25 February 2014

Comments on the Commission discussion paper on the interface between REACH and RoHS

The American Chamber of Commerce to the European Union (AmCham EU) has strongly encouraged the EU to ensure that there is consistency between EU environmental laws. Important to this is the use of a coherent approach, based on scientific evidence and taking into consideration socio-economic impact, when evaluating substances and choosing the most adequate risk management regulatory tool to avoid duplication of efforts and regulatory overlap.

AmCham EU welcomes the initiative of the European Commission to propose an analysis of the interface between REACH and RoHS and solutions in the cases of potential overlap.

We believe that the following recommendations should be taken into account when addressing the issue of co-existence of the two pieces of legislation:

- Proper Risk Management Options (RMO) analysis will be key for avoiding potential overlaps and double regulation;
- The first step should be to identify the key environmental and health concerns related to a substance if this substance is used in electronics and electronic equipment (EEE);
- The second step should be to identify which regulatory tool will be best and most efficient to address these concerns. This assessment should be made in the specific regulatory context, depending very much on what measures have been already introduced or are under development;
- If analysis shows that key environmental and health concerns are related to the use of the substance in EEE, RoHS should be considered as a possible appropriate regulatory tool to address these concerns. The RoHS Directive addresses both environmental and health issues and its model, regarding scope, exclusions and exemptions, as well as addressing industry specific needs for the continued use of a substance. This is particularly important for EEE, where new technologies and applications are constantly developed; and
- In cases where the review of a substance has started under REACH or RoHS and that substance has been already regulated under the other legislation, it is critical to use the knowledge already generated and draw the conclusions from the regulatory decisions made. For example, information generated under REACH on substances, their classification, uses, exposure and best risk management options, should be fully taken into consideration in the context of RoHS. To maximise the necessary synergies with REACH, we recommend that all relevant opinions from the Risk Analysis Committee (RAC) and Socio-Economic Analysis

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Committee (SEAC), as well as the regulatory decision of the European Commission, are taken into account. At the same time, RoHS should be recognised as a possible legal basis for exemption from REACH authorisation obligations.

Furthermore, we are pleased to provide the following specific comments related to the different case scenarios covered by the Commission paper:

Restrictions

Restriction proposed under REACH for a substance already in RoHS

We welcome the Commission's proposal to exclude EEE within the scope of RoHS from the scope of a proposed REACH restriction also covering EEE. The co-existence of different legal instruments restricting the same substance creates a complex regulatory environment with different obligations for substances used in the production process and/or incorporated in articles. We therefore strongly advocate for the unambiguous wording of REACH restriction proposals, be it in the scope definition or via specific derogations for articles in scope of sector-specific legislation restrictions.

This solution has been already applied in practice in 2013 in the context of the Swedish Annex XV Restriction Report, recommending a restriction on the placing on the market, or use, of lead and its compounds in articles (or individual parts of articles), which are supplied to the general public and can be placed in the mouth by children, if the concentration of lead (expressed as metal) in the article or part of article is equal or greater than 0.05% by weight.

We were pleased to see that there is a recommendation for derogation for uses covered by specific legislation such as EEE within the scope of RoHS, batteries within the scope of Directive 2006/66/EC, toys within the scope of Directive 2009/48/EC, packaging within the scope of Directive 94/62/EC, vehicles within the scope of Directive 2000/53/EC.

While we agree with the proposed solution, we do not necessarily share the view that RoHS substance methodology should be 'adapted to take into account of risk to human health and to the environment during the manufacturing process and the use phase'. It is questionable whether RoHS can be interpreted to also cover the manufacturing phase of EEE when the RoHS Directive focuses on the concept of placing on the market of EEE and article 6 of the Directive emphasises the waste phase of EEE.

The article 6(1) requirement that the review and amendment of RoHS-restricted substances should be coherent with REACH does not mean that RoHS should cover the same phases of EEE as REACH. Instead, it should be interpreted as requiring that any restrictions under RoHS be based on the same scientific evidence and procedural rights (methodology) as under REACH.

As rightly pointed out in the last paragraph of section 1, the potential exposure for workers and the environment during the waste management and recycling is

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probably comparable or higher that during the manufacturing of new EEE. Therefore the assessment made under RoHS in view of granting restriction is sufficient to address concerns related to human health and environment and therefore should be bases for exclusion from REACH restriction scope.

