ORGALIME

Position Paper

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ANALYSING THE INTERFACE BETWEEN CHEMICALS, PRODUCTS AND WASTE LEGISLATION: EUROPEAN ENGINEERING INDUSTRIES' SUGGESTIONS ON HOW TO MOVE FORWARD

1. GENERAL REMARKS REGARDING CONTEXT, PROBLEM DEFINITION AND UNDERSTANDING

Orgalime welcomes the possibility to comment on the Roadmap "*Analysis of the interface between chemicals, products and waste legislation and identification of policy options*".

The sector considers this initiative both, timely and highly relevant, as European engineering industries have been investing over decades into developing and manufacturing plenty of different technological solutions to societal challenges, including resource efficiency, energy efficiency, water quality and efficiency, air quality, waste and waste water collection, sorting or treatment technologies, or more circularity. We not only offer solutions to maintain the value of products, materials or resources in the economy for longer and minimise waste generation, such as through repair, remanufacturing or refurbishment of appliances and systems by Original Equipment Manufacturers and/or accredited centres. We attach great emphasis to continuously reducing resource input into companies' own processes and products, as the most resource efficient solution is the one that does more with the same or with less. The activities of our companies in the EU provide direct jobs to some 11 million Europeans and, with the ongoing digitisation of industry as the key driver of growth, we expect a further boost of simultaneously improving productivity, energy, water, resource and cost efficiency through technology manufactured in Europe for the world.

As a global industry with many European technology champions, we compete through quality, innovation and skills: Easy access to competitive, affordable and quality raw materials that satisfy technological needs is an essential prerequisite for our industries' competitiveness and innovation capacities, as much in a linear as in a Circular Economy.

In its resource and Circular Economy activities, our sector encounters a number of important barriers. These are mostly regulatory (as we specify further in this paper), partly economic (notably consumer demand, attitude, (un)willingness to pay or inappropriate consumer behaviour during use or waste phase), partly practical, but rarely technical, which we would be pleased to see resolved by the current initiative.

Several of them have been well captured in the Commission's study on "*Regulatory barriers for the Circular Economy – Lessons learnt from ten case studies*" of July 2016, which include five case studies related to Orgalime industries.

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In particular, we confirm the following key types of regulatory barriers:

- The lagging or incomplete implementation or enforcement of legislation, notably of the Waste Framework Directive and the Waste Exports of Shipment Regulations
- Different and conflicting national implementation of legislation, most notably Directives and national action plans, observed in the context of the Waste Framework Directive, Basel Convention or WEEE Directive
- Pieces of legislation that conflict each other because they represent conflicting values and for which "balanced choices" from a life cycle perspective will be essential.

Regarding the latter, such **legislative conflicts arise between the following environment policy instruments** that apply to our sector in parallel: Waste Framework Directive, WEEE Directive 2012/19/EU, RoHS Directive 2011/65/EU, REACH Regulation 1907/2006, Ecodesign Directive 2009/125/EC and Energy Labelling Framework 2010/30/EU (review). Other relevant tools include further waste policy acquis (Landfill Directive), the Industrial Emissions Directive 2010/75/EU or the Ecolabel Regulation 66/2010 and EMAS Regulation 1221/2009.

The **type of conflicts between these environment policy instruments** mainly arises in the following respects (which we specify in the annex):

- Double, overlapping and/or inconsistent product information requirements on manufacturers under Ecodesign implementing measures, WEEE, RoHS, REACH and Energy Labelling
- Conflicting requirements regarding product performances (energy consumption, water consumption, durability, restriction of the use of certain substances or end of life requirements)
- Conflicting and/or parallel evaluations and regulations that restrict the use of certain substances in electrical and electronic equipment (EEE) under REACH and RoHS
- Conflicting requirements regarding the push for increasing quantities of secondary raw materials and product specific regulation, such as substance restrictions
- Extended producer responsibility requirements for waste electrical and electronic equipment under the (proposed amended) Waste Directive and sector specific WEEE Directive.

In several respects, however, and especially with respect to the debate on boosting recycled contents into our products, **legislative policy conflicts extend from the above mentioned environment policy tools to EU technical and safety legislation**: according to the General Products Safety Directive, only products that are safe are allowed to be placed on the market. Product manufacturers are liable for any product default or damage, and especially when being asked to use more secondary raw materials in a new generation of products need to remain able to comply with all relevant product legislation, be them environmental, technical or safety related. Especially, arising **liability issues in a Circular Economy** need to be fully taken into account and addressed by the interface initiative to ensure legal certainty for both, the industry and for the consumer, and the acceptance of the Circular Economy in the market.

