

Brussels, 6 January 2012

Comments on BioIS Consultation on RoHS II-scope impact assessment study

Orgalime welcomes the opportunity to comment on the Bio Intelligence Service study and would like to confirm its comments raised at the stakeholder meeting on the consultation document of 18 October 2011 as follows:

1. PROPOSED CLASSIFICATION OF PRODUCT GROUPS

Orgalime supports the following proposed product groups and their classification:
Automatic doors, garage doors, electric gates (cat.11) and educational equipment (cat.11).

We also support the proposed exclusions of large scale fixed installations, R&D equipment, satellites and professional electric lawnmowers as non-road mobile machinery.

However, Orgalime feels that a number of proposed product groups stated to be included in the final text of the recast RoHS Directive have been erroneously classified for the following reasons:

- The Commission has clarified in its Declaration to the adopted Recast Directive that article 2.2 means “that electrical and electronic equipment which was outside the scope of Directive 2002/95/EC, but which would be covered by the new Directive does not need to comply with the requirements of this Directive during a transitional period of eight years”. **Consequently, any equipment that has not been in the scope of the Directive 2002/95/EC but will fall in the scope of Directive 2011/65/EC falls under the new category 11, including also equipment, which could otherwise be deemed to be under one of categories 1-10.**
Therefore, the product list needs to be revisited.
- The BioIS product list also considers that **non-electricity driven equipment** as being in the scope of the recast Directive (e.g.: gas water heaters). Orgalime does not share this view for the following reason:
Article 3.1 defines equipment in the scope of the recast Directive “*which is **dependent on electric current or electromagnetic fields** in order to work properly and equipment for the generation, transfer and measurement of such currents and fields*”.
Therefore, the Directive still requires **electricity as the primary energy source** to work properly as a criterion for an equipment to fall in scope. **Gas, petrol or other products – not driven by electricity are in our view not in the scope of the recast Directive.**

Orgalime, the European Engineering Industries Association, speaks for 34 trade federations representing some 130,000 companies in the mechanical, electrical, electronic, metalworking & metal articles industries of 22 European countries. The industry employs some 9.7 million people in the EU and in 2010 accounted for some €1,510 billion of annual output. The industry not only represents some 28% of the output of manufactured products but also a third of the manufactured exports of the European Union.

For example, the listed BioIS category of “petrol engine equipment, e.g.: lawnmowers” is wrongly classified as being in scope.

- Whether **electrical functions included in equipment not driven by electricity** fall into the scope of the recast Directive relates to the newly introduced definition of “**dependent**” meaning that “*the equipment must be dependent on electric current or electromagnetic fields to fulfill at least one intended function*”. Whether or not a certain function represents an “intended function” as required by the given definition needs to be assessed case by case based on the explicit process(es) or action(s) for which the product has been designed for. Where standards exist they can in our view provide guidance for “*intended function*” of the product, and producer manuals, instructions, and websites can be other means to identify the intended function of a product. If electrical energy is used only for startup functions, this type of equipment is in our view not covered by Directive 2011/65/EC.

The listed BioIS category of “petrol engine equipment, e.g.: lawnmowers” is in our view also wrongly classified from this perspective.

- We also note that BioIS proposes products such as, “furniture, clothing, swimming pools, mirrors, suitcases or wardrobes” as “EEE”. This terminology would mean that the whole furniture, swimming pool etc. would have to be RoHS compliant, which, we believe has not been the intention of the recast.

We propose to clarify that the issue is about the **electrical components in equipment not driven by electricity**. In other words: When two different finished products (an EEE and a non-EEE) are joined together and can continue to deliver their function if separated, only the EEE should be assessed if it falls into the scope of the RoHS. E.g.:

- A **bag with a battery charger** is composed of **two finished products**, a bag and a battery charger. The charger is simply placed in the bag. If separated they maintain their function.

The battery charger falls into the scope of RoHS II, will be produced and placed on the market by its own manufacturers conforming to the RoHS with a CE marking.

The bag does not fall into the RoHS scope. It is produced according to the applicable legislation on clothes, textiles, etc.

Adding the battery charger to a bag does not imply that the bag should be compliant with RoHS.

This is an important principle to keep in mind so as to avoid unpredictable consequences, including legislation which is unrealistic. Whenever two finished products are placed together, only the EEE has to comply with RoHS (i.e. a table with electric socket, furniture with a light, a statue with a light, a wooden structure with a display, etc.)

