

Comments on the UK Draft Proposal for a Batteries Directive. Proposals by RECHARGE aisbl and EUROBAT

The proposed Titles are linked to the Consultation document published on Dec. 20, 2007 under the reference number URN 07/1701.

RECHARGE and EUROBAT's remarks are indicated in bold next to the text of the Consultation document.

1.5. Key provisions in the Directive

We would like to add the following item about key elements of the Directive and its Article 12 § 1 (b).

1.5 Key provisions in the Directive are:

- *Restrictions on the use of mercury and cadmium in batteries;*
- *Labelling requirements for new batteries to aid consumer choice and recycling;*
- *A 25% collection rate for waste portable batteries to be met by September 2012, rising to 45% by September 2016;*
- **The treatment and recycling through compliant schemes of all collected and identifiable spent batteries and accumulators (Art 12(1)(b));**
- *A prohibition on the disposal by landfill or incineration of waste industrial and automotive batteries – in effect setting a 100% collection and recycling target – based on waste generated.*
- *The introduction of “producer responsibility” obligations;*
- *The setting of recycling efficiencies to ensure that a high proportion of the weight of waste batteries is recycled;*
- *The setting of waste battery treatment standards.*

2. Definitions

§ 2.2 An industrial battery or battery pack is one which is:

- (i) *designed exclusively for industrial or professional uses;*
- (ii) *used as a source of power for propulsion in an electric vehicle;*
- (iii) *unsealed, but is not an automotive battery; or*
- (iv) *sealed, but is not a portable battery.*

2.a. In the above §, the presence of the phrase, *but is not a portable battery*, in item (iv) creates a circular logic...because a portable battery is a battery that is not industrial...

§ 2.3 *We intend to introduce a presumption in the transposing Regulations to the effect that a battery that is sealed, can be hand-carried and is capable of being used in a consumer household product, is a portable battery.*

2.b. This sentence should be withdrawn as it is not in accordance with the decision tree which was adopted last year (2007) after several Stakeholders Consultations meetings (see Annex 4)

2.c. The proposed interpretation of the definitions of the Batteries Directive does not fit with the harmonized approach by all Member States for key elements of the Directive. In order to avoid any additional ambiguity, the definitions should be transposed as adopted in the text published in the Official Journal of the European Communities. The definition of an article under BD 2006/66/EC should fall under Article 95 of the Treaty.

In this respect, we would like to point out that the new wording of the “industrial battery” definition in section 2.2.

- **drastically deviates from the one adopted in co-decision which is based on the “exclusive design for industrial or professional uses...”. This concept seems to have been sidelined.**
- **changes the conclusions made by the EU institutions, which essentially assigns the portable status to batteries which would otherwise be classified as portable and industrial, an in so doing is likely to create confusion (avoiding confusion is the reason behind the “tie-breaker” clause (c) in the directive’s portable definition which states that batteries which are sealed, can be hand-carried but meetg the industrial definition are to be classified as industrial although they meet (a) and (b) of portable).**
- **creates a circular definition for sealed batteries. Indeed: a sealed battery would not be industrial if it is portable (as specified in section (iv) of the proposed re-worded industrial definition), this latest characteristic being defined (as per the portable definition) as a battery that can be hand carried (we already know it is sealed) which is not industrial!**

In order to avoid any additional ambiguity, the definitions should be transposed as adopted in the text published in the Official Journal of the European Communities.

§ 2.3 We also intend to define “electric vehicle” as a vehicle which uses battery-generated electricity as a source of power for propulsion and includes a vehicle which in addition uses, or is capable of using, other sources of power for this purpose.

2.d. We anticipate that this definition will not alter the status of the battery used in an EV or HEV that will remain an “industrial battery”

2.e. We make reference to the Batteries Directive’s Text : Article 12. § 1(b).

Batteries Directive Text : Article 12

1. Member States shall ensure that, no later than 26 September 2009:

(a) producers or third parties set up schemes using best available techniques, in terms of the protection of health and the environment, to provide for the treatment and recycling of waste batteries and accumulators; and

(b) all identifiable batteries and accumulators collected in accordance with Article 8 of this Directive or with Directive 2002/96/EC undergo treatment and recycling through schemes that comply, as a minimum, with Community legislation, in particular as regards health, safety and waste management.

There is a need to define what is an “identifiable battery”. The recycling Industry experience shows that collected batteries are generally identifiable and that the qualification of non-identifiable should be only be granted on an exceptional basis and according to defined criteria.