Therefore, **setting the right focus of the interface initiative** from the outset is key ingredient for its relevance and delivery of effective results for a Circular Economy developing bottom up: the selection of one measure, focus area or potential target actor limits Circular Economy and resource efficiency potentials, since the issue is "**an issue at system level**", as the Commission's 2016 Regulatory Barrier study confirms Orgalime's own assessment.

This is where we see the shortcomings of the context and problem definition and understanding as presented by the present Roadmap and suggest improvements:

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- The Commission Communication "*Closing the loop - An EU action plan for the Circular Economy*" announced an "*Analysis and [prepare] policy options to address the interface between chemicals, products and waste legislation, including how to reduce the presence and improve the tracking of chemicals of concern in products*" as a means to develop policies that can deliver circular economy through a seamless flow of materials recycled from waste as suitable raw materials back into the economy.
- The presented focus and suggested four issues, however, are now limiting the investigation to "*how to reduce the presence and improve the tracking of chemicals of concern in products*". It misses out on what represents the key area of added value of the interface initiative: resolving inherent policy conflicts and "balancing of values", as the 2016 Commission study recommends it, especially in the area of product policy, and a consistent integration, application, implementation and enforcement of these policy choices throughout the EU policy acquis, environmental or other.

Therefore, Orgalime recommends to use the occasion of this initiative to clean out nascent policy conflicts and existing legislative overlaps.

The Commission's proposal for amending Directive 2011/65/EU (RoHS) as presented in January 2016 and currently under final adoption by the European Parliament and Council, represents a balanced, encouraging first example of resolving inherent policy conflicts and establishing consistent legislation that reconciles environmental and economic aspects. **Extending the "repair as produced" principle**, which is the fundamental underlying principle of this proposal and the RoHS Directive as such, **to other legislations** (and the **REACH Regulation** (when further implementing REACH restriction and authorisation) and the **Ecodesign Directive** (when debating end of life requirements) in particular), would be a desirable next concrete step for more circularity in our sector.

2. COMMENTS ON THE SUGGESTED FOUR ISSUE AREAS THAT THE INITIATIVE AIMS TO TACKLE

The Circular Economy does not develop overnight but needs to be built bottom up, from the current economic, technical, social and environmental realities to the future.

We see the need to differentiate between short term issues and mid to long term issues:

- **In the short term**, the issue is to manage well the presence of substances in products and materials legally placed on the market before the REACH legislation entered into force. Innovative waste management technologies, with legally binding waste treatment requirements, will support cleaning up waste streams from the past, thereby pathing the way for better quality secondary raw materials in the future.

- **In the mid to long term**, the issue is about new materials in a new generation of products, which need to be fit for purpose in several respects: in particular, secondary raw materials need to perform from a technical perspective (sufficient quality) and from an economic perspective (reliability of supply of sufficient quantities at competitive prices) to guarantee the fitness for purpose of products and consumer satisfaction. **Material aspects need to be solved at the materials level, product aspects at the product level, to be workable in the supply chain, fair and enforceable.** Here, clear and consistent policy decision of by nature conflicting policy objectives are essential for legal certainty, planning and investment certainty for companies, as well as consumer acceptance and protection.

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The four issues suggested by the Roadmap are limited to a top down perspective, assuming that the better the product design and product information, the better the recycling output would be. This may seem a logical assumption; however, it does not provide a complete understanding of the matter:

Even if all substances of concern were banned from all products as of tomorrow, these substances would still remain present in secondary raw materials for decades, primarily due to the realities of today's waste management (poor and/or illegal performances, mixing of wastes, intentionally added substances during recycling), pre-REACH realities or a lack of implementation of existing waste and chemicals legislation. Also, experience shows that detailed product information does not translate into better recycling output, as recyclers do not have the resources to check detailed information. **We therefore recommend to complement the interface debate by a bottom up perspective** (addressing issues such as better waste management and implementation of existing waste and chemicals legislation).

Also, the suggested areas are primarily looking at issues arising from the perspective of recyclers, instead of **providing a comprehensive, system perspective of the issues at stake**. A Circular Economy is about many actors, and needs, among other, also to accommodate the perspective of product manufacturers. In particular, **we miss the issue of ensuring that product manufacturers can continue to comply with existing product regulation**, such as restrictions of the use of substances of concern in products or energy efficiency requirements as more secondary raw materials enter the market. **Minimum quality standards for secondary raw materials should be set** to facilitate compliance with an increasing number of product information and product performance requirements.

