ORGALIME

Position Paper

Brussels, 26 April 2012

Suggestions to improve the wording of the RoHS FAQ in relation to the application of the New Legislative Framework

1. INTRODUCTION

The Directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS) was aligned with the New Legislative Framework (NLF) following its revision on 8 June 2011. It therefore clarifies the requirements applying on the different economic operators, including compliance requirements of manufacturers with CE marking and technical documentation and verification requirements of subsequent actors in the supply chain.

The European Commission has recently launched the revision of the Frequently Asked Questions on RoHS (2005) which, among other issues, address questions relevant to the fulfilment of obligations deriving from the New Legislative Framework.

Orgalime urges the European Commission to align as much as possible the interpretation of NLF provisions in the FAQ on RoHS with the interpretation given in the "Guide to the implementation of directives based on the New Approach and the Global Approach", known as the "Blue Guide". We fear that diverging interpretations will only create additional administrative burden and confusion for compliant economic operators, while opening up opportunities for rogue traders to exploit these divergences in interpretation.

Orgalime also urges the European Commission to conclude promptly the revision of the Blue Guide, in order to give comprehensive and horizontal guidance to economic operators and market surveillance authorities.

Therefore, Orgalime calls upon the FAQ Working Group to clearly state that the Blue Guide is the main reference base for the interpretation of articles aligning RoHS with the NLF (i.e.: articles 7-17 and annex VI RoHS2) and to abstain from establishing own interpretations of the NLF and Decision 768/2008 for the purpose of the RoHS2 Directive.

Consequently, we suggest that the future RoHS2 FAQs include a clear reference to the Blue Book and its upcoming revision with the statement that it applies for RoHS2. RoHS2 specificities, as far as they exist, could be addressed directly in the RoHS2 FAQ.

In this respect, Orgalime suggests the following modifications of the present draft RoHS2 FAQ:

www.orgalime.org

ORGALIME aisbl | Diamant Building | Boulevard A Reyers 80 | B1030 | Brussels | Belgium
Tel: +32 2 706 82 35 | Fax: +32 2 706 82 50 | e-mail: secretariat@orgalime.org
Ass. Intern. A.R. 12.7.74 | VAT BE 414341438

Text in the draft FAQ (version of 5 April 2012)	Orgalime proposal
Q9.1 What do I need to include in my Technical Documentation?	
Article 7(b) requires the manufacturer to draw up the required technical documentation and carry out the internal production control procedure in line with module A of Annex II to Decision No 768/2008/EC or have it carried out. Hence, the requirements for the technical documentation can be found in that same Annex II of the Decision under module A. CENELEC have produced a draft standard on technical documentation expanding on the requirements in 768/2008/EC (prEN 50581 : Technical documentation for the assessment of electrical and electronic products with respect to the restriction of hazardous substances)	Article 7(b) requires the manufacturer to draw up the required technical documentation and carry out the internal production control procedure in line with module A of Annex II to Decision No 768/2008/EC or have it carried out. Hence, the requirements for the technical documentation can be found in that same Annex II of the Decision under module A. ***According to Annex II of Decision 768/2008 it should be possible to check the conformity of the product with the legal requirements by examining the technical documentation that usually contains information on design and production, including specifications of parts and materials used.*** ***CENELEC has produced a draft standard (prEN 50581: Technical documentation for the assessment of electrical and electronic products with respect to the restriction of hazardous substances).***
Reasoning: To facilitate the application for RoHS manufacturers the FAQ should explain in simple words the documentation requirements and the steps that they should follow in order to draw it up successfully. Mentioning standards to be referred to, may be useful.	
Q9.3 Can I have more than one Declaration of Conformity *in the situation when my product falls under the responsibility of more than one Directive?*	
Article 5 of the Commission Decision 768/2008/EC (common framework for the marketing of products) clearly states that any product should only have one Declaration of Conformity covering all relevant Community Acts that apply.	***Yes.*** ***Articles 7.c and 13 of RoHS2 depart from article 5 of model Decision 768/2008/EC. In particular, the NLF requirement that "any product should only have one Declaration of Conformity covering all relevant Community Acts that apply" has not been incorporated in RoHS2.*** ***It is therefore at the discretion of the manufacturer or his authorised representative to draw up one or several declarations of conformity for a product covered by several directives in addition to the WEEE and RoHS directives. According to the Blue Guide chapter 5.4, where several directives apply to a product, the manufacturer or the authorised representative can, cover all the declarations into a single document.***

