

Brussels, 10 March 2014

Comments on Öko-Institut consultation for a review of the RoHS 2 Directive scope provisions – 2nd area of review: EEE newly in scope

Orgalime thanks the Öko-Institut for the stakeholder consultation to provide further input to the European Commission impact assessment on the scope of the RoHS2 Directive as requested by Article 24(1). However, at an earlier stage a similar study has already been carried out by Bio Intelligence Service on behalf of DG Environment¹. We call for taking this earlier study into account in this follow up work.

As a European association representing the European manufacturers of mechanical, electrical, electronic and metal articles as a whole, Orgalime will focus its comments on the impacts of the suggested scenarios to solve the current side-effects of Articles 2(2), 4(3) and 4(4), as listed under section six of the questionnaire, rather than on sections three, four and five, which, in our view, target individual companies.

In this respect, Orgalime hereby substantiates its position on the following scenarios:

SCENARIO 1: RoHS 2 legal text to remain unchanged

Orgalime maintains its views that the “hard stop” provision in Article 2(2) brings no benefit for the environment as it does not prevent non-compliant products from entering the market.

On the contrary, Article 2(2) rather encourages waste generation earlier than necessary, since used equipment, instead of being refurbished, will be used for only a limited time and would have to be discarded even before their end-of-life. This contradicts the WEEE Directive, the Waste Framework Directive and the wider Resource Efficiency policy objectives, which promote reuse according to the EU's Waste Hierarchy.

By preventing secondary market operations, the provision of Article 2(2) not only gives rise to a negative environmental (and legal) impact, but also creates discrimination between different product categories and their environmental relevance without justification.

Additionally, from an economic point of view, any product newly in scope of RoHS2 and legally placed on the market will be declared as non-compliant and therefore illegal as of 22 July 2019. This will impact manufacturers', distributors' and users' assets and stocks, jeopardising their business activities.

¹ [Orgalime Position Paper on Directive 2011/65/EU \(“RoHS2”\): Impact Assessment of Article 2.2](#)

Furthermore, we see issues of general legal inconsistencies which also cause risks and uncertainties for companies: indeed, compliance obligations in product legislation have to be precise, specific and proportionate. Failing to achieve these implies room for free riding and unfair competition, an insufficient level playing field for companies and an arbitrary base for enforcement activities.

Moreover, EU law follows the general rule of non-retroactivity of obligations, with which Article 2(2) would be in conflict, thereby leaving EEE manufacturers in legal uncertainty and imposing disproportionate obligations, risks and impacts on them. Moreover, further negative impacts on companies will arise due to the given deadline of 22 July 2014 to amend the list of restricted substances in Annex II of the Directive.

Given these relevant negative environmental and economic consequences of Articles 2(2), 4(3) and 4(4) in their present form, Orgalime does not support the above mentioned option to maintain the RoHS2 Directive as it stands today.

Finally, these scope-related problems have already been acknowledged by the European Commission in the RoHS2 FAQ Guidance Document based on the consultant BioIS findings and recommendations for the way forward in 2012.

SCENARIO 2: Amendment of Article 2(2) to exclude Categories 8 and 9

Orgalime believes that adding exclusions from the provision of Article 2(2) is not sufficient nor the right way to proceed: the setup of a necessary list of exemptions of affected product groups, including a full assessment of the impacts, would require far more time and resources while still not being able to overcome the general legal inconsistencies. Also, we see difficulties in finding agreement on such a list, as Member States' scope interpretations of RoHS1 and consequently of what the new product groups in scope would indeed have to be, differ.

On the contrary, Orgalime advocates for a horizontal solution beyond categories 8 and 9 and does not see scenario 2 as fit for ensuring legal certainty, proportionality and fair rules to avoid the negative economic and environmental consequences of Article 2(2) in its present form.

An amendment to Article 2(2) in order to align it with the New Legislative Framework and the notion of "Placing on the Market" in particular, would, in our view, be such a horizontal way forward to solve the matter. We therefore suggest also exploring this option.

