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and supply chains: the big picture

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Waste batteries and accumulators, environmental regulation and supply chains: the big picture



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THE WASTE BATTERIES AND ACCUMULATORS Regulations 2009 (the 2009 Regulations) are the latest piece of legislation to come into force in the UK deriving from the European producer responsibility legislation. The staged implementation of the 2009 Regulations is now complete and the final obligations came into force on 1 February 2010.

The Regulations are based on similar principles to previous legislation, such as the Waste Electrical and Electronic Equipment Regulations (WEEE) 2006 and the Producer Responsibility Obligations (Packaging Waste) Regulations 2007. Obligations are placed on the producers of items placed on the market to take responsibility for the environmental cost of these items and complex mechanisms are put in place with obligations on others (such as distributors) to ensure that this happens.

It is increasingly important for companies to exercise careful control of their supply chains as the 2009 Regulations work alongside other legislation that requires producers and distributors to take responsibility for the content of their products, such as the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2008 (the RoHS Regulations), the Packaging (Essential Requirements) Regulations 2003 (the Packaging Regulations), the Batteries and Accumulators (Placing on the Market) Regulations 2008 (the Batteries and Accumulators Regulations), and the Registration, Evaluation, Authorisation and Restriction of Chemical substances (REACH) 2007 regime.

This article will analyse the 2009 Regulations and its specific requirements. It will also set out important steps for organisations to take to exercise and be able to demonstrate control of their supply chains.

BACKGROUND

The Regulations were made pursuant to Directive 2006/66/EC (the Directive) on batteries and accumulators and waste batteries and accumulators.¹ The Directive replaced an earlier batteries directive, which was generally perceived as inadequate at controlling the risks posed by batteries in the waste stream, and at creating a level economic playing field for battery collection and recycling across the EU.

One of the key aspects of the Directive is the imposition of national waste battery collection targets. European member states need to achieve collection targets of 25% and 45% within four and eight years respectively of the coming into force of the implementing legislation.

SUMMARY OF THE 2009 REGULATIONS

The specific obligations imposed by the 2009 Regulations will depend on several important distinctions, such as the battery type, the amount of batteries placed on the UK market and whether or not a company is characterised as a producer or a distributor. An accurate characterisation is a key element of compliance. Although there are many common obligations that affect all battery types (and, specifically, the classes of industrial and automotive batteries), there are also important differences between them. For example, although all distributors are required to register with the National Packaging Waste Database (NPWD), it is only the large producers of portable batteries that will be required to join a battery compliance scheme (BCS). It is therefore important to recognise the similarities and differences, and to appreciate the implications that this might have on compliance.

The 2009 Regulations apply to nearly all types of batteries and accumulators, regardless of their shape, volume, weight, material composition, use and whether they are incorporated into an electrical appliance. The only battery types exempted are those used in military and space equipment.

INDUSTRIAL, AUTOMOTIVE AND PORTABLE BATTERIES

An industrial battery is a battery or battery pack that is:

- designed exclusively for industrial or professional uses;
- used as a source of power for propulsion in an electric vehicle;
- unsealed (but not an automotive battery or accumulator); or
- sealed (but not a portable battery).

An automotive battery is defined as a battery for an automotive starter, lighting

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or ignition power, and includes all road transport (and tractor) batteries, except for those used in electric cars, which are considered industrial.

Over 95% of industrial and automotive batteries are recycled and so the 2009 Regulations focus on portable batteries, the UK recovery rates of which have been estimated to be as low as 3%. Portable batteries are defined as any battery or battery pack that:

- is sealed;
- can be hand-carried without difficulty; and

batteries used to power consumer household products, and batteries used in mobile phones and portable MP3 players.

PRODUCER OR DISTRIBUTOR?

The distinction between producer and distributor is important because of the different obligations imposed on each. The 2009 Regulations impose more stringent obligations on producers than distributors. Distributors are only responsible for portable batteries, while producers are potentially responsible for all three battery types.