Restrictions in place under REACH when a new substance is proposed for inclusion under RoHS

We agree with the proposed approach of excluding substances from the identification process for RoHS that are listed already in REACH Annex XVII and the restriction covers EEE.

We understand that, in theory, further actions for introducing more stringent measures under RoHS could be envisaged, such as introducing stricter concentration levels. However, we strongly recommend that if stricter measures are to be proposed these are made in the context of the same legislation, e.g. REACH. This will ensure clarity of legal obligations, will help avoiding double regulation, and very importantly – will not compromise the effort and investment made in compliance with REACH.

Annex XV proposal for a restriction under REACH for a substance used in EEE but not yet in RoHS

We broadly agree with the proposed solutions. However we would like to strongly emphasise that the best approach is not to apply multiple pieces of legislation even in a coherent way, but to carefully study the concerns related to the use of a substance in EEE, identify what the source of the issue is and choose the single most effective regulatory tool to address these concerns. Any other solution involving the use of REACH and RoHS will unavoidably create a risk for overregulating, administrative burden and legal uncertainty.

Authorisation

Substances already in Annex II to RoHS is proposed for inclusion in Annex XIV to REACH

This potential problem has been acknowledged in the REACH review report where 'the Commission services recognise that there is risk of potential overlap once the substance is included in the REACH authorisation list (Annex XIV) and the exemptions for specific uses from the restrictions in different pieces of EU legislation, such as the RoHS Directive, the End of Life Vehicles Directive and the Packaging Directive'.

This scenario is not theoretical as one of the substances – cadmium – restricted under RoHS and for which exemptions have been granted, has been listed in the REACH candidate list in 2013 and will eventually be included in the REACH Annex XIV.

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We strongly recommend applications for which exemptions are granted or which are excluded under RoHS are exempt from the REACH authorisation obligations on the basis of article 58 (2).

Inclusion in REACH Annex XIV will create additional burden and legal uncertainly especially for companies whose production process are based in Europe.

The alternative scenario envisages that a REACH restriction procedure could be used to prepare an amendment to RoHS outside the periodic review. In light of a four year review cycle and the time it takes for REACH restrictions process to be completed and implemented, it should be possible to implement this scenario within the expected review cycles, providing more legal certainty for EEE manufactures and predictability in their supply chain.

Substance already included in Annex XIV to REACH when it is proposed to be restricted under RoHS

This is not a theoretical case as DEHP, DBP and BBP, which are currently under consideration for potential restriction under RoHS, have already been included under REACH Annex XIV. Moreover several authorisation requests have been submitted to ECHA, one of them including the use of DEHP in capacitors (used in EEE).

As stressed earlier, to avoid inconsistency and make efficient use of the analysis generated under REACH, RoHS assessment should take the information submitted in the context of the REACH authorisation procedure and the opinions of RAC and SEAC into consideration. This is particularly relevant in the case of DEHP, as the authorisation request covers a particular use in EEE and recyclers have made a request for authorisation, which could provide valuable information about potential exposure to workers and environment in the end of life phase, and is therefore very relevant for RoHS.

Any measures for restricting substances under RoHS while an authorisation procedure is running in parallel will compromise the substantial effort made by industry to prepare a complex authorisation request. Further restrictions should be envisaged after the REACH regulation foresees such assessment of the need for restrictions in Article 69 (2): '[The] Agency shall consider whether the use of that substance in articles poses a risk to human health or the environment that is not adequately controlled. If the Agency considers that the risk is not adequately controlled, it shall prepare a dossier which conforms to the requirements of Annex XV.'

Considering restriction under RoHS or restriction under REACH is a question of which regulatory tool will better address the need for such a restriction and what the scope should be.

Substances not yet included in Annex XIV to REACH and not yet in RoHS

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As stressed earlier, the best solution for this situation is the detailed assessment of the health and environmental concerns and the proper identification of the sources related to this concern, which will determine then the most appropriate regulatory tool for addressing the problem. Some of this analysis could lead to a conclusion that another piece of legislation, not necessarily RoHS or REACH could be the best RMO. The RMO is the only guarantee of an adequate use of regulatory tool and prevent inefficient use, which could lead to erosion of the system and decrease its credibility.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €1.9 trillion in 2012 and directly supports more than 4.2 million jobs in Europe.

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