of distribution or sale.

9. **In the case of an independent distributor, warranty cards and local language instruction manuals are added locally (they are not shipped from the factory with all 25 EU local language instructions). In these cases are the products placed on the market when**
- a) **The warranty card and instruction manual are added to the product in an EU Member State?**
  - b) **The EU-based distributor sells the product to the next customer in the supply chain?**
  - c) **The EU-based distributor transfers the product to another physical location making it available for sale?**

The answer is c)

The electronic or electrical equipments are intended to be placed on the market for distribution only after the addition of relevant instruction manuals and other documents in the EU Member State. The operation of adding distribution warranty cards and local language instruction manuals occur prior to the putting on the market of the finished product. The placing on the market will therefore take place when the national distributor will hand-over or transfer the ownership of the goods to the next customer in the supply chain or to another physical location in a view of their distribution or use. It is sufficient that the product be “made available” for distribution. There is no need for an actual sale.

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Kind regards.