

Brussels, 3 March 2017

Commission proposal for amending RoHS Directive 2011/65/EU repairs legal certainty for European manufacturers

Orgalime considers the European Commission proposal for a targeted amendment of Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS 2) as a consequent step towards repairing the currently existing inconsistency of articles 2(2), 4(3) and 4(4) of the Directive with the principle of non-retroactivity of legislation, with the New Legislative Framework and with the objectives of a circular economy.

These provisions in their present form cause several concerns:

- Due to the ambiguous wording of articles 2(2), 4(3) and 4(4) of the RoHS Directive, and the use of the term “making available” in particular, compliance obligations on electrical and electronic equipment (EEE) newly in scope of RoHS are neither sufficiently precise nor specific, and therefore in contradiction with the New Legislative Framework (NLF). According to the NLF, product requirements need to apply as of one precisely determined moment in time to ensure fair competition between companies and to provide a reliable unequivocal legal base for market surveillance and enforcement activities. This precise moment in time according to the NLF is the placing on the market of the product.
- EU legislation 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 negative impacts on them.
- From an economic standpoint, 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 businesses.
- From an environmental point of view, article 2(2) brings no benefit for the environment as it does not prevent non-compliant products from entering the market, while it encourages waste generation earlier than necessary. The current wording of article 2(2) bans secondary market operations, such as selling, re-selling, reuse or refurbishment of EEE newly in scope after 22 July 2019. This means that those EEE would face short use and re-use phases and would be disposed of and scrapped earlier than necessary. Used equipment would be used for only a limited period of time and would have to be discarded even before their end-of-life, instead of being refurbished. This is in contradiction with the stated objectives of the WEEE Directive, the Waste Framework Directive and the wider Resource Efficiency and Circular Economy policy.

Orgalime, the European Engineering Industries Association, speaks for 41 trade federations representing the mechanical, electrical, electronic, metalworking & metal articles industries of 24 European countries. The industry employs some 10.9 million people in the EU and in 2015 accounted for more than €1,900 billion of annual output. The industry accounts for over a quarter of manufacturing output and a third of the manufactured exports of the European Union.

www.orgalime.org

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

These unwanted side-effects can in our view be remedied through the now tabled Commission proposal, which replaces article 2(2) by a modified article 4(3) adding the notion '*and to all other EEE that was outside the scope of Directive 2002/95/EC which is placed on the market from 22 July 2019 onwards*'.

While non-compliant EEE new in scope of RoHS would still not be allowed to be placed on the market after the given compliance date of 22 July 2019, products which were lawfully placed on the market before that date, could be re-used, re-sold and refurbished. Thereby, the EU objective for an economy where the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste is minimised, would be supported. We re-emphasise that these modifications relate to products that have been legally placed on the market before the respective substance restrictions applied.

Similarly, Orgalime considers the Commission proposal to modify article 4(4) as inevitable for a circular economy to work in practice. The introduction of an explicit exclusion for spare parts to EEE, newly in scope and placed on the market before 22 July 2019, implements the "repair as produced" principle of the Directive also for such products new in scope. This removes the currently existing discrimination of products newly in scope against products that have already been in the scope previously (and for which the "repair as produced" principle applies). The "repair as produced" principle allows using technologically compatible spare parts for the service, maintenance and repair of products already placed on the market before the entry into force of a new substance restriction. The availability of spare parts offers consumers the reparability of appliances and therefore longer product lifetimes. It also prevents waste generation earlier than necessary. These are elements that regulators expect product manufacturers to deliver on, which manufacturers however cannot deliver on if they are prevented by law from keeping spare parts available.

Finally, Orgalime also considers as a positive clarification the fact that the Commission proposes to amend article 5(2) to specify the validity periods of the exemptions listed in Annex III as at 1st July 2011 for each category of EEE listed in Annex I.

In conclusion, with the transitional date of 22 July 2019 fast approaching, we recommend adopting the Commission's proposed amendments to articles 2(2), 4(3) and 4(4). This would facilitate European manufacturers' compliance efforts with the RoHS Directive, contribute to re-establishing legal certainty for manufacturers as well as market surveillance authorities, while allowing secondary market operations on products that have been legally placed on the market before the respective substance restriction applied.