2.4. Producers.

We are proposing the following additions for clarification (in bold):

2.4 It follows from the Directive definition of producer that businesses will be producers in this context if they are:

- *UK manufacturers of batteries placed on the UK market **and not exported;***
- *Private label owners for the quantity of batteries sold on the UK market **and not exported;***
- *Domestic Original Equipment Manufacturers, if products include batteries not manufactured in the UK when placed on the market, **for that fraction of equipment which is not re-exported;***
- *Importers of batteries placed on the UK market **and not re-exported;***
- *Importers of appliances, equipment parts (power packs) and vehicles containing overseas-sourced batteries placed on the **UK market for the first time.***

We would like to stress the fact that producers are only responsible for those batteries placed on the UK market AND which are not subsequently re-exported; i.e. which become waste within the UK territory. This is not reflected in sections 2.4 and 4.7 through 4.9 of the consultation document. This can have serious consequences if/when market share is used when apportioning costs. The market share that needs to be considered for such purpose is the one assessed on the basis of the quantity of batteries that remains within the country.

3.2. Removability

3.2 There are three provisions in the Directive which were adopted with an Internal Market (also known as Single Market) Treaty Base – relating to the free movement of goods in the EU. These provisions are Article 4 (prohibitions), 6 (placing on the market) and 21 (labelling). A fourth, Article 11 (removability of batteries) could also be deemed to constitute a Single Market provision, since it contains design requirements for battery-powered appliances, despite being adopted with an Article 175(1) (Environment) Treaty Base.

We agree that this Article 11 should be covered by Article 95 of the Treaty.

3.4. Article 6 Placing on the market.

Background

§ 3.4 Our interpretation is that a producer can legally place on the market batteries that conform to current composition and labelling requirements up until the 26 September 2008, when this new Batteries Directive comes into force.

The next sentence should be corrected by taking out one of the negation, e.g.

We do not believe that the new Directive will ~~not~~ require distributors or retailers to cease making them available to consumers or remove them from the shelves

- *i.e. they can continue legally to be sold to end-users on and after 26 September 2008.*

However, any batteries placed on the market on or after 26 September 2008 must comply with the composition and labelling requirements of the new Batteries Directive.

After correction, we agree with the statement.

3.4. About Article 6 § 2. There is a need for clarification on this paragraph, which could be interpreted as a mandatory recall of batteries located at end-users sites or within the distribution channels.

The enforcement regime will only be effective and proportionate provided the interpretation of

Art 6.2 ‘necessary measures’ is in direct accordance with the EC Blue Book rules of 8.2.2. ‘Corrective actions’, applies, to ensure proportional and commensurate action. It would be disproportionate to recall batteries simply because of a minor marking or labeling infringement. (e.g. size of recycling mark was fractionally too small).

A Guidance Note should unambiguously indicate that Article 6 applies to batteries placed on the market from September 26, 2008 onwards.

The Guidance Note should also include a similar recommendation about the capacity marking requirement which will apply from September 26, 2009. Indeed, batteries placed on the market before that date and not marked with the capacity labelling requirement (as defined by the TAC before March 26, 2009) should not be withdrawn from the market after September 26, 2009.

Labelling.

Background

§ 3.5 The main labelling provision is identical to that set down in Directive 91/157, as amended, but now extended to all batteries, rather than being confined to those containing more than specified amounts of mercury, lead or cadmium. The European Commission have recently explained to us that they will be appointing a consultant early in 2008 to provide them with the technical underpinning to enable development of the detailed harmonised rules for the capacity labelling system. Once the consultants have reported back, the Commission will propose a system for Member States.

Q3: What are your views on the capacity labelling provision, in advance of the appearance of a Commission proposal?

**A detailed position paper on labelling issues is supplied in Attachment 1.
Regarding Capacity Marking, a position paper is supplied in Attachment 2.**

Single Market Provisions – Enforcement Regime

3.8 In the ELV Regulations, there is also a defence of due diligence in order to take into account the complexity of the product and the fact that it is not necessarily possible for a vehicle producer to take complete control over the chemical composition of the vehicles it assembles from many component suppliers. But batteries are less compositionally complex than vehicles, with fewer and less diverse materials input, and we are not at the moment proposing a similar defence when introducing the new legislation.

It seems appropriate to introduce in the Battery Directive the principle of Defence of Due Diligence in regard to the complexity of the composition of the Electrical and Electronic Equipment with incorporated batteries imported and placed on the market.