In addition, whether or not certain electric components in **equipment not driven by electricity** fall in scope needs also to be assessed against the **scope exclusions provided for in article 2.4**. Article 2.4.c explicitly excludes equipment that is “**a specifically designed/installed part of another type of equipment not covered by the Directive**” from its scope. For example:

- **Clothing with electrical function (life jackets with a light)** could well satisfy the criteria of scope exclusion art. 2.4.c
- **Wardrobes with lights or tie rotators:** Wardrobes are finished products, namely furniture, where a luminaire or an EEE have been added. The EEE or the luminaire may fall under RoHS- unless it benefits from the exclusion of art. 2.4.c. The wardrobe, as it is not an EEE, does not fall under the scope of RoHS.
- **Weather balloons** are latex balloons filled with helium or hydrogen. EEE are normally attached by a cord to the balloon for many reasons (measuring temperature, taking photos, etc). The EEE may fall under the scope of RoHS (unless it is subject to an exclusion), not the balloon as such. In the vast majority of

cases, it is likely that probably the instruments were already falling under the scope of the RoHS Directive (most in category 9). Each instrument has to be dealt with in accordance with the provision of its own category.

- **Fuse boxes** are not finished products but always components of something else, such as other products, machinery, energy distribution networks, airplanes, ships, etc. As such fuse boxes do not fall into the scope of RoHS but could be required to be RoHS compliant if the product they are destined to falls under the scope of RoHS. In addition, fuse boxes could also be part of a large scale fixed installation or a large scale industrial tool and therefore, do not fall into the scope of RoHS.
- **Lifts and escalators, including** moving walks, stair lifts for disabled, freight lifts etc., are in our view not in scope as they meet the scope exclusion of “large scale fixed installation” (see section 3 of this paper).
- Certain **pumps which are** placed on the market as single functional units as consumer products may fall under the scope of the directive. However, pumps, especially in **professional** applications, are excluded if they fall under one of listed scope exclusions given in article 2.4, i.e.: large scale stationary industrial tools or “part of another type of equipment not in scope”.
- The wording of “**power switches**” is insufficiently clear to identify the product. Supposing this refers to power switches not designed to work with a voltage rating higher than the ones defined for EEE, then these power switches are not EEE but components always integrated into something else, such as a product, a machine, a control panel, an energy distribution network, etc. As such, power switches do not fall into the RoHS scope by themselves; however, they may have to fulfill the RoHS restrictions if the product they are destined to falls into the RoHS scope.
- We would like to ask clarification for the criterion of certain equipment being “**self propelled or not**” as a criterion for scope inclusion/exclusion.

2. EXCLUSION FOR SPARE PARTS FOR CATEGORY 11

Directive 2011/65/EC excludes certain spare parts for categories 1-10 via article 4.4 and 4.5. A similar explicit exclusion for spare parts for category 11 is legally speaking missing in the Directive, but following the logic of the Directive should be introduced.

We invite BioIS to take up this issue, which results from the introduction of a new scope category 11, and support the introduction of explicit similar spare parts exclusions for category 11 in the Directive.

3. LARGE-SCALE FIXED INSTALLATION

Article 2.4 excludes “large scale fixed installations” from the scope of Directive 2011/65/EC and Article 3.4 provides a definition of “large-scale fixed installations”.

Orgalime’s proposed understanding of the exclusion is the following:

Only equipment which fulfils **all** the following conditions is excluded:

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- it should be a large-scale combination of several types of apparatus and, where applicable, other devices,
- they are assembled, installed and de-installed by professionals,
- they are intended to be used permanently in a pre-defined and dedicated location (i.e.: when used, they are not to be removed from the dedicated location of the building or the structure where they are installed/they are integrated to, but during the use phase permanently incorporated into that location). (Note: the previous criterion indicates that also this equipment can be de-installed during another phase than the use phase, e.g.: relocation of an industrial site).

We stress that any scope exclusion needs to be understood in its entire context with its full legal wording that contains several words. In other words, individual words contained in an exclusion cannot be seen as standalone words, but should be understood in the entire context of the legal wording of the given exclusion.

