

Industry Position Statement and Interpretation on the Application of Directive 2012/19/EU Annex VI on Minimum Requirements for Shipments of Used EEE

Brussels, 8 September 2014

1. Introduction

Uniformity in the application of requirements related to movements of goods and waste throughout the Union is of utmost importance for DIGITALEUROPE members.

DIGITALEUROPE members operate or utilize dozens of regional repair and refurbishment facilities. These facilities receive all types of equipment from several locations simultaneously. This regional approach allows for the scaling up of facilities and investment in the capital equipment and trained employees necessary for the effective and responsible operation of re-use programs. The shipment of equipment to and from such locations often involves trans-boundary movements (see figure 1).

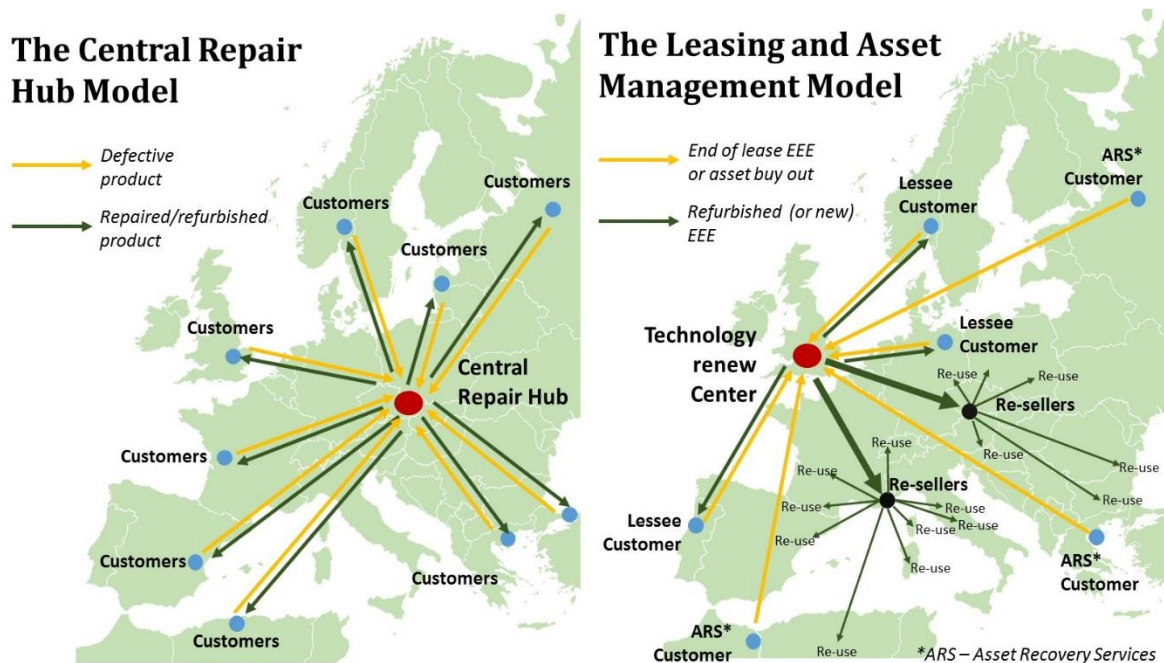


Figure 1: Flows of (U)EEE to and from a typical central repair and leasing/asset management facility

In the interest of a uniform application of Annex VI within the Union and a harmonized approach, DIGITALEUROPE has prepared this paper and accompanying decision tree setting out its

interpretation of the application of Directive 2012/19/EU on Waste Electrical and Electronic Equipment¹ (the **Directive**) with respect to the minimum requirements for shipments of used electronic and electrical equipment laid down under Annex VI of the Directive.

2. Scope of Annex VI

The Directive applies, according to Article 2 of the Directive, to EEE, defined according to Article 3(1)(a). The Directive does not apply to parts or components of EEE unless they comprise EEE in themselves. The European Commission's Frequently Asked Questions document² further elaborates on the scope of the Directive and subsequent exclusions.

Annex VI of the Directive therefore is only applicable to shipments of EEE, which are in scope of the Directive (in line with Article 2), and within the definition provided under Article 3(1)(a). Shipments of EEE explicitly excluded from the scope of the Directive, such as large scale stationary industrial tools, are not subject to Annex VI. This position has been confirmed by the European Commission in its FAQ document. Specific reference is made to FAQ 11.8.