Product Design Requirements under Article 175 (1)

§ 3.15 Comment:

It is indeed a free movement of goods issue if all MS do not adopt the same standard for the removability clause of Article 11. Applying Article 95 of the Treaty is recommended.

Regarding the sentence about exemptions in Article 11 of BD 2006/66/EC.

These provisions shall not apply where for safety, performance, medical or data integrity reasons, continuity of power supply is necessary and requires a permanent connection between the appliance and the battery or accumulator.

Exemption to the general removability requirement should be granted for contaminated medical equipment. Indeed those equipment are incinerated for safety and sanitary reason. It should not be a requirement to separate a battery before disposal.

Exemption to the general removability requirement should be granted for batteries (memory back-up and others) embedded in equipment or attached to Printed Circuit Boards as those batteries requires permanent connection with the appliance to ensure their proper functioning.

Portable Batteries and Accumulators

Key provisions.

Corrections to the text of § 4.2.

4.2 The key provisions in the Directive on portable batteries are:

- *A 25 per cent collection rate for waste portable household batteries to be met six years after entry into force of the Directive into UK law (i.e. by September 2012). There is also a 45 per cent collection rate to be met ten years after entry into force (September 2016).*

Please correct the above § in the following way:

A 25 per cent collection rate for waste portable household batteries to be met six years after entry into force of the EU Directive ~~into UK law~~ (i.e. by September 2012). There is also a 45 per cent collection rate to be met ten years after entry into force (September 2016).

Important clarification, 2012 is the deadline according to the EU Directive.

Battery Producer.

4.9 Other groups that may fall within the scope of the Directive and may therefore be affected by legislative changes include:

- Private label owner
- Pack assembler - only if the assembler places the batteries on the UK market
- Domestic Original Equipment Manufacturer (OEM) – only if also placing batteries on the UK market
- Importers of electrical equipment containing batteries when sold to the UK market
- Distance sellers - only if in other respects they fall within the definition of the Directive

NB.

The responsibility of those potential producers is limited to the quantity of batteries that are placed on the UK market at the exclusion of the quantity of batteries that are exported.

Compliance Scheme.

Q6: Of the two broad approaches to devising a compliance system set out in this consultation (i.e. Single national or network of multiple schemes) which do you think is likely to be most effective in meeting the objectives of the Directive and support producers meet their obligations? Please give your reasons.

Q7: What features do you consider essential for an effective and low cost compliance system?

Q8: What risks can you envisage with any of the approaches and models set out under either scheme system?

The Model 2.a. “ Multiple schemes with a coordinating body “ is recommended by Recharge, Eurobat and EPBA.

Two major reasons are justifying our selection.

- 1. There should be room for competition between schemes and opportunities for dedicated schemes to deal with dedicated problems. For example, rechargeable batteries are usually sold incorporated in an appliance and are often discarded along with this appliance. Therefore such batteries follow a different flow from waste primaries and may benefit from a dedicated compliance scheme.**
- 2. There should be a coordination body which controls the rules under which each scheme will operate, e.g. the same collection efficiency evaluation should apply to all schemes...**

Two Tier approach.

Q9: What are your views on this alternative approach?

According to Article 8 § 1(a) of Batteries Directive 2006/66/EC, the participation of Distributors in the take back operations is a mandatory requirement.

The multiplication of collection points is essential and distributors and retailers should offer a collection opportunity to their clients.

Most effective collection takes place where collection is closest to the household and/or to the purchase location. Optimum performance is reached where people can drop their batteries to the right waste stream at civil amenities, retailers, distributors, shops, schools, administrative buildings, post-office, private and public offices,...

Interim Targets.

Q11: Do you think that interim targets will help producers and others in meeting their overall responsibilities under the Directive? What additional controls would be effective?

Q12: If interim targets are helpful, how should we set such targets?

Q13: What action should be taken if interim targets are not met?

If any, an interim target should not be based on the weight of batteries collected nor should it be based on a percentage of sales.

One should concentrate on setting an efficient logistic system for collection, this will take time. We would like to propose that the intermediate target be the number of new collection points set up in the UK per year rather than the tonnage of batteries collected. This is investment (capital) money that will only be rewarded 3-5-10 years after being invested! In addition, such interim targets should not be mandatory but operational and indicative objectives.

Small producers.

Q15: If you do not think that the UK should take up the option to exempt small producers, how else should we take into account the needs of small producers, particularly SMEs?

There shouldn't be any exemption for small producers.

One should distinguish two issues: REGISTRATION and REPORTING.