The following terms in the context of the scope exclusion of “large scale fixed installation” should be understood as follows:

- **“large scale” in the context of the scope exclusion of “large scale fixed installation”** means “a combination of several apparatus and devices, where the combination is not intended to be placed on the market as a single functional unit and which is different from standalone consumer products due to, for example, physical volume of the combination, lifespan, number of produced units or custom tailor-made characteristics of the combination”.
- **Apparatus** means “a finished product, i.e.: any device or unit of equipment that has a direct function, its own enclosure and, if applicable, ports and connections intended for end users. Direct function means “any function of a component or a finished product which fulfils the intended use specified by the manufacturer in the instructions for use for an end user”. (=definitions provided in existing FAQ on Directive 2002/95/EC)
“Permanent use “means “permanently incorporated into the location during the use phase, not intended to be moved from the location to another during that phase”. (Note: 1. the definition of the exclusion indicates that also this equipment can be de-installed during another phase than the use phase, e.g.: relocation of an industrial site; 2. The term “fixed” should not be mixed with “moveable, as the term “fixed” in the context of large scale fixed installation still allows that the equipment contains moveable parts.).
- **“Location”** includes “industrial, commercial, and residential locations, such as industrial sites, hospitals, airports, ports or office buildings”.
- **“Professionals”** means “qualified personnel in accordance with national legislation, where it exists”

We also draw your attention to the fact that the term “fixed” should not be mixed up with “moveable”, since the term “fixed” does not excluded that equipment contains moveable parts.

BioIS in our view correctly states that electrical installations, where they satisfy all criteria of the definition, are out of scope.

However, we draw your attention to the inconsistent statement that fire and alarm systems (which represent electrical installations) are proposed by BioIS to be in scope at the same time. These would in our view be in scope as cat. 11 unless they benefit from an exclusion under article 2.4.

4. COMPLIANCE DATE FOR CATEGORY 11 (ARTICLE 2.2)

Article 2.2 addresses the issue as of which date equipment falling in the new category 11 will have to comply with the RoHS requirements.

Article 4.3 requires compliance for medical devices and monitoring and control equipment, which are “placed on the market from 22 July 2014”, and in vitro diagnostics which are “placed on the market from 22 July 2016” and industrial monitoring and control equipment which is “placed on the market from 22 July 2017”.

Following the definition of “placing on the market” as “making available for the first time”, article 4.3 in our view correctly sets one specific date for manufacturers to ensure compliance of their products. It therefore ensures fair competition and the necessary clarity for enforcement authorities. Equipment already in the supply chain can continue to be sold so that remaining stocks do not have to be scrapped.

Unlike the above arrangement for categories 8 and 9, however, article 2.2 introduces a transition period for category 11-equipment, which has been “made available on the market until 22 July 2019”. Since “making available” is defined as “any supply of an EEE for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge” and “placing on the market” is defined as “making available for the first time”, it is clear that EEE can be legally placed on the market until 22 July 2019. However, such equipment could no longer be sold after that date.

In order to avoid negative environmental consequences, such as unnecessary scrapping of appliances that have been legally placed on the market until 22 July 2019, but could no longer be sold to the consumer after that date, we suggest replacing the term “made available” by “placed on the market” in the scope provision of article 2.2 of Directive 2011/65/EC.
We invite BioIS to take up this issue.

5. OTHER ENVIRONMENTAL IMPACTS RESULTING FROM NEW SCOPE PROVISIONS

We would like to stress that substance restrictions can immediately influence the environmental performance of a product at other life cycle stages than the waste phase, and in particular the energy efficiency performance of a product during its use phase.

We therefore underline the necessity for an implementation of the RoHS Directive which is coherent with other EU legislation, as required in article 6 of Directive 2011/65/EC, in particular the REACH Regulation and Eco Design of Energy Using Products Directive and the newly proposed Energy Efficiency Directive.

6. ADDITIONAL PRODUCTS TO BE ASSESSED IN THE BioIS STUDY

In the absence of clarification given by the regulator concerning the scope of the Recast RoHS Directive and its scope exclusions, industry finds it difficult to identify if further scope exclusions for certain products would be needed/would have to be assessed by BioIS. This is also relevant for the recently circulated list of 14 product groups to be impact assessed.

We therefore call upon regulators to provide these clarifications in time.

The indicated timeline of finalising these scope discussions on a new FAQ by the end of 2012 while the BioIS study should be finalised by July 2012 bears the risk that the study will be outdated at the moment the Commission has to decide on its amendment proposal.

Orgalime kindly thanks for taking into account above mentioned comments and looks forward to contributing further to the discussion.