



Prague December 19<sup>th</sup>, 2018

No. MPO 92433/18/31200

Dear Madam,

on behalf of the Ministry of Industry and Trade of the Czech Republic and within the public consultation, I take the opportunity to express support for a proposal to grant an exemption, which have been applied for by the AUSTIN DETONATOR s.r.o. - **Request 2018-2 "Lead and hexavalent chromium compounds in electric and electronic initiators of explosives for civil (professional) use"**.

In this context, let me state some facts that should be taken into account in decision-making.

- 1) The electric and electronic detonators produced by the AUSTIN DETONATOR s.r.o. in the Czech Republic, respectively in the Member State of the European Union, belong to the product group No. 11, which will be subject to regulation under the RoHS 2 Directive not sooner than from 22 July 2019. This is a specific product group, which includes all other electric devices, yet uncovered by the directive. Not only within this last product group, the electric and electronic detonators for civilian use have a quite special nature. The practical application of the detonators eventuate in their total consumption and there remains no waste from their use, which could be collected and properly used. All substances are dispersed as a result of the explosion. In consequence of this, it is impossible to meet several objectives of the RoHS 2 Directive that are preconceived in its preamble. In general, in the case of electric and electronic detonators, altogether eight articles of the preamble out of total thirty cannot be applied. This includes articles: 2, 4, 7, 8, 13, 17, 20 and 30. The restriction rules of the use of certain dangerous substances in electric and electronic devices aim to contribute to the mitigation of problems at the end of the life cycle, when electric devices are treated as an end of life product or waste (in the collection, but in particular in the recovery and disposal). **In the case of electric and electronic detonators, fulfilment of that interest cannot be ensured at all for objective reasons.**
- 2) The application submitted relates to electric and electronic detonators for civilian use. Does the RoHS 2 Directive apply also to electric and electronic detonators for non-civilian purposes, respectively, for

military purposes? Not. Owing to the provisions of the article 2 paragraph 4 (a), the equipment necessary for the protection of the essential interests of the security of Member States, including arms, munitions and war material intended for specifically military purposes are excluded from the scope of the RoHS 2 Directive. This **duality in the austerity of regulation** raises the question of its rational substantiation. The difference between detonators is solely in terms of their use, i.e. either civilian or military, because there is no technical difference. In addition, there is also a question of meeting requirements of the RoHS 2 Directive by the manufacturer, concurrently supplying both the military and civil sector with electric and electronic detonators. Even this duality model regarding the same manufacturer must be taken into account. **I find undesirable the duality in access to product that can satisfy in technical terms both the civilian and military use.**

**3) In the European Union, disposing with the detonators either electric/electronic or non-electric intended for civilian use is subject to the rules regulated by the Directive No. 2014/28/EU on the harmonisation of the laws of the Member States relating to the making available on the market and supervision of explosives for civil uses (recast).** The article 1 (1) of that Directive defines its scope by applying to explosives for civilian uses. Explosives, in accordance with the Article 2 (1), shall be understood materials and articles considered to be explosives in the United Nations recommendations on the transport of dangerous goods and falling within Class 1 of those recommendations. The electric and electronic detonators that are covered by the application submitted fall within the scope of the Directive 2014/28/EU. This directive, which is subject to the requirements of the New legislative framework, sets out product requirements, i.e. explosives for civilian use, and is based on the principle of demonstrating compliance with the three essential elements: technical documentation, declaration of conformity and CE marking. An integral part of the Directive 2014/28/EU are essential safety requirements for establishments where explosives are present. These applies both to the design and manufacture of explosives. They include, among other thing, that every explosive:

- a) must be designed, manufactured and supplied in such a way as to present a minimal risk to the safety of human life and health, and to prevent damage to property and the environment under normal, foreseeable conditions, in particular as regards the safety rules and standard practices until it is used;
- b) must attain the performance characteristics specified by the manufacturer in order to ensure maximum safety and reliability;
- c) must be designed and manufactured in such a way that when appropriate techniques are employed it can be disposed of in a manner which minimises effects on the environment.

Besides that, additional specific requirements must be met (see the Annex II to the Directive 2014/28/EU. **Furthermore, detonators must reliably initiate the detonation of the blasting explosives which are intended to be used with them under all foreseeable conditions of use (see the section 3.3 (a) of Annex II to the Directive No 2014/28/EU).**



Essential is the fact that the Directive No 2014/28/EU is a special regulation when compared with the Directive 2011/65/EU. When assessing the legislation affecting the same matter, which is in addition regulated by rules of the same legal force, i.e. by the Directives of the European Parliament and of the Council, it is necessary to apply derogating rules, which are also generally applicable in EU law. The relevant derogating rules, which are of fundamental importance for the interpretation of the relationship between the two legal regulations, are the **rules: *lex specialis derogat legi generali* and *lex specialis per generalem non derogatur***. The first rule means that a specific legal regulation takes application precedence over a general regulation. The second rule reflects the fact that a special legal regulation is not/cannot be abolished or its application cannot be avoided as a result of the existence of a general legal regulation.

Based on the above derogation rules, it is necessary to understand provisions of the Article 3 of Directive 2014/28/EU, which clearly sets out: **“Member States shall not prohibit, restrict or hinder the making available on the market of explosives which satisfy the requirements of this Directive”**. Similarly, it is necessary to understand the meaning of the Article 4 of Directive 2014/28/EU, which provides: **“Member States shall take the necessary measures to ensure that explosives may be made available on the market only if they comply with the requirements of this Directive.”**

- 4) Should, despite that, the basic rules of interpretation be not taken into account between the special regulation and the general rule (see the paragraph 3), I would also like to draw attention to the **aspect of the exercise of the Union market surveillance when applying the rules under both directives**. In the Czech Republic, the inspection of the fulfilment of technical requirements for explosives under the Directive 2014/28/EU is performed by another control authority (The Czech Mining Authority) than the one that performs the inspection of fulfilling RoHS 2 Directive requirements (The Czech Trade Inspection Authority).

It could lead to a speculation about a similar situation regarding the institutional provision of supervision in other EU Member States. At this moment, it is not even possible to change the situation in terms of competences. The use of explosives for civilian purposes is very specific in terms of the authorization to dispose with explosives. **In terms of the RoHS 2 Directive, I would also point out that a standard requirement for a competent authority regarding a sampling procedure associated with electrical equipment and the follow up performance of analyses in accordance with the procedure set out in the technical standards, is, in the case of electric and electronic detonators, either virtually impossible to perform, or only partially feasible at a great expense.** As long as the surveillance over the meeting of RoHS 2 Directive requirements (not only in the Czech Republic, but also in any other Member State) is almost impracticable for objective reasons, **explosive producers in the European Union are potentially at risk of being disadvantaged against non-EU producers** that take advantage of impossibility to carry out a real surveillance. (At this point, I want to emphasize that mere checking of documents does not mean a sufficient inspection.)

In conclusion, I would like to point out that the above arguments go beyond the process of assessing the given application for granting an exemption for electric and electronic detonators and, in my view, when reassessing the scope of the RoHS 2 Directive, the European Commission should seriously address the merits of maintaining electric and electronic initiators of explosives for civil use under the current scope of the RoHS 2 Directive. In my opinion, these products should be permanently excluded from the scope of the RoHS 2 Directive.

As regards the request submitted by the AUSTIN DETONATOR s.r.o., I fully support granting of the maximum possible exemption for a period of five years.

Yours sincerely,

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned to the right of the closing text.

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