REGISTRATION of producers.

One should remember that it is a mandatory requirement to REGISTER as a producer, small or large.

**REPORTING of quantities of batteries placed on the market.
A simplified sheet for reporting yearly sales should be offered to small producers (e.g. those placing less than 1'000 units per year or 10.0 kg per year).**

Distance Sellers.

Q16: What are the most effective ways in which UK regulations can require EU distance sellers to (i) take-back portable batteries and (ii) achieve the environmental aims of the Directive?

4.80 ~~We propose that distance sellers within the EU ought to be required to fulfil their take-back obligations.~~ We would welcome proposals for how this could be best accomplished in practice. Some of the options being investigated in the WRAP trials such as postal return may be appropriate.

We are proposing the deletion of Part a of this §.

It is our understanding that a legal entity which imports batteries from overseas (EU or non-EU) for the purpose of incorporating them in an equipment to resell it is the battery producer.

We do not believe that legal entities that import batteries for their own use should be treated any differently.

Indeed, the definition of Producer in Article 3 § 12 of the directive places the producer responsibility at National level and nowhere else.... Clearly the producer definition was amended with the intent of defining producers within the MS in which the waste will be generated and assigning the attached responsibilities to these domestic entities.

This is why amendments with the purpose of creating producers at the EU level have been rejected.

In Belgium, the Collective Scheme reports to the Authority any infringement to the Producer Responsibility duty when an importer fails to register and to declare. The Authority has the power for imposing penalties to this importer. There must be either via the Collective scheme or via individual scheme ways to report to the authority about free riders.

NB The first sentence of § 4.80 ...

...We propose that distance sellers within the EU ought to be required to fulfil their take-back obligations...

... is in contradiction with the statement in § 4.8 which reads...

4.8 A business will only be a producer in a Member State if it is in that Member State and it puts batteries onto the market for the first time in that Member State.

A company in Country A exporting a Battery to Country B to an end user in Country B cannot be made responsible for the battery end of life in Country B.

To fulfil its environmental responsibility, the end-user in Country B (here the UK) should

- Either be recognized as a UK producer,
- Or, should continue to be responsible for the end of life of the battery (as per the Environment Protection Act 1990 which defines the responsibilities of a producer of controlled waste).

4.81 Batteries imported for a business' 'own use' (for example, a producer that imports a battery for use in its own production or operational processes) would not normally be counted towards the amount of batteries that a producer places on the market.

It will be the responsibility of this business entity to secure the appropriate waste management of the battery at end of life.

Small retailers.

Q17: Do you agree that the regulations transposing the Directive should exempt very small retailers below a threshold to be determined from the requirement to take back batteries in store? If so, what do you think the criteria for determining the threshold should be?

One should supply small collection boxes to small retailers and offer a free of charge picking logistic.

Small retailers should participate at minimum cost to the collection network...it is an education and opportunity...issue.

Education of the end user because he needs to find a drop-off point at any sales, and Opportunity: where you buy, you take back...

The alternative is the following...either you drop the spent battery in the home bin.. or you bring it back where your purchased it or where you need to purchase a new one, e.g. from small distributors...

This is why there should be a take back opportunity at any sales point....

Civic Amenities.

Q18: What you think would be the most effective and efficient method of collection? We would welcome views on the adequacy of Civic Amenities in achieving the accessibility requirements of the Directive. If you think additional collection points will be required, which ones would you suggest?

In the Table below we have summarized the major collection routes used in various MS of the EU.

All of them have a role to play in the achievement of the collection efficiency.

Countries	A	B	D	F	L	NI	S
Public collection locations							
Kerb side collection (*)					■	■	■
Municipal Depot (**)	■	■	■	■	■		■
Administrative buildings	■	■	■	■			
School, hospital, post-office...	■	■	■	■		■	
Private collection locations							
Sales point	■	■	■	■			
School, hospital...	■	■	■	■		■	
Offices, Industries	■	■	■	■			
Waste Management and Collection Centers	■	■	■	■		■	

(*) Together with other special household waste
 (**) Centralised Municipal Collection with Hazardous Waste Collection

A key factor : the number of inhabitants per coll. point

WEEE

Relationship with batteries collected under WEEE Schemes

4.103 So battery producers are only required to finance the treatment and recycling of waste portable batteries collected under the collection obligations in Article 8 of the Batteries Directive. We are considering whether or not to impose an obligation on portable battery producers to finance the collection, treatment and recycling of batteries collected under schemes set up in accordance with the WEEE directive or whether to make this an option for battery collection schemes.