11.8. Does EEE that is excluded from the scope of the Directive have to meet the Annex VI requirements when shipped?

No. EEE that is excluded from the scope of the Directive (e.g. defective large-scale stationary industrial tools and large-scale fixed installations) is not subject to the minimum requirements for shipments of Annex VI.

Similarly, shipments of products which are not EEE in themselves, for example components used to manufacture and/or repair EEE such as server switches, motherboards, internal memory cards, etc., do not fall within the scope of the Directive and are therefore not subject to Annex VI. For these products, determination of waste/non-waste status in the context of a waste shipment is subject to the definition of "waste" provided under Directive 2008/98/EC on waste (The Waste Framework Directive).

3. The Application of Annex VI

Article 23(2) provides that Member States "shall ensure that shipments of used EEE **suspected to be WEEE** are carried out in accordance with the minimum requirements in Annex VI and shall monitor such shipments accordingly."

By the inclusion of the words "suspected to be WEEE", Article 23(2) suggests that Annex VI should not be interpreted as a strict requirement applicable to all shipments of used EEE.

This position has been confirmed by the European Commission's FAQ document. Specific reference is made to FAQ 10.1.

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0019\eel>

² <http://ec.europa.eu/environment/waste/weee/pdf/faq.pdf>

10.1. Does Article 23(2) mean that Member States must impose the criteria in Annex VI for all shipments of used EEE?

No. On the basis of Article 23(2) Member States are required to apply the requirements of Annex VI only in cases where there is suspicion that a shipment of used EEE is a shipment of WEEE. The minimum requirements for shipments should not hinder the legal trade of used equipment. Where there is a suspicion that a shipment is de facto an illegal shipment of waste, Annex VI gives Member States the legal instrument to clarify the situation.

For example, suspicion can be raised because of improper packaging of used EEE. Insufficient packaging for protecting items from damage during transportation, loading and unloading operations is an indication that an item may be waste. Used EEE that is properly packaged is therefore unlikely to be suspected to be WEEE.

DIGITALEUROPE supports this view; however, we note that upon review of Member States' implementation of Directive 2012/19/EU, it is evident that the application outlined above and confirmed by the FAQ document question 10.1 has not been followed by all Member States.

For example, several Member States including Austria, Bulgaria, France, Italy and the UK, have implemented or are in the process of implementing Annex VI of the Directive as a mandatory requirement to be adhered to by the holder or the person engaged in shipping Used EEE.

4. The Application of Annex VI for a person engaged, on a professional basis, in carrying out a leasing business

Leasing companies typically run multi-national operations throughout the Union. It is consequently critical that the rules applying to shipments by them are uniform across the Union.

Lessors must refurbish and, if necessary, repair equipment prior to re-sale or re-lease. The refurbishment/repair process is an essential element in any re-use program. Most leasing operations make use of regional refurbishment and renew centers as described in the introduction to this paper (see figure 1 above).

Leasing companies will not be able to conduct their businesses if different Member States prescribe different rules for leased equipment. The importance of uniformity throughout the Union is specifically referenced in Article 23(4) of the Directive, which empowers the European Commission to enact legislation necessary to ensure uniform conditions for implementation.

DIGITALEUROPE considers that used EEE under a valid leasing contract and which is shipped by a person engaged, on a professional basis, in carrying out a leasing business is not to be considered WEEE. This position has been confirmed in the European Commission's FAQ document. Specific reference is made to FAQ 11.4.

11.4. Does the derogation from the requirements referred to in point 2 of Annex VI apply when used EEE to be shipped is under a leasing contract?

According to the definition of WEEE in Article 3(1)(e), EEE becomes WEEE when its holder discards

or intends or is required to discard the EEE. Used EEE under a valid leasing contract and which is shipped by a person engaged, on a professional basis, in a leasing business, is not WEEE as long as there is no intention from the holder to discard it. Therefore such EEE is not 'suspected to be WEEE', unless there is another reason to believe that the used EEE is not destined for further use (e.g. insufficient packaging and inappropriate stacking of the load).