A producer is defined as any person in the UK that places batteries, including those incorporated into appliances or vehicles,

other businesses, and the definition is sufficiently wide to catch a variety of different companies.

Companies can be both producers and distributors, but not in relation to the same batteries.

LARGE OR SMALL?

The final distinction that needs to be made is whether the producer or distributor is classed as large or small. Size is not material when considering the requirements imposed on the producers of industrial and automotive batteries and, as previously mentioned, distributor responsibilities under the 2009 Regulations are restricted to the class of portable batteries.

‘It is intended that the battery compliance schemes will want to work with distributors because they will need battery waste to meet their collection targets.’

- is not an automotive or industrial battery.

There is potentially an overlap between the definitions of industrial and portable batteries. ‘Waste Batteries and Accumulators Regulations 2009 – Government Guidance Notes’ (the guidance) suggests that the overriding considerations in such circumstances will be the design of the product and the purpose of its use. A presumption will be applied in favour of a portable classification if the batteries fulfil the definition criteria and are capable of being used in a household consumer product. For example, the guidance suggests that batteries used in laptop computers should be treated as portable batteries under the 2009 Regulations, even if they are used for professional purposes. Other examples of portable batteries include the AA or AAA

on the market for the first time in the UK on a professional basis, irrespective of the selling technique used (including by distance selling). Producers include manufacturers, retailers, wholesalers and those who import batteries for sale in the UK. Batteries in products already covered by the WEEE 2006 and the End-of-Life Vehicles Regulations 2003 are also covered by the 2009 Regulations.

The producer obligations are triggered by the process of placing batteries onto the UK market for the first time. Those accustomed to the WEEE 2006 and RoHS regimes will be familiar with this concept, and government guidance based on the European Commission’s ‘Blue Book’ suggests that ‘placing’ means supplying or making available to a third person on a professional basis for the first time.² Although there are a variety of possible permutations, one example of a producer under the 2009 Regulations would be a UK company that imports goods containing batteries and sells them wholesale in the UK.

The Regulations define a distributor as a person that provides batteries on a professional basis to an end-user. This could include both retailers and those supplying

Under the 2009 Regulations, placing more than one tonne of portable batteries on the UK market for the first time is the quantitative threshold that separates large producers from small producers. The threshold is much lower for the distributors of portable batteries and stands at 32kg of batteries supplied to end-users per annum. This is not a very high threshold. To add some perspective, it has been estimated that 32kg of portable batteries is equivalent to approximately 1,400 AA batteries.

CORE OBLIGATIONS OF PRODUCERS OF INDUSTRIAL BATTERIES (TAKE BACK)

The core obligations imposed on the producers of industrial batteries relate to the free take back of waste batteries from end-users. End-users have the following options, in descending order of priority:

- i) requiring a producer to take back waste batteries on the supply of new batteries to that end-user during the calendar year;
- ii) where end-users are unable to return the batteries to the supplier (for example, because i) is not applicable), the end-user can request take back from producers that have placed batteries of the same chemistry on the market in the calendar year of the request or within the three preceding calendar years; or
- iii) where an appropriate producer cannot be located because neither i) or ii) are applicable, an end-user can contact any producer to request take back.

NOTES

- 1) Accumulators are devices such as rechargeable batteries.
- 2) The *Guide to the Implementation of Directives Based on the New Approach and the Global Approach*, published by the European Commission.

The relevant producer must take back the waste batteries within a reasonable period of time.

CORE OBLIGATIONS OF PRODUCERS OF AUTOMOTIVE BATTERIES (COLLECTION)

Automotive battery producers are required to collect waste batteries free of charge and within a reasonable period of time of a request made by a final holder of the waste. Final holders are defined in the 2009 Regulations and include garages, scrap yards, authorised treatment facilities and civic amenity sites. Individual consumers, such as private car owners, do not constitute final holders and cannot request individual collection.