Please refer to our position paper on this issue (Attachment 3 : Double Charging). The obligation for the collection of spent batteries can be fulfilled via WEE scheme for certain types of batteries.

Recycling Efficiency.

Treatment requirements and recycling efficiencies

4.114 A new schedule will be inserted into the EPR requiring the regulator to exercise its relevant functions so as to comply with the requirements in Articles 12(2) and 14. This would mean that any permitted premises would have to treat the waste batteries in accordance with Article 12(2) and Annex IIIA, and would have to observe the ban on disposal of batteries and accumulators in landfill or by incineration, except in the limited circumstances allowed by Article 14.

Article 12 § (b) clearly indicates.....that identifiable spent batteries collected should be processed for recycling.

Article 8 (exception for landfilling) applies to identifiable portable

Consequently, landfilling of collected spent portable is not permitted except under the circumstances of not being identifiable (See comment 2.e. above) ...or when there is no end market.

Q19: With regards to the export of batteries for recycling, what do you consider sound evidence of equivalent standards to be?

All recyclers should comply with the same standards regarding working conditions and emissions. There is a need for developing a recycling certification standard that could be used for the certification of recycling operators located within and outside EU borders.

4.127 If batteries are exported for treatment and recycling, the exporters will need to provide the evidence that the treatment and recycling was carried out under conditions equivalent to those set by the Directive. In practice, this is likely to mean some form of approval of exporters similar to that used under the packaging (where it is called 'accreditation') and WEEE Regulations. As a minimum, this approval would require confirmation that the export will be carried out in accordance with the Transfrontier Shipment of Wastes (TFS) legislation and that the overseas reprocessing facilities will have to be identified (i.e. not just an intermediate broker or recipient) and there will have to be evidence that they are operating to conditions equivalent to those required of domestic treatment and recycling facilities.

Q21: Do you broadly agree with Government's approach for recycling facilities gathering evidence? If not, can you please suggest an alternative.

TFS never defines or guaranties that companies abroad are working with EU standards. It just confirms that they are companies with minimum legal compliance, may be working according to local standards.

Again: an auditing procedure is necessary.

INDUSTRIAL BATTERIES

5.5 The concept of “net cost” in the third bullet, or how it should be calculated, is not explained in the Directive. We believe it is best left to the market to determine when there is a net cost. Where an independent battery collector is acting commercially – i.e. where there is enough in the value chain to make it worth his while -- it may be assumed that there is no net cost. However, where a collector cannot recover his costs, then the collection activity will not take place, and should therefore be regarded as having a net cost, and collection etc must then be funded by producers, directly or via a contracted third party. In this way, independent collection is allowed to continue, but producers take “producer responsibility” when commercial activity chooses not to deal with the waste stream.

To avoid producers sidestepping an obligation, by extravagant charging, as seemingly allowed by the text of the Directive, and to recognise the expectation that independent collection will continue, producer take-back should be free of charge.

We do not believe that article 8 (or article 16) creates a free take back obligation.

Indeed, the Batteries Directive goes into great length to explain that no fee can be charged to end users of waste portable batteries [art. 8(1)(b), mandates “distributors to take back waste portable batteries or accumulators at no charge when supplying”, art 8(1)(c) prohibits “any charge to end-users when discarding waste portable batteries”, art 16(1)(4) prohibits that “The costs of collection, treatment and recycling (...) be shown separately to end-users at the time of sale of new portable batteries and accumulators.”].

No similar charging or invoicing prohibition requirements are spelled out for industrial batteries. Producer obligations are framed by an obligation “...not [to] refuse to take back industrial batteries...” and by the legal freedom to charge for this service (either at the time of sale or at the time of return as agreed between the parties) as long as it is acceptable by the end user.

With such limited freedom, it seems that the possibilities to “charge extravagantly” are rather limited.

This statement in the last sentence should be withdrawn as it is not in line with the statement of 5.23 (iii)...

Further comments to this section related to “free take back” are provided at the end of this document.

For the purpose of clarity, we shall keep the same market structure analysis as the one presented in the joint DFRA/BERR consultation document

i New industrial batteries replace existing spent industrial batteries. This can be seen as the ‘mature’ market for batteries. For a mature industrial country like the UK this is thought to represent the vast majority of sales and of waste arisings.

