

EUROPEAN PARLIAMENT

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Ms Margot Wallström
Member of the European Commission
Rue de la Loi 200
B-1047 Brussels

Re: Interpretation of RoHS directive in a letter by Grant Lawrence

Strasbourg, 10 March 2004

Dear Commissioner Wallström,

We write to you with regard to a letter from Grant Lawrence to Lawrie McLaren from the Bromine Science and Environmental Forum dated 25 February concerning Directive 2002/95/EC of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS) with regard to Deca-BDE.

We are most surprised to see that the "Commission services are of the opinion that Deca-BDE is currently covered by the exemptions" of the RoHS directive. To our mind, this interpretation is contrary to the provisions of the directive - for a detailed argumentation, please refer to the Annex.

It is also contrary to the legislative intent of the European Parliament. In this context, it is useful to point to a parallel legislative file, which also dealt with PBDE (COM(2001)12 on Penta-BDE). The justification of the plenary amendment in second reading - after the adoption of the Common Position on RoHS - to extend the horizontal phase-out to Deca-BDE illustrates the understanding of the EP of the RoHS Directive:

"In the directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment, the European Parliament voted for a phase out of all PBDEs with respect to this specific application by January 2006. As regards decaBDE, it should nevertheless be possible to lift this ban depending on the results of the risk currently in progress."

A very large majority in the EP voted to extend the horizontal phase-out to cover Deca-BDE. It can be safely predicted that there would not have been the necessary majority in the EP for this had there not been the phase-out of Deca-BDE in RoHS.

You also seem to have understood the PBDE ban in the RoHS directive to cover all PBDE, as stated in the context of the plenary debate of 9 April 2002 on Penta-BDE:

"I also hope that MEPs are aware of the fact that the Commission has proposed a ban on these three substances – penta-, okta- and dekadiphenyls – in our proposal for a directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment."

In light of these arguments, we urge you to have the letter of Grant Lawrence withdrawn as an error and to clarify explicitly that Deca-BDE is covered by the ban in RoHS.

Yours sincerely,

Karl-Heinz Florenz
MEP

Bernd Lange
MEP

Chris Davies
MEP

Jonas Sjöstedt
MEP

Alexander de Roo
MEP

Johannes Blokland
MEP

Annex

The Legal provisions of Directive 2002/95/EC on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS)

In line with the legislative intent as it appears in the recitals (1, 2, 5, 6 and 11), Article 4(1) of RoHS phases out the use of all polybrominated diphenyl ethers (PBDE). Article 4(2) refers to the Annex with a list of exemptions from Article 4(1). The Title of the Annex says "Applications of lead, mercury, cadmium and hexavalent chromium, which are exempted from the requirements of Article 4(1)" - there is no reference to PBDE in the title.

Deca-BDE is referred to in point 10 of the Annex¹. The wording and structure of point 10 is very different from the wording and structure of points 1 to 9. Points 1 to 9 list specific substances in specific applications, which are thus clearly exempt from the prohibition of Article 4(1). Point 10 concerns the evaluation of certain applications to see whether these items are to be amended. This cannot be considered to be an exemption similar to those given in points 1 to 9, but rather a reference to an implementation power to be conferred upon the Commission to evaluate the applications concerned with a view, if appropriate, to either including (Deca-BDE, light bulbs) or excluding (mercury in straight fluorescent lamps for special purposes, lead in solder for ...) certain applications within the scope of the exemptions.

Article 5 concerns the adaptation to scientific and technical progress. Article 5(2) lists very specific conditions under which "materials and components of electrical and electronic equipment " may be exempted from Article 4(1). The entry of Deca-BDE in the Annex, Point 10, first indent, is not linked to any material or component.

According to the Bromine Science and Environment Forum (BSEF), Deca-BDE accounts to 91% of the total volume of PBDE used in Europe in 2001². Octa-BDE accounts for 7% and Penta-BDE for 2%. In the context of electrical and electronic equipment, only Octa- and Deca-BDE are relevant, as Penta-BDE is almost exclusively used in the manufacture of flexible polyurethane foam for furniture and upholstery³. Octa-BDE is almost exclusively used in polymer applications⁴. About 70% of Deca-BDE are used in plastics mainly for electrical and electronic equipment⁵. In other words, Deca-BDE accounts for around 90% of the PBDE to be phased out by RoHS. If the Annex were interpreted in such a way that 90% of the substances to be covered would be exempted, Article 4(1) would be deprived of its *effet utile*, all the more that exemptions are only justified under very specific conditions.

In summary, the legislator clearly did not intend to exempt Deca-BDE from the phase out of Article 4(1). The legislative intent is clear from the recitals (1, 2, 5, 6 and 11), the need for an *effet utile* to Article 4 paragraphs 1 and 2, the requirements of Article 5, the title of the Annex, and the structure and wording of point 10 of the Annex.

Deca-BDE was added to the Annex merely as part of a requirement to the Commission to look at its applications again in light of the final conclusions of the risk assessment. The risk assessment is still ongoing to date.

¹ The lawyer-linguists must have introduced this enumeration after conciliation, as the Council inserted what is now point 10 as a separate and unnumbered paragraph at the end in the Common Position. As the EP did not adopt an amendment to the Annex in second reading, the Annex should read as it was in the Common position, with the last part as a separate paragraph, and not listed as point 10.

² http://www.bsef.com/newsite/bsef_frameset.html

³ Explanatory Memorandum of Commission proposal COM (2001)12 on Penta-BDE

⁴ European Union Risk Assessment Report on Octa-BDE, Volume 16, 2003

⁵ Draft European Union Risk Assessment Report on Deca-BDE, 2003