ORGALIME aisbl | Diamant Building | Boulevard A Reyers 80 | B1030 | Brussels | Belgium
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Reasoning:

Decision 768/2008/EC is not addressed to the economic operators but to the legislator himself. Articles 7 and 13 of the revised RoHS Directive did not transpose the provision of Article 5 of the Commission Decision 768/2008/EC. The FAQ, as a guidance document, cannot lay down stricter requirements than the Directive itself.

Articles 7.c and 13 of RoHS2 erroneously state that "a single technical documentation may be drawn up", being noted that under the NLF the "DoC" and the "technical documentation" are two different kinds of documents that fulfill two different functions :

- The "DoC" is the manufacturer's declaration that his product is in compliance with the applicable legislation.
- The "technical documentation" is the underlying evidence that market surveillance authorities can request from the manufacturer in the conduct of their enforcement activities.

The NLF does NOT require the manufacturer to establish one single technical documentation covering all relevant Community Acts that apply.

Q9.4 Do spare parts need to be CE marked and have a Declaration of Conformity?

Article 3 draws a distinction between EEE (3.1) and spare parts (3.27). Article 4 requires EEE and spare parts to comply with the substance restrictions but the requirements for affixing CE marks under Article 15 only apply to finished EEE. Therefore spare parts that are not EEE (3.1) do not have to be CE marked or have a Declaration of Conformity. Spare parts that are also EEE such as printer cartridges do need to be CE marked and have a DoC.	Article 3 provides for a distinction between EEE (3.1) and spare parts (3.27). Article 4 requires both EEE and spare parts to comply with the substance restrictions, while the requirements for affixing the CE marking under Article 15 only apply to finished EEE. Therefore, spare parts ***which are not units with a function themselves,*** should not need to be CE marked and the manufacturer should not be obliged to draw up a declaration of conformity for them.

Reasoning:

In contrast to article 5 of the Commission Decision 768/2008/EC (common framework for the marketing of products), article 7.c and 13 RoHS2 (erroneously) state that "A single ***technical documentation may*** be drawn up".

Q2.1 What does "Without prejudice to Article 4(3) and 4(4), Member States shall provide that EEE that was outside the scope of Directive 2002/95/EC, but which would not comply with this Directive, may nevertheless continue to be made available on the market until 22 July 2019." mean?

Articles 2(2), 4(3), 4(4) This paragraph states that non-compliant EEE that were outside the scope of RoHS 1 but inside the scope of RoHS 2 must be granted full market access until 22 July 2019, unless the granted transition period is limited via Articles 4(3) and 4(4).	***Because of legal inconsistencies, a correct reply cannot be provided at this moment in time. Therefore, we suggest not including the question in the FAQ at this moment.***

Reasoning:

- Art.2.2, and its notion "making available" instead of "placing on the market" in particular, is not in line with the NLF and the general principle of "non retroactivity of law": Products have to comply with the legal requirements in force at the moment of their first placing on the market.
- In addition, an impact assessment of the scope provisions of RoHS2 is currently pending in view of a possible amendment of the Directive.

