ORGALIME

OPINION ON RoHS RECAST AMENDMENTS 1-339

Brussels, 4 May 2010

In view of the further proceedings of the European Parliament on the **draft report of Rapporteur Jill Evans** concerning the recast of Directive 2002/95/EC on **the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS)**, Orgalime would like to provide its comments on the 339 amendments tabled in the Environment Committee with its request for your support.

Our comments are grouped according a number priority topics and indicate for each of them
- the proposals for amendments, which Orgalime supports (=positive),
- the proposals for amendments, which Orgalime does not support (=negative),
- those, on which Orgalime has no particular recommendation (=neutral), and
- Orgalime's comments and justification for the proposed recommendation.

TOPIC 1: SCOPE (art. 2, 3, annexes I, II)

Issue	Positive	Negative	Neutral	Orgalime comments and justification for proposed recommendation
Art. 2: Open scope		15 68 110 301		**Orgalime can at this stage not support the proposal to include all EEE in the scope** ("**open scope**"), since the impacts of such a far reaching modification have not been subject to a **representative, thorough impact assessment at EU level**. This, however, is a fundamental principle of Better Regulation. Moreover, even the recently published Danish impact assessment concedes that it covers selective aspects only and that "*the introduction of a general scope, where RoHS covers all EEE, may have quite far reaching consequences and there may be the need for general exclusions for some product groups*." We feel that especially in the area of industrial and professional goods severe and, we presume, undesired effects could occur, including more particularly negative implications at the level of product reliability or safety.
Impact assessment prior to scope extension	146 147			Amendments implement Better Regulation principles. (see also comments under previous point)

Art.2.3. Scope Exclusions		17 41 148		In any case, a distinct set of comprehensive scope exclusions are necessary to avoid double regulation on certain equipment and to avoid regulating on waste streams that are already taken care of separately, especially in the area of industrial/commercial equipment. Amdt 41 and 148 create legal uncertainly by including equipment which is excluded at the same time. For equipment not in the scope of RoHS, other safety legislation applies, including GPSD or worker protection legislation. Also, we question the enforceability of the amendments. In areas where other sector specific substance restrictions legislation applies, e.g.: End of Life Vehicles Directive, clear RoHS scope exclusions need to be introduced to avoid double legislation. Products with high reliability and safety demands, as it is the case for equipment used in business-to-business relationships, need to be addressed very carefully to avoid undesired negative impacts. B2B equipment should therefore not be generally included in the Directive. Art. 2.3 should in our view include at least the following scope exclusions: - military equipment; - equipment which is part of another type of equipment outside the scope; - equipment not intended to be placed on the market as a single functional or commercial unit - fixed installations; - large scale stationary industrial tools; - mobile machinery; - any means of transport; - active implanted medical devices - non electrical and electronic consumables and accessories - equipment for research and development - renewable energy generation technology - spare parts for the repair and upgrade of functions of equipment placed on the market before the entry into force of substance restrictions
- "Part of another type of equipment"- clause	119=120= 121=122	16 115-118	123	We support clarifying the exclusion in line with the Commission's FAQ guidance document.

- Fixed installation	130=131 162=165 163 164		132	Proposals for definitions of scope exclusions that reference the existing EMC Directive will in our view clarify the legal situation and help enforcement of the directive by codifying the existing Commission WEEE F.A.Q.- guidance document.
- Large scale industrial tools	133 172 (or alternativ ely 155)	171 173	134	"Large scale industrial tools" are defined in the Commission RoHS F.A.Q.- guidance document. None of the proposed definitions in amendments 134, 155, 171-173 unfortunately takes up this definition word by word. Out of the given suggestions, amendment 172 is most close to the existing FAQ-definition, which we therefore support. Amendments 171 and 173, however, include the term "fixed", which would as a consequence include all mobile/moveable machinery, such as cranes, in the scope. No impact assessment has been carried out for including further product categories in the scope, which we therefore cannot support.
- Means of transport	112 126 128	109 127 170	129	The exclusion "means of transport" needs to encompass all means of transport, i.e.: by land, air, water and space. The proposed exclusion for motor vehicles (amendment 109) is too narrow to cover all other means of transport. The proposed definition for "means of transport" is also restricted to land transport.
- Non electrical and electronic consumables and accessories	125=141 143 188	14 26 27 106=107 108 179 181 161 167=168 169	154	The RoHS Directive regulates electrical and electronic equipment, which we support. Including consumables and accessories in its scope, however, would mean that products that are of non-electric/electrical nature, (e.g.: printer papers, vacuum cleaner bags, water filters in coffee machines) would fall under its scope, too. The RoHS Directive should apply to electrical and electronic equipment falling under the categories set out in Annex I of the COM proposal. Regarding cables, we would like to stress that cables that form part of the EEE itself are already covered by the directive. For any further extension of the scope, including industrial/professional cables, no impact assessment has been carried out. We therefore object to their inclusion in the scope. In addition, such cables represent products handled by professionals and as such will not end up in the municipal waste stream or dustbins.