- Scheme following option 1: direct responsibility: the original producer is legally responsible for taking back the waste battery as it is replaced by a new one.
- Scheme following option 2: alternatively, the producer of the new battery can contractually propose to take back the old battery which is replaced and may disengage

himself by contract with the end-user of the future take back obligation he would otherwise have for the new one he just sold.

ii New industrial batteries are purchased by a user. This can be seen as the 'growing' market, where new industrial activity is taking place. For the UK, this is thought likely to represent a smaller proportion of sales.

- Scheme following option 1: direct responsibility: the original producer is legally responsible for taking back the waste battery when it will ultimately be replaced by a new one.
- Scheme following option 2: but the end-user, when replacement time comes, may elect (for practicality purposes) to solicit and possibly accept the take back from the replacement battery producer (and hence relinquish the mandatory commitment from its original producer).

iii Existing spent industrial batteries are discarded by the last holder. This can be seen as the 'declining' market, where existing industrial activity ceases. For the UK, this is thought to represent a relatively small proportion of activity.

- Scheme following option 1: direct responsibility: the original producer is legally responsible for taking back the waste battery as it is replaced by a new one.
- Scheme following option 2: if the end-user has solicited and accepted the proposal of his vendor to swap his obligation on the new battery for the obligation on the old battery, he then has the responsibility to organize by himself the end-of life of the said last battery.

From this analysis, it can be inferred that:

Option 1

- Ensures a straightforward scheme where each producer has responsibility over the batteries he produced.
- The last battery (of the declining market) has a responsible party "attached" to it; its producer.
- Under the rare circumstance where that last producer was to go out of business between the time of sale and the time the battery turns into waste, then the responsibility would fall back on the waste generator, as it does today. With regard to industrial batteries, this could hardly be seen as a catastrophic situation since the vast majority of such batteries are collected under the present situation (positive value).
- We can therefore see that a minimal risk remains if/when a producer goes out of business AND the price of recycling is high AND the waste owner is showing a dishonest behaviour by trying to escape his legal obligations not to landfill nor incinerate (no industrial batteries ever end up in rivers or forests, as sometime mistakenly stated!).
 - This is balanced with the legal certainty that links a given battery to a given producer.

Option 2:

- Gives flexibility to the replacement battery producer to provide a service to his customer (which he may or may not accept).
- If accepted by the end-user, this service takes care of the theoretical producer inability to take back in case of bankruptcy between the time of sale and the time of waste arising
- Leaves the responsibility of the last battery arising as waste in the declining market with the end-user who, faced with the illegal status of land-filing or incineration outcomes, may have, if negative, to shoulder the recycling cost under purely market conditions.

- We can therefore see that a minimum risk remains if/when the end-user of the last battery in a declining market is faced with a high recycling cost AND is showing a dishonest behaviour by trying to escape his legal obligations not to landfill nor incinerate.
 - This is balanced with the operational certainty (no so-called orphan products) linked with the fact that a new battery producer takes back the replaced battery at the same time he sells the new one

COMMENTAIRE: JE CROIS QUE EC TEXTE PERMET D'ELIMINER UNE PARTIE DE CE QUI VIENT APRES. A DISCUTER.

5.23 Thus producer responsibility obligations in relation to spent batteries would be as follows:

iii For the 'declining' market, when an end-user is discarding spent industrial batteries, the end-user is to deliver these batteries to a producer who cannot refuse to takeback these batteries. The producer is then responsible for dealing with these batteries in accordance with the Directive.

Indeed, it is a mandatory requirement for the producer to take back those batteries at the request of the owner.

The take back obligation is mandatory for the producer. Even if there is no provision in the Directive on the financial conditions that should govern the take back of orphan products, the take back could occur either free of charge or should be part of an agreement between parties.

Return schemes for spent industrial batteries.

The following comment is proposed regarding the collection of spent industrial batteries.

New § 5.5. (bis).

Contrasting with the “portable” and “automotive” segments for which the Directive mandates that the collection points from which producers are required to collect be “accessible and in the vicinity” of the end users [see art 8(1)(a) for portable batteries and art 8(4) for automotive batteries], there is no such requirement for industrial batteries.

This flexibility allows for the continuation of the existing agreements between producers and industrial end-users by which the cost of moving waste batteries from the industrial site to the collection or recycling point can be freely negotiated between both parties.

Q22: What is your preference for the adoption of one or other of these two options, your views on any foreseen deficiencies in the operation of either system, and how such deficiencies could be corrected?