2.1 Comments on the suggested issue "*Insufficient information about substances of concern in products and waste*"

- The availability of information regarding substances in products and waste requires thorough communication in the entire supply chain that faces important **constraints**: confidentiality issues, complex global multi-tier supply chains, diversity of products and industrial sectors for which it is impossible to implement one standardised communication tool, or simply language hurdles or resource constraints, especially for SMEs.
- Information requirements can be a powerful tool, especially if they incentivise consumers to make right buying decisions, as is the case with the EU energy label that we support. However, product information requirements also have shortcomings: there are risks of misleading consumers and even consumer fatigue if too much information is spread (see Eurobarometer findings that confirm that consumers do not want information but regulators tackling issues of concern). Also, there is a risk of exposing European companies to unfair competition if sensitive business information needs to be shared. This is particularly the case for information regarding disassembly of products: knowing how to disassemble a product means knowing how to assemble a product.
- Globally spread and complex supply chains that may change on a daily basis are indispensable for a competitive industry but hinder the information flow towards European manufacturers.
- **Information to recyclers also faces constraints**: even if recyclers would have detailed information about all substances of concern in the waste stream it would not lead to a real improvement of the worker protection and quality of the output, because usually recycling operators are processing mixtures of many different waste streams to achieve larger batches and thus economy of scale. The more mixed waste streams are, the less meaningful the provision of such information, especially at the level of individual products, because waste streams always have different compositions. We are currently experiencing this during the implementation of the existing WEEE and Ecodesign end of life information requirements.

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- The issue is however not only about information on substances in products and waste, but also of **information on substances in secondary raw materials**.
- Increased traceability requirements at product level will lead to increased prices of secondary raw materials, and thereby disincentivise their market uptake in comparison to virgin material.
- The use of information requirements therefore **needs to be carefully weighted and only be imposed if bringing proven environmental benefit.** Providing information for the sake of information does not make sense: it is costly for the industry, confusing for consumers and not improving environment al protection.
- No doubt, **product manufacturers can only provide as good information as they receive themselves in their supply chain**. Substances in products can only be traced if they are traced at the material level and if this information is passed on to product manufacturers by their suppliers. It is important to get supply chain information right from the beginning of the chain. Hence, we see potentials for improvement, such as the following:

- **REACH registration dossiers, where they are incomplete or of poor quality, should be improved and complemented as a matter of priority**: In particular, REACH evaluation needs to ensure the proper implementation of the **ECHA guidance on information requirements and chemical safety assessments, chapter "R.18: Exposure scenario building and environmental release estimation for the waste life stage**"[1].
- Improving the **quality of Safety Data Sheets** for the purpose of supply chain communication and proper risk management measures during the manufacturing, use and waste phase of products, should be a priority, too.
- Improving the quality of safety data sheets will also be essential with respect to article 2.7.d REACH, since recyclers can only benefit from the exemption if, besides the sameness requirement, the recycler has the necessary information corresponding to articles 31 and 32 REACH. Recovered substances not meeting these requirements would indeed be illegally placed on the market without a REACH registration, and would therefore also not be legal for use in new products.

- **Other helpful actions** should in our view include the following:
    - **Harmonised quality standards for secondary raw materials** should be developed and applied throughout the EU.
    - **Waste treatment requires improvement**: more focus should be placed on supporting the market uptake of innovative technologies that support clean waste streams. Enacting ambitious recycling and recovery targets under EU waste legislation and harmonised waste treatment standards to ensure good quality recycling are further important factors for more circularity without compromising other environmental and human health aspects.
      With regard to waste electrical and electronic equipment (WEEE), we call for **applying article 8(5) of the WEEE Directive** and transferring the contents of the existing harmonised European WEEE treatment standards into a legally binding delegated act.

[1] For example, this guidance requires the following:

- "R18.2.3.1 Assessment of the relevance of the waste life cycle stage" p.16: "*during the waste stage milling processes (e.g. for electronic articles) may be carried out, potentially leading to respiratory or dermal exposure. In such cases the registrant would be expected to additionally include the conditions at waste stage into his exposure assessment*".
- "Appendix R18-2 Default release factors for waste treatments processes", which list relevant terminology for waste life cycle stage", p.51 reads: "*In addition, all substances which are included in articles for which specific waste regimes exist, such as vehicles, electric and electronic equipment, batteries and accumulators etc. should be included here. Recycling wastes are normally not hazardous wastes but, especially in the case of complex articles, may contain hazardous components.*
- Table R.18- 12: Correlation of PCs and other wastes to most likely waste treatment processes.