- Equipment for research and development	135 174	138	136= 137	Amendments can be helpful for development of new technologies.
- Renewable energy generation technology	144			We support this exclusion in order to avoid that RoHS undermines other EU policy priorities, i.e.: in the area of energy efficiency.
- Photovoltaic solar panel	89		124 142	Included in proposed exclusions for « renewable energy generation technology », which we support.
- Spare parts	140		139	The repair and update of functionalities of products placed on the market before the substance restriction entered into force should be excluded to guarantee the workability of the product and to avoid that it turns into waste earlier than necessary.
- New annex III.a on scope exclusions instead of listing in art. 2.3		114	113 312	While we support all exclusions listed in new annex III.A (amendment 312), we consider article 2.3 to be the better place to establish scope exclusions. Also, the list in annex III.a is not comprehensive, further scope exclusions would be necessary. Amendment 114 creates legal uncertainty by establishing an exclusion to the exclusion.
Annex I (scope categories)	302	300		To be seen together with proposals for an open scope: Orgalime does not support on open scope, since no impact assessment has been carried out. We support annex I of the COM proposal including ten RoHS scope categories.
Annex II (product list)	69=303	304	305	Since an illustrative list of product examples can never follow technological path in time nor be complete, we support the proposal. However, we do not support an open scope.
Review (COM report) on scope and scope exclusions		145 267 272		We support that any scope change should be preceded by a proper impact assessment. However, a general review clause should apply, which would then also include the area of scope. Introducing an additional review clause for the scope “only” before the general review of the Directive, would cause legal instability.
Art.3 Definition of “EEE“	149 150	176	151	Clarifying the term “dependant” used in the definition of EEE in line with the existing Commission WEEE F.A.Q.- guidance document helps improving legal certainty and therefore to avoid free riding. It is however unnecessary to further define “working properly”. Including a reference to the RoHS scope annex is important as otherwise an open scope would apply.

Art. 3 : Definition - "finished product" - Industrial monitoring and control instruments	166	 25		To ensure better coherence with other EU legislation and to improve legal certainty so as to avoid free-riding, the definition of "finished product" given in the Commission's FAQ document should be introduced. The replacement of the term "professional", which is a standing expression, by "industrial" in amendment 25 may cause confusion.
Include nanomaterials in the scope, require labelling and require notification of their use to COM		80 97 100 159=160 175 183 250 261 263 309 310 313 316 317		Orgalime does not support addressing nanomaterials in the WEEE and RoHS Directives, since nanomaterials are used in a wide range of different applications far beyond the EEE industry. We agree that nanomaterials should be investigated and where necessary regulated on, however, this needs to be done at a horizontal level, i.e.: the framework of the REACH Regulation. Many activities in that respect are currently ongoing in the Commission with a view to the REACH review 2012. The proposed definition in amendments 159 and 160 is inappropriate and leads to misleading results: For example, transistors would be covered via this definition, which we assume is not intended and which would in any case be inappropriate.