COMMON OBLIGATIONS OF PRODUCERS OF INDUSTRIAL AND AUTOMOTIVE BATTERIES

Regulation 42 of the 2009 Regulations requires the producer to register on the NPWD within 28 days of the date on which that producer places industrial or automotive batteries on the market for the first time after 15 October 2009. Successful registrants will be issued with a registration number. Producers are required to inform the NPWD within one month of any changes to their registration details or if they cease to be a producer.

Regulations 35 and 36 of the 2009 Regulations apply to producers of industrial and automotive batteries respectively, and require such producers to publish in a conspicuous manner details of how requests can be made to them to take back or collect batteries.

Producers must ensure that all identifiable waste batteries taken back or collected by them are either delivered to and accepted by an approved battery treatment operator or an approved battery exporter for treatment and recycling. The 2009 Regulations compel such responsible treatment by prohibiting the disposal of whole and untreated waste batteries by landfill or incineration.

There are two different reporting requirements for both types of producers. Producers have an obligation to report the chemistries and total tonnage of the batteries that they place on the UK market in each annual compliance period to the Department for Business, Innovation and Skills (BIS) by 31 March

each year. Producers are also required to provide the same weight and chemical composition information on batteries that they have collected (or had collected on their behalf) and delivered to an approved treatment operator or approved exporter for treatment and recycling during each compliance period. The government will use this information to assess and report to the Commission on whether the UK is meeting the recycling targets in the Directive. Producers need to keep records of

‘Large portable battery producers are obliged to join a battery compliance scheme, which will be responsible for discharging their responsibilities under the Waste Batteries and Accumulators Regulations 2009.’

the information supplied for a period of four years from the date on which it is provided.

OBLIGATIONS OF LARGE PORTABLE BATTERY PRODUCERS

Large portable battery producers are obliged to join a BCS, which will be responsible for discharging their responsibilities under the Regulations, including registration, reporting of sales data, publicity, collection, treatment and recycling. The 2009 Regulations do not allow producers to change between BCSs within a compliance year unless their BCS has its approval withdrawn. New large producer entrants have 28 days from the date on which they first place batteries on the market to join a scheme.

The main commitments placed on large producers are fiscal and the BCSs will charge producers a fee for their services. Because the amount of waste batteries a BCS will need to collect, treat and recycle is linked to the quantity of new batteries placed on the UK market by their portfolio of producers, both BCSs and regulators will need to know the weight of batteries placed on the market. Large producers are required to report sales data to their BCS by weight on a quarterly basis, broken down into the categories of lead-acid, nickel cadmium and other portable battery types. Large producers of portable batteries will need to retain reporting records for four years.

OBLIGATIONS OF SMALL PORTABLE BATTERY PRODUCERS

Small producers do not have collection, treatment or recycling obligations and therefore do not need to join a BCS, but they still have relatively minor compliance obligations under the 2009 Regulations. Small producers need to register with the NPWD within 28 days of the first day that they place batteries on the UK market. Small producers need to report annual sales data, also by weight and chemistry,

by the 31 January immediately following the compliance year. In addition, small producers are required to pay an annual charge of £30 to recover the administrative costs of the regulators. If a small producer subsequently places more than one tonne of batteries on the market in a compliance period, they must comply with the obligations imposed on large producers within 28 days of exceeding the threshold.

OBLIGATIONS AND RIGHTS OF DISTRIBUTORS OF PORTABLE BATTERIES

These obligations have only recently come into force and place responsibilities on large distributors. Distributors that sell equipment containing batteries have no obligations under the 2009 Regulations unless they also sell portable batteries separately. At any place that they supply batteries to end-users, large distributors are obliged to:

- take back all types of portable waste batteries (not just the types that they sell) at no charge; and
- inform end-users about the possibility of such take back at the distributor’s sales points.

Large distributors can request any BCS to collect the batteries and the BCS operator must ensure collection (within a reasonable time), treatment and recycling without

charge to the distributor. It is intended that the BCSs will want to work with distributors because they will need the battery waste to meet their collection targets. Early evidence suggests that such partnering is taking place. Although small distributors have no formal take back obligations, they may choose to do so. However, they would not have a formal right to request collection from a BCS free of charge.