We consider this solution as more ambitious and effective than the voluntary certification of waste treatment facilities that the Action Plan Circular Economy suggests.

The **updated IED Waste Treatment BREF**, as currently under development, should also promote market take up of innovate waste management technologies rather than remain locked in in base technologies, notably mechanical treatment.

- **Ensuring clarity about definitions of "hazardous substance", "substances of very high concern", and now new terms such as "toxic substances" or "substances of concern":** There is no definition of "toxic substance", "substance of concern" or "hazardous substance". REACH provides for a definition of "substances of very high concern" that we support.
- **Implementing a risk-based approach**, focusing product requirements, including information requirements, on areas where there is indeed a risk and a risk for which relevant information is not yet provided by other means, to ensure added value of the provided information.
- The burden of product information requirements on substances of very high concern (SVHCs) should remain **proportionate, fair and targeted to the necessary to properly control risks**.
- Proper implementation and enforcement of EU waste policy acquis, notably in the area of waste shipments, recycling and recovery targets and waste treatment

2.2 Comments on the suggested issue "*Presence of substances of concern in recycled materials and in articles made thereof (including imported articles)*"

- Most of the comments made under chapter 2.1 are also relevant in this area, including for the need for clarity of definitions.
- There is an issue with the presence of chemicals or secondary raw materials in products or spare parts that may later be considered as substances of concern – defined as **"legacy substances"** (waste from long-life products such as building materials). Retrospective obligations to provide information on substances once used under full compliance with legal requirements would be disproportionate and the provision of the information would be technically and procedurally very difficult – in particular in consideration of very long and complex supply chains. Such an approach would be contrary to the Commission's much proclaimed wish to simplify regulation.
- We confirm that there is **no framework that deals with the presence of substances of concern in recycled materials**. As regards the presence of substances in recycled materials in articles, however, there is no legislative gap, since any product legislation also applies to products containing secondary raw materials. The quality of secondary raw materials therefore has to be such that product manufacturers remain in a position to comply with the applicable product legislation, including on substance restrictions.
- There is **no agreed methodology to determine the overall costs and benefits for society of the use of recycled materials containing substances** compared to disposal (including also the potential of recovering energy from waste or the impacts of production of virgin materials in case recycling is prevented). This would also be highly relevant for a proper implementation of the Ecodesign Directive in the area of resource efficiency that would not shift environmental burden from one life cycle stage to another.
- Certain REACH restrictions foresee a **differential treatment when the restricted substances are present in recovered materials** (for example entry 23 of annex XVII REACH).

  We have concerns on such an approach considering the existence of sector specific substance restrictions, RoHS, which product manufacturers need to be able to comply with also when containing recovered material.

- Granting **authorisations for recovered materials** containing substances of very high concern can work as long as article manufacturers are allowed to rely on the granted authorisation, but indeed bear the risk of discriminating European industries against their foreign competitors.
- **Regarding imposing substance restrictions, we stress that more legislative convergence is needed for our sector as both REACH and RoHS apply in parallel** and cover the same uses of the same substances in electrical and electronic equipment. To improve legislative consistency in the electrical and electronic equipment (EEE) sector, we suggest the following:

  - **Applying one common methodology for the identification and evaluation of substances to be restricted in EEE for both, the implementation of RoHS and REACH** (instead of two different ones as is the case today).
    Such a methodology should be based, inter alia, on risk, the availability of reliable substitutes and technical feasibility of substitution. REACH should be the primary vehicle for gathering data and evaluating substances, under full involvement of relevant committees, notably RAC and SEAC.
    - Identifying the proper risk management measure in application of the existing Commission REACH-RoHS Common Understanding during the REACH RMO-A process.
    - When setting a new restriction, granting sufficiently long compliance deadlines determined on a case by case basis, as well as a workable exemptions mechanism as set up under RoHS.

  - The EU's policy in this area must also take into account that industry in Europe heavily depends on the sourcing and easy flow of components from outside the EU for its own activities and the millions of jobs offered to Europeans. Circular Economy to work properly requires **smooth trade relationships of the EU with its global partners.**

2.3 Comments on the suggested issue "*Uncertainties about how materials can cease to be waste*"

- Orgalime would welcome better harmonisation of end of waste criteria across the EU. We regret that the instrument to date has not delivered satisfactory results.
- The ongoing revision of article 6 of the Waste Directive is a welcome opportunity to include quality aspects of secondary raw materials into this legal provision.
- As for the previous case, **where legislative product requirements exist, article manufacturers need to remain in a position to comply with them when using secondary raw materials.**

2.4 Comments on the suggested issue "*Difficulties in applying EU waste classification methodologies and impacts on the recyclability of materials*"

- Any changes to the waste classification should be based on **a coherent methodology**. This will require a proper impact assessment to evaluate the consequences of any proposal in terms of modifying the classifications, which should in particular look into the administrative and economic consequences for more complex products.

