

Deca ban dispute to be decided by European Court of Justice in 2008

The following is a short summary of the legal tussle in the European Court of Justice on December 4, 2007 concerning the decision by the European Commission to exempt Deca-BDE from the RoHS Directive which stipulates the phase out of PBDEs in new electronic products put on the European market as of July 1st, 2006. The full Report of the Hearing is attached and all will be posted at www.saferproducts.org under the section Deca-BDE Controversy in Europe.

The court case was instigated by the European Parliament, DK, Sweden, Finland and Norway and contested the action of the Commission to grant Deca an exemption in 2005, arguing that its use was essential in electronics.

The Commission is basing its exemption on an EU risk assessment of Deca which they claim has not revealed a need for control measures and therefore this should be enough for producers to continue marketing the substance. It is supported by the UK, which carried out the risk assessment. In fact, the Commission started its pleadings at the court hearing with the following analogy: "In every family, there is a black sheep, a cousin that nobody wants to invite to the family gatherings. With PBDE, it is the other way around: it is a bad family, with DecaBDE being the not so bad cousin." The Commission continued with this theme throughout its pleadings.

However the European Parliament pointed out that this is not proper procedure. The original Directive can only exempt hazardous substances from the original prohibition *if*— as stipulated under Article 5(1)(b) of the Directive -- safer alternatives are not practicable¹. Therefore because this is the only criteria that can be taken into consideration if exemptions are added to the Annex of the RoHS Directive the Commission has basically overstepped its' powers. The Parliament is challenging the Commission and pursuing the legal case under the rules of comitology² which is the legal procedures under which laws are passed in the European Union.

The Commission asserts in recital 2 of the proposed decision that certain materials and components containing certain hazardous substances should be exempt from the prohibition,

¹ *"exempting materials and components of electrical and electronic equipment from Article 4(1) if their elimination or substitution via design changes or materials and components which do not require any of the materials or substances referred to therein is technically or scientifically impracticable, or where the negative environmental, health and/or consumer safety impacts caused by substitution are likely to outweigh the environmental, health and/or consumer safety benefits thereof"*

² Comitology defines and sets out the delegation of powers within the European Union. The Council and the European Parliament control the Commission – which is the body responsible for preparing proposals and initiating legislation – by ensuring that the Commission must collaborate with a vast number of committees that consist of representatives of the various national administrations in order to draw up legislation and must abide by the text in these directives and regulations.

since the "elimination or substitution of these hazardous substances in those specific materials and components is still impracticable. " However several studies have shown to the contrary that safer alternatives to decaBDE covered by Article 4(1) of Directive 2002/95/EC are indeed available for many, if not all, polymeric applications in electrical and electronic equipment. In May 2006 Denmark bolstered its legal case against the European commission by presenting two studies claiming safer alternatives are available for every application of the chemical in electronics manufacture.

Denmark stated that "for all materials and components presently using deca, technically acceptable alternatives are available on the market." The Commission replied that because the risk assessments had shown no need for concern there was no need to conduct a full examination of substitutes.

Norway pointed out at the Court hearing that the Commission had been selective in its use of various reports on Deca-BDE and had underestimated "the genuine concerns which are apparent from those reports and the opinions of the scientific committees and the growing realization of the dangers linked to DecaBDE. In particular, in the third recital of the contested decision, the Commission refers only to the risk to consumers, while the reports deal with workers, consumers and people indirectly exposed through the environment." At the hearing Norway referred to Deca as the "asbestos of our times"

Note that this is also clearly laid out in the European Parliament's legal challenge decision of January 2006 in which they observe that the Commission "ignores findings from the additional environment risk assessment of May 2004, which found DecaBDE to be very persistent, and which presented data on widespread occurrence in top predators and the Arctic, neurotoxic effects, uptake of the substance by mammals in laboratory studies and possible formation of more toxic and accumulative products such as inter alia lower brominated diphenyl ether congeners; whereas the marketing and use of all commercially available lower brominated diphenyl ether congeners has been banned by Directive 2003/11/EC as of 15 August 2004, and.....whereas the proposed decision goes against the opinion of the Commission's own Scientific Committee on Health and Environmental Risks of 18 March 2005, which 'strongly recommends further risk reduction' on the basis of the above risk assessment..."

In the attached Report for the Hearing judge Allan Rosas summarized the arguments of the two sides in the case. Unlike many other European Court of Justice cases there will be no advisory opinion from an advocate general, and a ruling of the full court is expected within months. Both the Commission and the UK invited the court at the end of their pleadings - should the court decide to annul the Commission's decision to exempt Deca- to consider upholding its effect for 9 months. They argued that the ban was never meant to enter into force overnight and that a transition period would be necessary to allow industry to adapt accordingly.

The European Parliament is cautiously optimistic that the rules of comitology plus the controversy round the risk assessment will rule in their favor. Bromine industry association BSEF says the outcome will be vital as a "test case as to whether scientific assessment conclusions should be the basis for EU policy on chemicals". It is apparent that more is at stake here than just the Deca issue. The very nature of decision making within the European Union is under scrutiny.

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