SCENARIO 3: Incorporation of Article 2(2) into Article 4(3) with the 22.7.2019 as compliance date, thus allowing secondary market operations for non-conform products newly placed on the market before July 2019

As previously stated, Orgalime promotes a generic solution that should not only solve the issue for some sectors newly introduced in scope but for all products falling in the scope of RoHS2 to ensure that no product group would be discriminated against another.

Subject to confirmation of the envisaged alternative wording of Article 4(3), Orgalime believes that the option suggested in scenario 3 also represents a sensible basis for a horizontal solution solving the undesired effects of Article 2(2) in its present form.

Any such incorporation of Article 2(2) in Article 4(3), however, needs to be consistent with the principles of the EU Treaty and the New Legislative Framework (NLF).

We are convinced this option can also provide the necessary coherence and prevent retroactive side effects causing legal uncertainties for EEE manufacturers and imposing disproportionate obligations and risks.

SCENARIO 4: Incorporation of Article 2(2) into Article 4(3) with an earlier compliance date (to be agreed upon with the EU COM), thus allowing secondary market operations for non-conform products newly placed on the market before the respective date

Orgalime draws your attention to the fact that the implementation of an earlier compliance date for non-conforming products newly placed on the market before 22 July 2019, risks a direct conflict with the general rule of non-retroactivity of legal obligations.

Indeed, the Article 2(2) provision, which foresees that any product newly falling under the scope of RoHS2 benefits from the transitional period of 22 July 2019, has already been legally enforced since 21 July 2011.

Bringing forward the compliance date for products newly falling in the scope of RoHS2 also risks undermining manufacturers' preparations for compliance on the basis of the existing Article 2(2), which allows the placing of non-conforming products on the market until 22 July 2019.

Designing new products requires lengthy development cycles. Producers need sufficient predictability, reliability and certainty to develop innovative products; since any such amendment proposal would procedurally- wise have to be adopted by the European Parliament and Council, we challenge that producers could achieve legal certainty in time.

SCENARIO 5: The addition of a spare part provision for non-conform products newly coming into scope and placed on the market before 2019

Orgalime welcomes and supports the implementation of an explicit spare parts exclusion for any other non-conforming EEE products newly coming into scope and placed on the market before 22 July 2019, following the "repair as produced" principle of the Directive.

Such a solution supports EU environmental policy objectives as they support the repair and other secondary market operations for products, which have been legally placed on the market before the RoHS Directive's requirements entered into force.

In addition, we believe that implementing such a coherent provision would prevent unfair discrimination towards any new EEE falling into the scope of RoHS2, that will then be treated in a similar way to the products listed in Article 4(4) from (a) to (f). EEE manufacturers should be given rules that ensure fair competition and a level playing field.

In conclusion, Orgalime believes that Articles 2(2), 4(3) and 4(4) in their present form are going to significantly impact all the products newly in scope of RoHS2 (in particular category 11 small scale installations in addition to categories 8 and 9), as well as all market operators (not only EEE manufacturers) from an economic perspective, while the overall cost benefit ratio appears negative.

We ask the contractor to take into account that providing precise cost figures and quantification at this stage may be somewhat difficult, since it remains unclear which new substances may be restricted via the RoHS2 Directive in the future.

We support:

- **In general, an amendment to Article 2(2) in order to align it with the New Legislative Framework and the notion of "Placing on the Market" in particular, would be a horizontal way forward to solve the matter.**
- **Incorporation of Article 2(2) into Article 4(3) with the 22 July 2019 as compliance date, thus allowing secondary market operations for non-conform products newly placed on the market before July 2019, as long as such incorporation would be consistent with the principles of the EU Treaty and the New Legislative Framework (NLF).**
- **Adding an additional spare part provision for non-conform products newly coming into scope and placed on the market before 2019.**