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2.5 Other suggested options to solve the situation

As mentioned, solving legislative conflicts and overlaps would provide most added value of the interface initiative.

There is no silver bullet or a "one size fits all" solution, but a combination of measures will be necessary for a workable interface of EU waste, products and chemicals legislation.
De-harmonisation of requirements, especially in the area of product policy, cannot be accepted, since it would disrupt the proper functioning of the internal market for products.

In addition, to possible actions suggested under chapters 1 and 2, Orgalime proposes the following additional policy options:

- Promoting the deployment of innovative technologies throughout the **implementation of the Industrial Emissions Directive**, and the soon to come waste treatment BREF in particular
- To **base public procurement on Life Cycle Costing** to be cost effective
- To evaluate the fitness for purpose of the **existing provisions of the shipment of used EEE under the WEEE Directive**: too stringent requirements, such as used EEE having to be fully functional to be allowed to be shipped, hinders Circular Economy potential in the sector
- **Differentiate new products from legacy products**

As soon as **product requirements** are concerned, the **existing Ecodesign Directive and its Consultation Forum** need to remain the horizontal body for debate on any product aspect in our sector.

Information requirements are the least preferred option of the sector:

- They can easily become disproportionate for product manufacturers while not translating into (much) benefit (see art 33 REACH).
- They generally represent the most complex instrument of all, since requiring data exchange in the whole chain, which is all the more challenging for complex products and global supply chains. It would require access to recycling data, which is not granted today.
- They can easily compromise Intellectual Property Rights: protection of confidential and sensible business data however must not be compromised.

Finally, and to conclude, **a proper balance needs to be found between material aspects to be addressed by material regulation and product aspects to be addressed by product legislation.** This will be particularly relevant for the traceability of substances in materials, where material regulation will have the key role to play in order for product manufacturers to be in a position to deliver through product regulation further on. Product manufacturers need to be able to continue to comply with product specific legislation, such as RoHS or Ecodesign.

We look forward to contributing further to this important debate in the interest of overall sustainable solutions implementing the UN Sustainable Development Goals in Europe.

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ANNEX: Areas of legislative conflicts that require consistent policy objectives and balancing of values

- **Overlapping and inconsistent product information requirements on manufacturers stem from the parallel application of the following existing legislative measures:**
  - Ecodesign resource efficiency information requirements in existing implementing measures
  - Energy Labelling requirements
  - Ecolabel requirements
  - Public interface of the newly established Energy Labelling Product Database
  - Article 33 REACH: presence of substances of very high concerns above 0.1% w/w
  - CE marking (RoHS)
  - WEEE marking obligation of crossed out wheeled bin
  - National labels, such as Blue Angel etc.

- **Conflicting regulations regarding product performances occur form the parallel application of the following legislative measures:**
  - Ecodesign Implementing measures: 29 energy efficiency implementation measures and 13 of these measures also regulate on resource efficiency
  - Article 4 WEEE: Member States to encourage recyclability, disassembly, recoverability of products
  - Draft Article 9 (waste prevention measures) of pending amendment of the Waste Directive
  - Commission ecodesign standardisation mandate regarding resource efficiency requirements
  - Restriction of the use of certain substances in EEE under REACH and RoHS with different substance identification and evaluation methodologies
  - Conflicting requirements regarding the push for increasing quantities of secondary raw materials and product specific regulation, such as substance restrictions

- **Conflicting and/or parallel regulations regarding the use of substances in electrical and electronic equipment (EEE):**
  - RoHS annex II list of restricted substances, evaluated under UBA methodology (art.6 RoHS)
  - REACH restrictions (annex XVII), evaluated under REACH methodology
  - REACH authorisation (annex XIV)

- **Extended producer responsibility requirements for waste electrical and electronic equipment**
  - WEEE Directive establishes (extended) producer responsibility for WEEE management
  - Waste Framework Directive also proposes harmonised EPR minimum requirements (how to organise WEEE take back and further harmonisation of WEEE financing requirements)

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