TOPIC 2: NEW SUBSTANCES RESTRICTIONS AND COMPLIANCE WITH RESTRICTIONS

Issue	Positive	Negative	Neutral	Orgalime comments and justification for proposed recommendation
Scientific facts and impact assessment prior to setting new restrictions	81 82 83 84 88	4 5 6 9	87	We fully support amendments 81-84 and 88 requesting an impact assessment before setting restrictions. Orgalime does not per se object to new substance restrictions. However, such new restrictions need to be scientifically evaluated beforehand and ensure that the shift to alternatives provides better performance in environmental and technical terms. New restrictions would also need to fully tie in with the new European wide EU chemicals regime REACH to avoid undesired environmental results and other negative impacts, such as on product safety or reliability.

				The **Rapporteur's proposal to immediately restrict further 7 (groups of) substances used in EEE**, however, lacks any scientific evidence and justification. Moreover, while the Rapporteur's report claims that the Öko-Institut study would recommend such restrictions, the Öko-Institut study specifically underlined that ***"there can be no robust recommendation as to the need to restrict the use of substances according to the present state of knowledge"***. In particular, consumer safety and fire safety should not be unnecessarily put at risk via new substance restrictions without proper scientific evaluation and certainty on the timely availability and the reliability of alternatives. The **EP's own impact assessment of April 2010** draws the conclusion that "*Given the difficulties in quantifying the costs and the health and environmental benefits and the high uncertainties of the estimates as well as the numerous data gaps* ***it is not possible to derive definitive conclusions*** *(for all the substances to be restricted under the proposals) from this analysis. In order* ***to produce a more robust basis*** *for estimating the magnitude and monetary impact of the health and environmental benefits of restricting the use of halogenated flame retardants and PVC,* ***a more detailed study is required."***
Adoption of new restrictions via co-decision instead of comitology		100		We agree that it may be less complex to tackle exemption requests individually rather than grouped. We have no particular view if substance restrictions should be finally adopted via comitology or co-decision. However, it needs to be secured that the necessary technical details will be provided and that European standardisation committees will be mandated to support RoHS compliance activities. However, we do not support amendment 100, since it refers to nanomaterials, which in our view should be addressed at the horizontal level of the REACH Regulation instead of the sectoral RoHS legislation (see separate entry under topic 1 on "scope).

Art. 4.1: Restrictions - for spare parts - for equipment for upgrading functionality, warranty etc - implantable medical devices	 32 194 30 190 193	 184=185 187 28 29 179 180=181= 182 192 196	 191 186= 188= 189	The repair and update of functionalities of products placed on the market before the substance restriction entered into force and of equipment which benefits from an exemption and was placed on the market before expiry of the exemption, should be excluded to guarantee the workability of the product and to avoid that the equipment turns into waste earlier than necessary. The exclusion for the purpose of repair and upgrade should in our view be more generally worded. Especially, limiting the exclusion to the warranty period is insufficient, since equipment has a longer life time than the warranty period and its repair and upgrade should also after expiry of the warranty period still be possible.
Annex III: List of substances for evaluation - Deletion of annex III - Move annex III substances to recital - Add further substances to annex III		 70 309 310 311	 306= 307= 308 85=86	There is no clarity on the criteria and procedure for adding new substances on annex III. Listing substances for evaluation can easily result in a black list of substances with related market implications and potential negative consequences on innovation. It is therefore important that an impact assessment should be carried out. Also, we are concerned with the overlap of the proposed annex III with the REACH candidate list (which is the pre-step of the annex XIV list of REACH on substances to be authorised). In any case, we do not consider it appropriate to extend the proposed annex III list of four substances with further substances. This would create further overlap with the REACH Regulation.
Annex IV: List of restricted substances and their maximum concentration values				Any new restriction needs to be scientifically evaluated beforehand and ensure that the shift to alternatives provides better performance in environmental and technical terms.