Q2.2 In this context what does "making available on the market" mean?	
Articles 2(2), 3(11), 3(12) Making available on the market includes the first placing on the market and all secondary market operations, e.g. resale. This means that the products benefitting from Article 2.2 will have full market access until 22 July 2019. However, after that date none of these products shall be allowed to remain on the market even if they have been placed there before that date. This means that the distribution chain within the EU must be clear of non-compliant products by 22 July 2019.	***Because of legal inconsistencies, a correct reply cannot be provided at this moment in time. Therefore, we suggest not including the question in the FAQ at this moment.***
Reasoning: - Art.2.2, and its notion "making available" instead of "placing on the market" in particular, is not in line with the NLF and the general principle of "non retroactivity of law": Products have to comply with the legal requirements in force at the moment of their first placing on the market. - In addition, an impact assessment of the scope provisions of RoHS2 is currently pending in view of a possible amendment of the Directive.	
Q2.3 Which products benefit from this provision?	
Articles 2(2), 2(1), 3(1), 3(2), 4(3), 4(4) All category 11 products may benefit from the transitional period of Article 2(2), but also products in other categories that only now will fall within the scope of RoHS 2 due to a new scope related provision, such as the now clarified definition of EEE, which comprises any piece of equipment that needs electric currents or electromagnetic fields for at least one intended function.	***Because of legal inconsistencies, a correct reply cannot be provided at this moment in time. Therefore, we suggest not including the question in the FAQ at this moment.***
Reasoning: - Art.2.2, and its notion "making available" instead of "placing on the market" in particular, is not in line with the NLF and the general principle of "non retroactivity of law": Products have to comply with the legal requirements in force at the moment of their first placing on the market. - In addition, an impact assessment of the scope provisions of RoHS2 is currently pending in view of a possible amendment of the Directive.	
Q1.3 When do the new provisions of RoHS 2 apply?	
RoHS 2 entered into force on 21st July 2011 and must be transposed into national laws by 2nd January 2013. At that time RoHS 1 will be repealed. As of 22nd July 2014, the scope will gradually be extended, which means that from the dates mentioned below, the provisions of RoHS 2 will also apply for these types of EEE:	***We suggest adding a reference :*** - ***that article 2.2 is currently under impact assessment following article 24 RoHS2, which requires the Commission to examine the need to amend the scope of RoHS2.*** - ***that the common starting point for judging whether or not a product is new in scope of RoHS2 is the Commission's FAQ on RoHS1 instead of individual Member States' interpretations.***

(Editorial note: Slide on timelines and footnote to Member States' RoHS1 interpretations given in draft FAQ are not copied in here) Cables, spare parts for the repair, the reuse, the updating of functionalities or upgrading of capacity for a specific product category, are in scope from the same date as their respective product category. The requirements for CE-marking and Declaration of Conformity are effective from 2nd January 2013 as considered by Chapter 11 of these FAQs.	

Reasoning:

- Art.2.2, and its notion "making available" instead of "placing on the market" in particular, is not in line with the NLF and the general principle of "non retroactivity of law": Products have to comply with the legal requirements in force at the moment of their first placing on the market.
- In addition, an impact assessment of the scope provisions of RoHS2 is currently pending in view of a possible amendment of the Directive.

RoHS2 is a fully harmonised product legislation, which is to be secured by the Commission in its role as a "Guardian of the Treaty".

Q9.7 Do I need to CE mark and have a Declaration of Conformity for RoHS for equipment in categories 8 and 9 and other equipment newly entering the scope before the substance restrictions apply?

Article 2.2 says that non-compliant products that were outside the scope of RoHS 1 but inside the scope of RoHS 2 have full market access until 22 July 2019, unless there are specific application dates in Articles 4(3) and 4(4). For the purposes of Article 2.2, non-compliant not only means that these products do not need to comply with the substance restrictions but also with the procedural requirements under RoHS 2, including Declarations of Conformity and CE marking. Therefore, although there is no transitional phase for the Declarations of Conformity and CE marking, Category 8 and 9 equipment does not need to be CE marked or include RoHS on Declarations of Conformity until the substance restrictions apply. Other EEE outside the scope of RoHS 1 and inside the scope of RoHS 2 will not require CE marking and a declaration of Conformity for RoHS unless placed on the market from 23 July 2019.	***Delete*** ***Category 8 and 9 equipment does not need to be CE marked or include RoHS in the Declaration of Conformity unless it is placed on the market after the substance restrictions apply according to Articles 4(3) and 4(4).***