OPTION 1

5.12 Producers may offer a free take-back service to their customers, but must also be prepared to accept back from business users (their own and others' customers) waste industrial batteries, free of charge. They would have no obligation to exceed in total (through take-back and acceptance) the tonnage of the same chemistries of batteries they reported to the Agencies, (otherwise there would be risk of disproportionate burden and diverted obligations, as one producer, posing as a user, presents waste batteries to another).

Comment.

We would like to receive confirmation that the mandatory requirement for accepting spent batteries fulfils the double rule of quantity and quality. It means that the producer has to take back as a maximum the equivalent quantity of spent batteries (and of the same chemistry) to its yearly sales (quantity placed on the UK market) .

OPTION 2.

The establishment of a collective scheme for spent industrial batteries may appear attractive and the logic and arguments developed in the paper are valuable.

Nevertheless, we are wondering if this can be practically implemented, when considering several practical aspects:

- 1. The fact that the industrial battery market (by weight) is dominated by one chemical system (lead-acid) = more than 95 % by weight of the industrial market.**
- 2. The system should be financed not only via a contribution obtained from new sales but also by replacement sales (the growing market and the mature market).**
- 3. The long time span between the sales and the return of those industrial batteries.**

Distance sellers (Industrial Batteries).

Please refer to our notes on section 4.80.

NB The first sentence of § 5.46 ...

5.46 We propose that distance sellers within the EU ought to be required to fulfil their take-back obligations.

is in contradiction with the statement in § 4.8 which reads...

4.8 A business will only be a producer in a Member State if it is in that Member State and it puts batteries onto the market for the first time in that Member State.

One has to consider the national legislation on Waste which generally states that for Business Producing Waste, there are various regulations (The environment Protection Act of 1990 and provisions of the duty of care with respect to Controlled Waste) that the Business has to comply with in order not to be prosecuted.

It will be the responsibility of this business entity to secure the appropriate waste management of the battery at end of life.

Additional Comment on Charging end users.

With regards to the ability for producers to charge end users, we disagree with the conclusion reached in section 5.5 of the consultation document which states that: “To avoid producers sidestepping an obligation, by extravagant charging, as seemingly allowed by the text of the Directive, and to recognise the expectation that independent collection will continue, producer take-back should be free of charge.”

To finance the collection and recycling of batteries, producers can either generate cash at the time of sale of a new battery, at the time of return of a waste battery, or possibly through a fee levied during the use phase of the battery (this third option will be ignored for obvious reasons of low practicality).

It must be considered that when raised at the time of sale of a new battery, this cash may or may not be shown as a separate line item on the invoice.

For portable batteries, the directive states that:

- Art 8(1)(b): “[Schemes] shall require distributors to take back waste portable batteries or accumulators at no charge when supplying portable batteries or accumulators”
- Art 8(1)(c): “[Schemes] shall not involve any charge to end-users when discarding waste portable batteries or accumulators”
- Art 16(4): “The costs of collection, treatment and recycling shall not be shown separately to end-users at the time of sale of new portable batteries and accumulators.”

From these statements, it should be concluded that the only options left open to producers is a charge levied at the time of sale of a new battery, charge which can only be shown to the distribution chain but which may not be shown in the last transaction between the retailers and the end users.

For automotive batteries from private non-commercial vehicles, the directive states that:

- Art 8(4): “Schemes shall not involve any charge to end-users when discarding waste batteries or accumulators, nor any obligation to buy a new battery or accumulator.”

From this wording, it should be concluded that automotive battery producers (in the case of private non-commercial vehicles) may raise cash only at the time of sale of a new battery, either by means of a visible fee (not prohibited here) or as a hidden charge embedded within the selling price.

For industrial batteries, the directive does not create any such limit, and only states that:

- Art 8(3): Producers of industrial batteries and accumulators, or third parties acting on their behalf, shall not refuse to take back waste industrial batteries and accumulators from end-users...”
- Art 16(1)(b): “Producers, or third parties acting on their behalf, finance any net costs arising from (...) (b) the collection, treatment and recycling of all waste industrial and automotive batteries and accumulators collected in accordance with articles...”
- Art 16(5): “Producers and users of industrial and automotive batteries and accumulators may conclude agreements stipulating financing arrangements other than the ones referred to in paragraph 1.”

From this wording, it should be concluded that producers may be allowed to raise cash either at the time of sale of a new battery or at the time of return of a spent battery. If said cash is insufficient to cover the costs of the scheme, then it is for producers (either individually or collectively) to finance the balance (the net cost). Moreover, Agreements between producers and end-users may be implemented to provide for a different cost sharing structure.

