

# Refreshing IT Equipment: Business Users on the Hook

## Introduction

Businesses beware! By accepting the costs of disposing of obsolete electronic equipment under a supply contract, you may be getting more than you bargained for:

A new UK law is expected this autumn which could make it an *offence* if your business:

- fails to hit certain targets for the treatment, recovery and recycling of its obsolete equipment (WEEE),
- fails to keep records to prove such targets have been met, or
- fails to report compliance to the relevant authorities.

Whilst producers have been developing their strategy in response to the new law for months if not years, most business users remain in the dark. The risk is that business users may not appreciate the full impact of the law on their equipment supply arrangements (including IT outsourcing agreements) and on their waste management of WEEE.

Furthermore, the costs and obligations arising under the new law may not have been factored into existing long-term, or even upcoming, supply arrangements and will need to be revisited in the contract terms.

## Background

On 30 July 2004, the UK Government, through the Department of Trade and Industry (DTI), published its final consultation on the forthcoming WEEE Regulations. The Regulations will implement into UK law the provisions of the underlying EC Directive. The consultation includes the draft Regulations, produced on the back of intensive lobbying by producers and the recycling industry.

The aim of the legislation is to reduce the amount of waste generated by users of electric and electronic equipment (EEE).

According to draft DTI guidance, “the Regulations set a framework in which the allocation of responsibility for WEEE end-of-life management can become a factor in commercial transactions during the sale of electrical and electronic equipment in the future”. In fact, this

law will also impact existing long-term service contracts which include equipment supply and disposal obligations.

The law primarily applies to producers of EEE, placing a substantial financial and administrative burden on them to adopt and maintain an effective system of waste management (including proof of compliance) with the threat of criminal sanctions if they do not comply. The costs of compliance will vary with the methods of waste management adopted by the producer (see the Partial Regulatory Impact Assessment issued by the DTI). For example, producers could join producer compliance schemes or opt for an independent system of management.

Distributors and retailers also have certain responsibilities under the new Regulations regarding take-back of WEEE and the provision of certain information in relation to such materials.

## Impact on Business Users

### Historic WEEE not replaced on a Like-for-Like Basis

Not all equipment may be refreshed at the end of its life, due to corporate restructuring, outsourcing or even insolvency. If so, the business users will have primary responsibilities for any remaining “historic” WEEE (where the EEE was placed on the market before 13 August 2005) which is not replaced on a like-for-like basis.

- The business user will be “responsible for providing for the costs of financing” the collection, treatment, recovery and environmentally sound disposal of such “historic” WEEE.
- The business user must meet target percentages in its collection, recovery and reuse of such WEEE, must ensure the treatment facilities used are authorised, and must record and report its results to the relevant authority (para 121 of the draft DTI guidance). The Regulations are less clear on this point<sup>1</sup> and further clarification to the draft text would be welcome.

### All other WEEE

The principles are slightly different for all other WEEE, whether placed on the market after 13 August 2005, or replaced on a like-for-like basis.

At first reading, the law places primary responsibility for the costs, targets and reporting on the producer, not on the business user.

However, the producer and business user are free to make “alter-

native arrangements between themselves to provide for the costs of financing” the collection, treatment, recovery and environmentally sound disposal of WEEE (Regulation 26(2)).

There is, however, a hidden sting in the tail for business users if they agree to bear these costs:

By agreeing to finance the costs of treatment, the business user will *automatically* inherit primary responsibility under law to report, keep records and meet the recycling and re-use targets for such WEEE.

The business user will presumably want to sub-contract the performance of these obligations. No doubt, producers and/or take-back providers will be responding with a fresh suite of WEEE services to facilitate compliance by end-users. Care needs to be taken, however, in negotiating the contract (in particular, cross indemnities and mitigation provisions) as business users could be committing an offence if their supplier defaults in its obligations.

## Enforcement

The draft Regulations introduce a number of offences relating to compliance with the target, recording and reporting obligations mentioned above. Business users will not be able to contract out of this liability.

The draft guidance suggests that the Government rejected any *de minimis* exemption for business users on the grounds that this was “*impractical*” although it intends enforcement against business users to be proportionate. How this apparent conflict will be resolved is an open question.

## Implementation Timetable

The draft Regulations were due to be enacted into UK law on 13 August 2004 under the Directive. The DTI has confirmed there will be delays to this final implementation of the Directive. The final consultation process only closes on 29 October 2004. The final text of the Regulations is expected some time during the autumn 2004. The main requirements and obligations under the new law will only take effect on 13 August 2005 and will be rolled out in phases. It should also be noted that the Directive is being adopted across the EU at different stages and with differing interpretations by Member States.

## Conclusion

Shaw Pittman will be formulating a response to the DTI consultation to clarify the language of the draft Regulation relating specifically to the scope of business user responsibility.

In the meantime, business users and producers are advised to factor into existing or future arrangements the costs of compliance and the new liability allocation under this forthcoming law.

Business users in particular need to consider carefully whether they accept the costs of financing treatment under the new law for all WEEE. If so, the business user may want to subcontract performance of its legal obligations to a third party (or indeed back to the producer). The range of services and applicable service levels should be clearly defined in the contract to reflect the requirements of the law.

## Shaw Pittman

Shaw Pittman has extensive experience in working with both purchasers and suppliers over a wide range of IT products and services. For further details on Shaw Pittman’s expertise in the fields of technology or outsourcing, please contact your usual Shaw Pittman contact.

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<sup>1</sup> This may be due to a partial oversight in the current draft. Regulation 30(2) has the effect of placing the target, recording and reporting obligations onto the party that agrees, as an “alternative arrangement”, to be responsible for the costs of financing. As the business user is responsible from the outset for historic WEEE (not replaced on a like-for-like basis), there would be no “alternative arrangement” if this is simply reflected in the contract.