Reasoning:

- Art.2.2, and its notion "making available" instead of "placing on the market" in particular, is not in line with the NLF and the general principle of "non retroactivity of law": Products have to comply with the legal requirements in force at the moment of their first placing on the market.
- In addition, an impact assessment of the scope provisions of RoHS2 is currently pending in view of a possible amendment of the Directive.

Q9.9 There seems to be duplication between item 1 and item 4 of Annex VI - both refer to "identification of (the) EEE": "1. No … (unique identification of the EEE)"; "4. Object of the declaration (identification of EEE allowing traceability. It may include a photograph, where appropriate)". How should item 1 and item 4 be interpreted?	
Item 1 should relate to the unique identification of the Declaration of Conformity itself, whereas item 4 should relate to the identification of the EEE (e.g. by referencing the product/model number or by including a photograph). This interpretation is consistent with the European Standard EN ISO/IEC 17050-1 (which formed the basis for the DoC layout in the NLF).	***This clause Q9.9 should be removed from the FAQ document.***
Reasoning: Questions of general meaning and dealing with horizontal NLF issues should not be tried to be clarified individually in guides for specific directives, such as in these RoHS2 FAQs. In particular, this question arose during the preparation of the alignment process in all sectors. It requires a horizontal solution to ensure harmonised interpretation and thus must be dealt with in a revised version of the Blue Guide, which should be discussed horizontally.	
Q 9.13 What is the New Legislative Framework?	
To remove obstacles to the free circulation of products and to create an efficient and coherent European legal framework with regard to the marketing of products the Commission in 1985 introduced the “New Approach” which was further developed in 1990 by the “Global Approach”. The New Legislative Framework (NLF) constitutes the modernisation of the New and the Global Approach. Regulation 765/2008 sets out the requirements for accreditation and market surveillance relating to the marketing of products1. Decision 768/2008 sets a common framework for the marketing of products. This includes model provisions to support market surveillance and the application of CE the marking, definitions of terms commonly used in product legislation (but sometimes used differently at present) and procedures which will allow future sectoral legislation to become more consistent and easier to implement. The decision is only binding upon the EU institutions. To be operational the model provisions of the Decision need to be incorporated into existing Directives when they are next revised. This process is known as “alignment”.	To remove obstacles to the free circulation of products and to create an efficient and coherent European legal framework with regard to the marketing of products, in 1985 the Commission introduced the “New Approach” which was further developed in 1990 by the “Global Approach”. The New Legislative Framework (NLF) constitutes the modernisation of the New and the Global Approach. Regulation 765/2008 sets out the requirements for accreditation and market surveillance related to the marketing of products. Decision 768/2008 sets a common framework for the marketing of products. This includes model provisions to support market surveillance and the application of CE the marking, definitions of terms commonly used in product legislation (but sometimes used differently at present) and procedures which will allow future sectoral legislation to become more consistent and easier to implement. The decision is only binding upon the EU institutions. To be operational the model provisions of the Decision need to be incorporated into existing Directives when they are next revised. This process is known as “alignment”. ***Their relevant parts for RoHS2 have been directly introduced in the RoHS2 Directive during the recast (notably, articles 7-17, annex VI RoHS2).***
Overall, the objective of the NLF is to help the internal market for goods work better and to strengthen and modernise conditions for placing a wide range of industrial products on the EU-	Overall, the objective of the NLF is to help the internal market for goods work better and to strengthen and modernise conditions for placing a wide range of industrial products on the EU-market.