In the above response, the Commission has specifically stated that Used EEE under a valid leasing contract and which is shipped by a person engaged, on a professional basis, in a leasing business, is not WEEE as long as there is no intention from the holder to discard it. The Commission has subsequently concluded in addition, that such EEE is therefore not 'suspected to be WEEE' unless there is another reason to believe that the used EEE is not destined for further use.

DIGITALEUROPE fully supports this conclusion, however the answer is not fully in line with the question initially asked which is whether point 2 of Annex VI can apply when used EEE to be shipped is under a leasing contract.

Point 2 of Annex VI applies three derogations from the requirements under point 1(a) and 1(b) and point 3 of Annex VI. Considering that several Member States have implemented Annex VI not as a measure to apply upon suspicion of WEEE but rather as a requirement of shipment, irrespective of prior suspicion, DIGITALEUROPE takes the position that question 11.4 is to be interpreted as follows:

Used EEE under a valid leasing contract and which is shipped by a person engaged, on a professional basis, in a leasing business is not to be considered suspicious, or, it should be subject to the derogation under point 2(b) or 2(c) as appropriate unless there is another reason to believe that the used EEE is not destined for further use. The application of this FAQ is represented in the Annex VI decision tree developed by DIGITALEUROPE below.

DIGITALEUROPE consider that in the context of Article 23(2) and the content of the FAQ 11.4, a shipment should not be considered suspicious or it should be subject to the derogation under point 2(b) or 2(c) as appropriate, if it meets the criteria set out below:

- The equipment is being shipped to a technology renewal centre or receiving centre for the purpose of refurbishment or repair with the intention of re-use;
- The equipment is packed with appropriate protection against damage during transportation, loading and unloading in particular through sufficient packaging and appropriate stacking of the load;
- A declaration made by the holder who arranges the transport of the EEE stating that none of the material or equipment within the consignment is waste as defined by Article 3(1) of Directive 2008/98/EC is available.

5. Interpretation and application of the derogations under section 2 of Annex VI

DIGITALEUROPE welcomes the inclusion of three points under part 2 of Annex VI that applies derogations from the requirements under point 1(a), 1(b) and point 3 of Annex VI.

It is imperative that these derogations are interpreted and applied by Member States in a harmonized manner without deviation from the text of the Directive and faithful to the guidance provided by the Commission in the Frequently Asked Questions document. DIGITALEUROPE outlines its interpretation and application of these derogations below.

5.1 Derogation 2(a): Interpretation and application of the term “warranty”

In some EU Languages (notably German), the term “warranty” is similar or identical to the term “guarantee” (“Gewährleistung”) which is a term also used in Directive 2011/83/EC (Consumer Rights Directive) to describe a requirement by the seller or producer to the consumer to replace, reimburse or repair consumer goods if they do not meet the specification set out in the guarantee statement or relevant advertising. The Consumer Rights Directive requires that guarantees are provided for a period of 24 months.

DIGITALEUROPE was concerned that some Member States may interpret the term “warranty” used in section 2(a) of Annex VI to apply to the standard, legally required “guarantee” specified under Directive 2011/83/EC. Under such a narrow interpretation, DIGITALEUROPE estimated that for the ICT sector alone at least 3.3 million products³ currently shipped to or within the EU each year by, or on behalf of manufacturers, for repair as part of an extended warranty or service repair contracts, would not be considered “under warranty” in case Member States interpreted warranty to mean “guarantee” within the context of Directive 2011/83/EC and may be considered waste by such Member States.

Warranty is a widely used term and can also be used to describe additional contractual undertakings, e.g. extended warranties, or warranty obligations undertaken in the context of service, maintenance and repair or replacement agreements.

DIGITALEUROPE discussed this concern surrounding the term “warranty” extensively with the European Commission and the Commission has subsequently provided a definition of the term “warranty” to be used within the context of Annex VI point 2(a) in the Frequently Asked Questions document. Specific reference is made to FAQ 11.3.

11.3. What is the meaning of a ‘warranty’ in the context of Annex VI point 2(a)?

In the context of Annex VI (point 2(a)), a ‘warranty’ can be considered to be either an obligation under national legislation of producers towards consumers for the lack of conformity of equipment on the sale of consumer goods, or any written agreement by a seller or producer to repair or replace equipment if it does not meet the specifications set out in the guarantee

³ There exist no official figures for repairs. The figure of 3.3 million is a conservative estimate arrived at by using repair data of certain DIGITALEUROPE members and extrapolated to the entire ICT sector using a market share approach

statement or in the relevant advertising.