- Add new substances without scientific assessment (including organobromines, organochlorines or PVC) - Deletion of COM annex IV		31 71 79 313 314 315 316 318		In the absence of scientific evidence and impact assessment, we do not support the immediate inclusion of new substances in annex IV. In particular, there has been no impact assessment to demonstrate the environmental benefit of a phase out of brominated flame retardants, chlorinated flame retardants, PVC and its hazardous plasticizers, nor have the socio-economic consequences of the proposal nor the feasibility, suitability or safety of alternatives been assessed. We are surprised with the proposal to restrict PVC based on the Rapporteur's report's claim of PVC "*creating problems for waste treatment*": this conflicts with the **Commission's study findings and the Commission's Green Paper on PVC**, which states the following: - "*At the current levels of chlorine in municipal waste, there does not seem to be a direct quantitative relationship between chlorine content and dioxin formation,*" and - "*It is most likely that the main incineration parameters, such as the temperature and the oxygen concentration, have a major influence on the dioxin formation*" instead. In a **recent article published by Dr. Paul Goodman, ERA Technology**, it is confirmed that the alternatives available today for the proposed new substances for restriction would bear similar effects during incineration and can therefore not improve the present environment situation. If regulators are considering banning substances, it is in our view an essential condition that this should lead to better environmental results. Finally, this ERA article also concludes that the **issue of formation of dioxins and furans during incineration is an issue that is addressed in the EU Waste Incineration Directive.** We do not support the deletion of the existing annex IV as proposed in amendment 318, since this would annul the existing restrictions and render all investment made by industry for compliance with these existing 6 substance restrictions redundant.
Art.3.l: Definition of "homogeneous material"			23 24 156 157 158	Amendment 23 improves the COM proposal to some extent. However, we feel that the following definition would provide for more legal certainty for the many different products covered by RoHS: "Homogeneous material ***shall mean either*** a material of uniform composition throughout***, or a material*** that cannot be mechanically disjointed into different materials meaning that the materials cannot be separated by mechanical actions, such as unscrewing, cutting, crushing, grinding or abrasive processes."

				In any case, **European standardisation bodies need to be mandated** to render any definition of homogeneous material workable in practice. We therefore support amendment 256 (see also next point).
Art. 4.7 a (new) and art.6: RoHS compliance	213 253 256 264 265	45 47 208 209 266	257 258= 259= 260	The Directive itself will provide for the **essential requirements for RoHS compliance** (i.e.: the level of allowed maximum concentration values (MCVs) per homogeneous material of an EEE, as well as a definition of homogeneous material that applies for all covered product groups at a horizontal level. Further technical details, however, are needed and should be developed via **European standardisation bodies** to secure a level playing field. We fully support reintroducing the requirement to establish the level of tolerated **maximum concentration values (MCVs)** for each restricted substance in art. 5 (amendment 213), since this is a pre-requisite for fair competition and legal certainty.

TOPIC 3: RELATIONSHIP RoHS AND REACH (Art 1, Art. 4.7, Art 5.5, New Recitals)

Issue	Positive	Negative	Neutral	Orgalime comments and justification for proposed recommendation
Assess added value of RoHS Directive during Reach review	90=103	7 111		We fully support amendments 90 and 103. Today, the electrical and electronics industry sector is included in both, the scope of the RoHS Directive and the scope of the REACH Regulation. Both, REACH and RoHS, claim to lay down the rules for the restriction of substances. RoHS claims to do so for electrical and electronic equipment. The scope of REACH is broader and regulates substance restrictions for a broad range of industrial sectors also beyond the EEE sector. Establishing parallel frameworks for substance restrictions in EEE, however, is neither helpful for the environment, since it easily results in conflicting requirements, nor fair to the industry, since it will have to comply with two different laws while supplying products to all other industrial sectors that have to comply with REACH and bearing the financial and economic consequences of (unnecessary) double legislation. Clarification of the link and relationship between the REACH Regulation and the RoHS Directive is therefore an important matter.

