

EU Environmental Law Bulletin

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Electronic Waste - Prohibition of DecaBDE

**Judgment of the European Court of Justice in Joined Cases C-14/06 and C-295/06
- April 1, 2008**

The ECJ handed down an important judgment clarifying the interpretation of the RoHS Directive with regard to DecaBDE, and annulling Commission Decision 2005/717 that had established a permanent exemption for DecaBDE from the hazardous substance restrictions of the RoHS Directive.

Summary of the Case

The judgment concerned an action for annulment of Commission Decision 2005/717 (the 'Decision'). The contested Decision provided for an exemption of decabromodiphenyl ether ('DecaBDE') from the general marketing prohibition for certain undesirable substances imposed by Article 4 (1) of Directive 2002/95 (the 'RoHS Directive'). It had been adopted on the basis of Article 5 (1) (b) RoHS Directive according to which such exemption was to be granted only where:

- the elimination or substitution via design changes or materials and components which do not require any of the prohibited material or substances is technically or scientifically impracticable, OR
- the negative environmental, health and/or consumer safety impact caused by substitution is likely to outweigh the environmental, health and/or consumer safety benefits thereof.

The ECJ action was brought by the European Parliament (the 'EP') and by the Kingdom of Denmark who claimed that in adopting the Decision, the Commission had not complied with the conditions listed in Article 5 (1) (b) and thus exceeded its powers, that it failed to state reasons specifying the fulfillment of the conditions, and that it had breached the precautionary principle. Moreover, the EP alleged breach of the principle of proportionality, as the decision exempted all polymeric applications of DecaBDE.

The ECJ began its analysis by examining the provision of Article 5 of the RoHS Directive. According to the ECJ, the title of Article 5, and the introductory words of Article 5 (1), suggest that the Annex to the RoHS Directive (listing the exemptions from the Article 4 marketing ban for hazardous substances) could be amended only where:

- it was necessary to adapt the list contained therein to scientific and technical progress, AND
- provided that the requirements set out in Article 5 (1) (b) were met.

Bearing in mind that the contested Decision was based on the findings of a 2002 report, which were not changed by its successive updates in 2004 and 2005, and that the RoHS Directive itself was adopted on January 27, 2003, the ECJ concluded that the condition concerning the need to adapt the Annex to scientific and technical progress was not met. The ECJ rejected the reasoning put forward by the European Commission (the 'Commission'), who had maintained that it was under no obligation to show that the action it had taken with regard to DecaBDE constituted an adaptation to technical and scientific progress. The Commission had based its argument on the wording of point 10 to the Annex of the RoHS Directive, according to which the application for DecaBDE was to be evaluated as a matter of priority in order to establish as soon as possible whether it was to be amended accordingly. Referring to the established rules of interpretation, the ECJ concluded that nothing in the RoHS Directive supported the view that with regard to substances listed in point 10 to the Annex, the Commission was relieved from the obligation to comply with the conditions of Article 5 (1). According to the ECJ, the sole effect of the provision of point 10 was to create a priority in time, rather than empowering the Commission or creating an evaluation procedure separate from that already provided for in the RoHS Directive.

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The ECJ also rejected the arguments raised by the Commission with regard to compliance with the provisions of Article 5 (1) (b). According to the ECJ, in order for the second requirement of Article 5 (1) (b) to be met, it was necessary to examine the possibility of substituting DecaBDE and the possible negative effects of such substitution. The reference to the risk assessment of DecaBDE under Regulation 793/93 which concluded (first in 2002 and then updated in 2004 and 2005 as confirmed by one of the Commission's scientific committees) that there was no need for further measures to reduce the risks for consumers beyond those which were being applied already, was found insufficient.

Finally, considering that Article 5 of the RoHS Directive specifies the conditions for exemption from the principle of prohibition laid down in Article 4 (1), the ECJ confirmed that it had to be interpreted strictly. Given that DecaBDE is principally used in polymers, the ECJ concluded that the exemption of the substance "in polymeric applications" was equivalent to a general exemption of the substance per se, thus contrary to the objectives of the RoHS Directive (which had prohibited it from being used) and the provisions of the EC Treaty on the high level of the protection of health and environment needed.

In view of the above findings, the ECJ concluded that in adopting the contested Decision as regards the exemption of DecaBDE, the Commission had infringed Article 5 (1) of the RoHS Directive. The effects of the annulled provision were however maintained for a period of adaptation until June 30, 2008 on the grounds of legal certainty.

Commentary

The judgment is remarkable in several aspects:

First, it confirms that the Commission and the business community for the last six years misinterpreted the RoHS Directive by assuming that the reference in the Annex to the RoHS Directive to a review by the Commission of the DecaBDE applications constituted a continued permission of the use of this substance despite the wording of Article 4 of the RoHS Directive explicitly prohibiting the use of DecaBDE. Admittedly the wording in the Annex was odd - but leaving all stakeholders in vain for six years on this matter seems quite astonishing all the more as now all involved are just given three months by the ECJ to remedy the situation.

Second, the ECJ disregarded the results of the general risk assessment pursuant to Regulation 793/93 on DecaBDE - such risk assessments usually forming the basis for risk management measures, i.e. regulation restricting the use of dangerous substances - by arguing that the RoHS Directive was taking as a basis a high level of environmental protection and that the 793/93 risk assessment report had not examined the question of substitutability of DecaBDE as was required by Article 5 of the RoHS Directive. The ECJ also in the beginning of its judgment alluded to the Preamble of the RoHS Directive that states in Recital 6 that the *"most effective way of ensuring the significant reduction of risks to health and the environment relating to those substances which can achieve the chosen level of protection in the Community is the substitution of those substances in electrical and electronic equipment by safe or safer materials. Restricting the use of these hazardous substances is likely to enhance the possibilities and economic profitability of recycling of WEEE and decrease the negative health impact on workers in recycling plants."*

Third, the line of argument taken by the ECJ may therefore reduce the importance of 793/93 risk assessments (or future REACH risk assessments) for purposes of development of future regulation. The judgment seems to open the door to introduce legislation (based on the precautionary principle?; or Article 152 and Article 174 (2) EC Treaty 'high level of protection') that goes beyond the conclusions and recommendations of 793/93 risk assessment reports.

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