Warranties include, for instance, the legal and consumer guarantees under Directive 2011/83/EC as well as warranties provided by manufacturers and sellers in relation to business-to-business transactions involving EEE. The term also covers additional contractual undertakings, e.g. extended warranties, or obligations undertaken in the context of sales, service, maintenance and repair agreements.

DIGITALEUROPE members fully support this definition and rely upon it for the purpose of evaluating whether a specific batch of UEEE or individual UEEE shipped should be considered “under warranty” under point 2(a), applicable to all EU Member States.

5.2 Derogation 2(b): Interpretation of the OECD restriction for third party facilities.

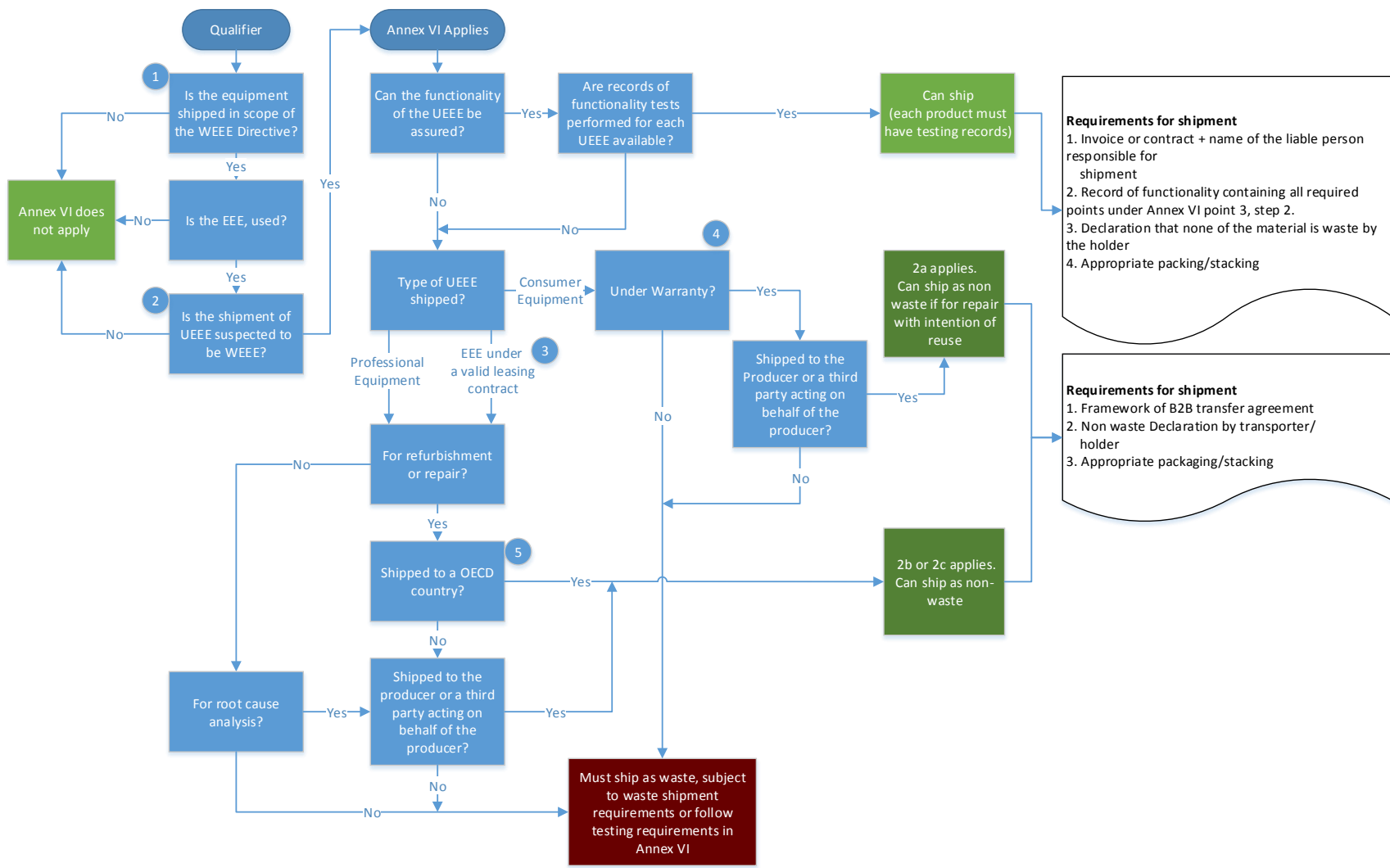
DIGITALEUROPE interprets the reference to the OECD restriction in line with the guidance provided in the Frequently Asked Questions published by the European Commission and relies upon it for application of its members’ processes in line with Annex VI. Specific reference is made to FAQ 11.5.