OBLIGATIONS OF BCSs, APPROVED BATTERY TREATMENT OPERATORS AND WASTE BATTERY EXPORTERS

Due to the important roles that all three groups are expected to play in helping the UK to achieve their targets under the Directive, the 2009 Regulations also impose several requirements on these organisations. However, a detailed consideration of these requirements is beyond the scope of this article.

PENALTIES

Producers, distributors, BCS operators, approved battery treatment operators and approved battery exporters are all potentially subject to enforcement action for non-compliance with the 2009 Regulations. The level of fine will depend on the particular breach but there is the possibility of an unlimited fine for most breaches.

ENFORCEMENT BODIES

There are numerous different enforcement bodies that will exercise jurisdiction, depending on the category of battery waste involved and/or whether a party is classed as a producer or a distributor. The respective environment agencies in England and Wales, Scotland and Northern Ireland have been given most of the enforcement obligations but BIS has taken on enforcement duties in relation to waste industrial and automotive batteries. The Vehicle Certification Agency has been appointed as the regulator for battery distributors by Defra.

THE BIGGER PICTURE: ENVIRONMENTAL REGULATION AND SUPPLY CHAINS

The 2009 Regulations have the greatest financial impact on large portable battery producers but have the potential to affect various different stakeholders. In combination with other related legislation, they underscore the importance of

co-ordinated supply chain management. It is suggested that affected companies should:

- 1) Determine which legislation will be applicable to their activities.
- 2) Determine whether they will be classified as producers or distributors (or neither) in relation to all affected products. A company can be classified as a producer and distributor in relation to different products and it must carefully consider its resulting obligations in respect of each product.
- 3) Check that regulated products comply with the applicable product design and information or labelling requirements of the RoHS Regulations, the Packaging Regulations and the Batteries and Accumulators Regulations. There is a defence of 'due diligence' available in relation to these requirements. However, to satisfy this it will be necessary to have documented processes, including audits to show management of the supply chain.
- 4) Join compliance schemes, where necessary. Large portable battery producers and producers under WEEE 2006 and packaging regimes are required to join such schemes. The highest fines (in excess of £200,000) under the packaging regime have been given to companies that have failed to join schemes. However, companies should be aware that joining compliance schemes does not discharge them of all of their liabilities. For example, most will still be required to comply with their reporting obligations because schemes will require quantitative justification for the quantity of products placed on the UK market.
- 5) If classed as a distributor, check that your supplier is registered as a producer or that it knows who is registered as a producer.
- 6) Keep records to demonstrate compliance with the relevant regulatory obligations. There is generally a requirement to retain reporting records for four years. Although these administrative obligations are relatively easy to satisfy, they can easily be neglected. A co-ordinated approach

to regulation will help ensure that adequate records are maintained and updated centrally.

- 7) Consider the compliance issues raised by intra-company product transfers. Companies with internal supply arrangements involving product transfers between them and other group companies may need to determine which company will take ultimate responsibility for compliance. A co-ordinated approach to pan-European supply chain management is important to take into account both local and European legislation.
- 8) Collect and retain sufficient upstream and downstream evidence of compliance if other companies in the supply chain have taken regulatory responsibility for a product. One relatively simple way of achieving this is by requesting documentary evidence of compliance scheme registration from contracting parties. There are also a variety of publicly available sources of information, such as the REACH database and the NPWD, which can be used to gather documentary evidence.

CONCLUSION

The scope of the 2009 Regulations is wide-reaching, and affected companies need to assess and manage their liabilities carefully. Companies need to understand their varied obligations under the 2009 Regulations and the financial implications of compliance.

Despite the differences between the regulatory regimes, a co-ordinated approach to supply chain management will assist companies to identify possible efficiencies, reduce overlap and ensure that their obligations are effectively discharged. Although the challenges posed by the regulatory landscape are complex, there is a real commercial opportunity for companies that co-ordinate their compliance requirements effectively.

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