Art. 4.7 (and art.6.a new): Methodology for new restrictions consistent with Reach / Review of the measures of the Directive	101=102 201 202=203 204 207	34 48 198 199 200 205 268 269 270	197	Orgalime supports that there should be clear criteria and procedures for identifying and evaluating substances before restricting substances in EEE. This improves transparency and increases the quality of legislation. A concise and encompassing methodology already exists under the EU's harmonised chemicals law, the REACH Regulation (title VIII). This methodology has been developed in co-decision. The REACH Regulation itself and several subsequent guidance documents explicitly state that REACH covers the waste phase. Also, all products in the scope of RoHS fall in the scope of REACH. Therefore, we believe that this existing methodology is also fit, besides of being readily available, for establishing RoHS restrictions. In particular, we oppose that the RoHS methodology should look into the waste phase from an isolated perspective. It is important to embed also an assessment of the impacts of a substance occuring during the waste phase into a life cycle perspective to avoid arbitrary environmental results. An isolated focus on the waste phase particularly ignores that the significant benefit that a substance can bring during other life cycle stages (e.g.: on energy efficiency during the use phase). Once restricted under RoHS, such substances could no longer be used to explore these other benefits We support amendments that suggest involving stakeholders in the process.
Relationship REACH authorisation and RoHS exemptions	243 247 248	44 49 104 206 242 244 271 273		The RoHS recast proposal specifies that for existing RoHS exemptions and finally approved future RoHS exemptions, no REACH authorisations would have to be sought. We welcome this proposal in the light of improving consistency and legal certainty. However, there still remain some uncertainties and possible risks of overlapping requirements to be fulfilled by producers of EEE considering that the four substances listed for assessment in annex III of the RoHS recast proposal are already included in the REACH candidate list for evaluation and are likely to be included in the future REACH annex XIV list of substances to be authorised, too. Restrictions for these very same substances could also be adopted under REACH soon. Since requirements on REACH authorisation will enter into force earlier than a recast RoHS Directive, it remains unclear today in how far granted authorisations under REACH would account for possible exemptions from RoHS.

				We believe that amendments 49, 206, 271, 273 unnecessarily duplicate law. Amendment 104 introduces legal uncertainty by creating a RoHS evaluation of the any evaluation carried out under REACH.

TOPIC 4: EXEMPTIONS MECHANISM, CRITERIA AND RENEWEABILITY

Issue	Positive	Negative	Neutral	Orgalime comments and justification for proposed recommendation
Art. 5 Criteria for exemptions - Deletion of "socioeconomic criterion" - Definition of "socioeconomic criterion" - Deletion of criterion of "ensurance of availability and reliability of substitutes"	215 220 237	211 217 39 91 92 216 153 10 38	212	Orgalime supports improving the criteria and procedure for granting exemptions to established RoHS restrictions. In particular, the criteria of **availability and reliability of a substitute** are prerequisites for successful substance phase out. Otherwise, product safety or product performance is at risk and the competitiveness of European industries would be hampered. Also, the **socio economic criterion** needs to be secured to guarantee a workable process and alignment with the REACH Regulation. The proposed definition for this criterion within RoHS is, however, contrary to the claim of the author of amendment 153, is not in line with the understanding of annex XVI of the REACH Regulation on "socio-economic analysis". In particular: - Annex XVI includes impacts on human health and environment - Annex XVI states that the analysis may include the following in addition to "availability, suitability and technical feasibility of alternative substances and technologies": o Impacts on the applicant, on industry, on all other actors in the supply chain, on investment, on research and development, on innovation, on one off and operating costs o Impacts on consumers o Social implications o Wider implications on trade , competition and economic development o Proposals for other regulatory or non regulatory measures o The benefits for human health and the environment as well as the social and economic benefits

- Stakeholder Consultation on exemption applications and impact assessment before granting exemption	296=297 (or alternatively: 239 240=241)		43	- Introducing a **format for applying for exemptions** and **for the consultation of stakeholders** as well as **deadlines for the Commission for taking decisions** will improve the transparency and legal certainty of the process besides facilitate the preparation for RoHS compliance in companies. However, a **substitution plan** cannot be submitted in all cases (as suggested in amendment 338), i.e.: if no alternatives are available. We support that an **analysis of alternatives** should be provided.
- Applications for exemptions		46 236 254 255 338	246 249	We feel that amendment 249 goes in the right direction; however, it proposes type A and type B exemptions with differentiated but fixed validity periods, which we do not support. The validity period of each exemption should be judged on a case by case basis depending on technical facts and product characteristics (see next comment).
Review / renewability of exemptions - case by case	42 second sentence until end 94 95 96 224=226 227 229	11 42 first sentence 72 73 74 228 232 233	225 230 231	To clear supply chains, to carry out necessary testing and to implement reliable alternative solutions without compromising the functionality, technical and safety reliability of EEE, industry needs **realistic time frames for the review and validity of the individual exemptions on a case by case basis, instead of any fixed maximum validity period of a certain number of years for all exemptions at once** (4years/10years/Type A/Type B) or the practice of expiry of an exemption for procedural reasons alone. **Reviews on a case by case basis** are also recommended by the Commission's own preparatory RoHS study carried out by the Öko-Institut. We also strongly reject the implementation of a fixed validity date for those exemptions, where no technical alternatives exist at the time of stakeholder consultation.
- Review exemptions according to 2 types after 4 years or 10 years		93 177 178 214 218 219 221		