11.5. In which cases does the derogation in Annex VI point 2(b) apply?

Point 2(b) of Annex VI applies to used EEE for professional use sent for refurbishment or repair under a valid contract with the intention of re-use, sent to

- the producer; or
- a third party acting on behalf of the producer; or
- a third-party facility in countries to which Decision C(2001)107/Final of the OECD Council concerning the revision of Decision C(92)39/Final on control of trans boundary movements of wastes destined for recovery operations applies.

6. Decision tree for the application of Annex VI



6.1. Supporting Explanation for use of the decision tree

The aim of the decision tree is to provide a practical interpretation and application of Annex VI coupled with the guidance provided by the European Commission's FAQ document on the application of Article 23(2) and Annex VI.

Information concerning numbered points in the decision tree:

1. This relates to section 2 of this document
2. This relates to section 3 of this document. Under section 4 of this document we also highlight the guidance under the European Commission's FAQ document question 11.4, which states that EEE to be shipped is under a leasing contract is not 'suspected to be WEEE'.
3. This relates to section 4 of this paper. Used EEE under a valid leasing contract and which is shipped by a person engaged, on a professional basis, in a leasing business is not to be considered suspicious (see point 3) and/or is subject to the derogation under point 2(b) or 2(c) as appropriate, unless there is another reason to believe that the used EEE is not destined for further use.
4. This relates to section 5.1 of this document.
5. This relates to section 5.2 of this document.

--

For more information please contact:

Sylvie Feindt, DIGITALEUROPE's Environmental Policy Director
+32 2 609 53 19 or [Sylvie.Feindt @digitaleurope.org](mailto:Sylvie.Feindt@digitaleurope.org)

ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 58 corporate members and 36 national trade associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

DIGITALEUROPE MEMBERSHIP

Corporate Members

Acer, Alcatel-Lucent, AMD, Apple, BlackBerry, Bose, Brother, CA Technologies, Canon, Cassidian, Cisco, Dell, Epson, Ericsson, Fujitsu, Hitachi, Hewlett Packard, Huawei, IBM, Ingram Micro, Intel, iQor, JVC Kenwood Group, Konica Minolta, Kyocera, Lenovo, Lexmark, LG Electronics, Loewe, Microsoft, Mitsubishi Electric Europe, Motorola Mobility, Motorola Solutions, NEC, Nokia, Nvidia Ltd., Océ, Oki, Oracle, Panasonic Europe, Philips, Pioneer, Qualcomm, Ricoh Europe PLC, Samsung, SAP, Schneider Electric IT Corporation, Sharp Electronics, Siemens, Sony, Swatch Group, Technicolor, Texas Instruments, Toshiba, TP Vision, Western Digital, Xerox, ZTE Corporation.

National Trade Associations

Belarus: INFOPARK

Belgium: AGORIA

Bulgaria: BAIT

Cyprus: CITEA

Denmark: DI ITEK, IT-BRANCHEN

Estonia: ITL

Finland: FTTI

France: Force Numérique,

SIMAVELEC

Germany: BITKOM, ZVEI

Greece: SEPE

Hungary: IVSZ

Ireland: ICT IRELAND

Italy: ANITEC

Lithuania: INFOBALT

Netherlands: Nederland ICT, FIAR

Norway: IKT NORGE

Poland: KIGEIT, PIIT

Portugal: AGEFE

Romania: ANIS, APDETIC

Slovakia: ITAS

Slovenia: GZS

Spain: AMETIC

Sweden: Foreningen

Teknikföretagen,

IT&Telekomföretagen

Switzerland: SWICO

Turkey: ECID, TESID, TÜBISAD

Ukraine: IT UKRAINE

United Kingdom: techUK