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:en:PDF

market. The package of measures within the NLF – improves the market surveillance rules, to better protect both consumers and professionals, including imports from third countries; – boosts the quality of the conformity assessment of products through clearer and stronger rules on the requirements for the notification of assessment bodies; – clarifies the meaning of CE marking; and – establishes a common legal framework for industrial products in the form of a toolbox of measures for use in future legislation. –	The package of measures within the NLF – improves the market surveillance rules, to better protect both consumers and professionals, including imports from third countries; – boosts the quality of the conformity assessment of products through clearer and stronger rules on the requirements for the notification of assessment bodies; – clarifies the meaning of CE marking; and establishes a common legal framework for industrial products in the form of a toolbox of measures for use in future legislation.
Reasoning: The explanation does not mention that the relevant parts of decision 768/2008/EC have been incorporated directly into RoHS2.	
Q 9.15 What is a Declaration of Conformity (DoC)?	
When a product is placed on the market, the manufacturer or the authorised representative established within the EU are obliged to draw up an EC declaration of conformity as part of the conformity assessment procedure. This declaration must ensure that the requirements of the applicable Directive have been satisfied, i.e. with regard to RoHS 2 the electrical or electronic equipment is in compliance with the substance restrictions of RoHS 2. Article 5 of the Commission Decision 768/2008/EC (common framework for the marketing of products) clearly states that any product should have a single Declaration of Conformity covering all relevant Community Acts that apply.	When a product is placed on the market, the manufacturer or the authorised representative established within the EU are obliged to draw up an ***EU*** declaration of conformity ***("DoC")*** as part of the conformity assessment procedure. This declaration must ensure that the requirements of the applicable Directive have been satisfied, i.e.: with regard to RoHS 2 the electrical or electronic equipment is in compliance with the substance restrictions of RoHS 2. ***The elements to be included in the DoC are specified in annex VI of the Directive.*** ***General information on the DoC is available in the Blue Guide (chapter 5.4, p. 34f).*** ***Delete***
Reasoning: The reference to article 5 of Decision 768/2008/EC conflicts with articles 7.c and 13 of RoHS2, which depart from art.5 . (See also comments on Q 9.3 elaborating on the difference between a "DoC" and a "technical documentation".)	
PROPOSAL FOR A NEW QUESTION 9.16: Should the Declaration of Conformity accompany the EEE?	
Proposed Orgalime response: ***No, article 7 requires the manufacturer only to "draw up" the declaration of conformity. Directives, which require the DoC to accompany the product, state this requirement clearly in the legal text.***	

RoHS2 does not include such a requirement. ***Thus, the distributor is not requested to hold the Declaration of Conformity, but should facilitate the task of market surveillance authorities in acquiring it from the manufacturer.***
Reasoning It is important to clarify to economic operators that they do not need the declaration of conformity to make the product available further down the distribution chain, even if in some reported cases market surveillance authorities insist on collecting it from them.
PROPOSAL FOR A NEW QUESTION 9.17: What are the obligations of the installer?
Proposed Orgalime response: ***Annex VI.3 includes a reference to "installer" in the bracket expression, as this entry has been copied from the model wording of Decision 768/2008, where it is relevant for Directives that include specific obligations for installers. The RoHS2 Directive does not include such specific obligations.*** ***However, if he is also the final distributor in the Business-to-Business supply chain, an "installer" bears verification obligations of article 10 RoHS2.*** *(Note: this question ties in with the SCOPE part of the FAQs, on which Orgalime provides its comments in a separate document).*
Reasoning: The NLF establishes clear requirements on the different economic operators, including manufacturers' compliance obligations (see article 13.3 RoHS2, which reads that "*By drawing up the EU Declaration of Conformity, the manufacturer shall assume responsibility for the compliance of the EEE with this Directive*") and distributors' verification obligations following article 10 RoHS.

For more information, please contact:

Sigrid Linher, Environment Manager, sigrid.linher@orgalime.org
Philippe Portalier, Technical and Standardisation Policy Manager, philippe.portalier@orgalime.org