- Review exemptions for cat. 9		223 234 245		
Transition period in case of expiry of an exemption	238		235	**Transition periods** are necessary in cases where the review concludes to terminate a certain exemption in its entirety by a given date to implement the final substance ban in global, complex supply chains of companies.
Adoption of exemptions via comitology (but not scope annexes)	36 40 99	35		We agree with the proposal in amendment 36 to adopt exemptions via comitology, but the decision on whether or not a product should fall in the scope of the Directive represents a political decision and should therefore be taken in co-decision. Regarding amendment 35, the Commission wording of "annexes" includes the modification proposed by the Rapporteur.
Annex VI: - Exemptions for categories 8 and 9	319=320, 321 322 323= 324 325=326 327 328=329 330=331 332=333 334=335			The exemptions proposed for categories 8 and 9 (amendments 319-335) are supported by the recent updated study of ERA Technology, which we support.
- Exemptions for category 11	12 33 37 195 210 336=337			Orgalime does not support the introduction of a new cat.11, since it would result in an open scope. For any category falling in the scope, however, it is necessary that exemptions can be granted.

OTHER TOPICS

Issue	Positive	Negative	Neutral	Comment
Adapt Directive to Lisbon Treaty (Legal base, Comitology procedure)			77 78 98 251 252 295 298 299	No particular comment.
Art.1 and several recitals: Objective of the Directive	13=105	3	1 2	No particular comment.
Art. 3: Definitions "manufacturer", economic operator", "technical specification", "recall", withdrawal"	18 19 20 21 22 152			The amendments align these definitions with the New Legislative Framework, which we support.
Information to third countries			262	If the EU provides such information to third countries, third countries should commit themselves to provide similar information on their national legislation to the EU.
Transposition deadline for Member States			67	No particular comment.
Alignment with New Legislative Framework (NLF)	50 51 54 60-62 64 66 75 76 277	52 55 56 58 59 63 65 274 275	53 57 282	We support aligning the RoHS Directive with the New Legislative Framework, which will contribute to better legal consistency and facilitate compliance in companies. Manufacturers' obligations with regard to non-compliant products are regulated in other New Approach Directives regulating product safety that also counts for RoHS. Amendments 278-280 are consistent with both Article 7(3) of the Commission proposal, and also module A of Annex II to Decision No 768/2008/EC, which is referred to in Article 7(2) of the Commission proposal:

	278=279= 280 281 283 284 285 288 290=292 293 294 339	276 286 287 289 291		"Placing on the market" means "the first making available of a product on the Community market" (ref. Article R1(2) of Decision No 768/2008/EC), which is a specific moment in time that only occurs once and therefore clearly specifies the moment for RoHS compliance. In contrast to components and materials, electrical and electronic equipment as finished products cannot be "tested" to show compliance. These can only be assessed for compliance. Amendments 290, 292 and 293 clarify this properly. Also, these amendments make it clear that the use of relevant standards should not be limited.

Orgalime, the European Engineering Industries Association, speaks for 33 trade federations representing some 130,000 companies in the mechanical, electrical, electronic, metalworking & metal articles industries of 22 European countries. The industry employs some 10.6 million people in the EU and in 2009 accounted for some €1,427 billion of annual output. The industry not only represents more than one quarter of the output of manufactured products but also a third of the manufactured exports of the European Union.