How is extravagant pricing (for industrial waste batteries) made impossible under the directive?

We believe that the text is designed to leave open a possibility for producers to charge end-users provided the charge is not “extravagant”, which would indeed be akin to “a refusal to take back”. Reasoning is as follows:

Article 14 creates a prohibition to landfill or incinerate, effectively requiring waste generators to entrust their battery waste with recyclers.

When turning to private, independent recycling operators, (industrial battery) waste generators will be charged a market price.

What is required of industrial battery producers is to “not refuse to take back”, which essentially forces such (industrial battery) producers to keep their price on par or below the said private independent operators’ market price.

This is how the directive ensures that no “extravagant price” can be charged, since such extravagant price would be akin to a refusal to take back.

Conversely, any price below the (private independent recycling operators’) market price would be attractive to waste generators and could hardly be construed as a “refusal to take back”.

(Such as charge can be raised either at the time of return or at the time of sale. If raised at the time of sale, it can be shown as a separate line item or embedded within the price.)

In this context, art 16(1)(b) must be read as a requirement that producers make up, from their own funds, the difference between what they can raise (within the limitation described in the prior paragraph) and the true cost to them to operate the scheme.

This is why we disagree with the conclusion of section 5.5 that “[industrial] producer take back should be free of charge”, although such producers may elect to do just this.

6 AUTOMOTIVE BATTERIES

6.1 The passages in the Directive relevant to automotive batteries are:

Directive text

Article 8.4. Member States shall ensure that producers of automotive batteries and accumulators, or third parties, set up schemes for the collection of waste automotive batteries and accumulators from end-users or from an accessible collection point in their vicinity, where collection is not carried out under the schemes referred to in Article 5(1) of Directive 2000/53/EC. In the case of automotive batteries and accumulators from private, noncommercial

vehicles, such schemes shall not involve any charge to end-users when discarding waste batteries or accumulators, nor any obligation to buy a new battery or accumulator.

Article 12.1. Member States shall ensure that, no later than 26 September 2009:

(a) producers or third parties set up schemes using best available techniques, in terms of the protection of health and the environment, to provide for the treatment and recycling of waste batteries and accumulators; and

(b) all identifiable batteries and accumulators collected in accordance with Article 8 of this Directive or with Directive 2002/96/EC undergo treatment and recycling through schemes that comply, as a minimum, with Community legislation, in particular as regards health, safety and waste management.

Article 12.2 Treatment shall meet the minimum requirements set out in Annex III, Part A.

Article 12.4. Recycling processes shall, no later than 26 September 2011, meet the recycling efficiencies and associated provisions set out in Annex III, Part B. (*2010 is the date wrongly shown in Directive 2006/66, but this date was changed to 2011 by [Commission Decision].*

Article 12.5 Member States shall report on the levels of recycling achieved in each calendar year concerned and whether the efficiencies referred to in Annex III, Part B have been met. They shall submit the information to the Commission within six months of the end of the calendar year concerned.

Article 14 Member States shall prohibit the disposal in landfills or by incineration of waste [.....] automotive batteries and accumulators. However, residues of any batteries and accumulators that have undergone both treatment and recycling in accordance with Article 12(1) may be disposed of in landfills or by incineration.

Article 16.1. Member States shall ensure that producers, or third parties acting on their behalf, finance any net costs arising from:

(b) the collection, treatment and recycling of all waste [.....] automotive batteries and accumulators collected in accordance with Article[s] 8(4).

Article 16.2 Member States shall ensure that the implementation of paragraph 1 avoids any double charging of producers in the case of batteries or accumulators collected under schemes set up in accordance with Directive 2000/53/EC.

Article 16.5 Producers and users of [.....] automotive batteries and accumulators may conclude agreements stipulating financing arrangements other than the ones referred to in paragraph 1.

Article 16.6 This Article shall apply to all waste batteries and accumulators, irrespective of the date of their placing on the market.

Article 17. Member States shall ensure that each producer is registered. Registration shall be subject to the same procedural requirements in each Member State. Such requirements for registration shall be established in accordance with the procedure referred to in Article 24(2).

RECHARGE aisbl and EUROBAT.

March 13, 2008

JPWx

Annexes.

Attachment 1	Position paper on Compliance and Labelling
Attachment 2	Position paper on capacity marking of rechargeable batteries
Attachment 3	Position paper on Double Charging (WEEE/Batteries Directive)
Attachment 4	Copy of the Decision Tree

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