



ORGALIME¹ guidance on Producer Responsibility in the proposed WEEE Directive

Notes for the conciliation process

9 July 2002

This document gives the industry's opinion in advance of conciliation of the WEEE Directive. It sets out for policy makers the principles regarding producer responsibility on which the WEEE directive should be based. It comments on the most recent formulations of Article 7 (referring to products from private households) and related provisions, as put forward by the EU institutions involved (for convenience, see Annex II).

The texts resulting from the Second Reading of the European Parliament and the Common Position of the Council of Ministers appear to be converging on a number of the principles outlined below, but there are a number of discrepancies that must be addressed.

Principles for Producer Responsibility in the WEEE Directive

All sections of industry covered by the proposed legislation share a common vision of how the EU should apply producer responsibility to WEEE and would like to see the Directive apply the following principles:

- ***Producer responsibility for products sold in the future, Article 7.2***

As a fundamental principle, producers should only be legally responsible for the costs associated with the take-back and treatment of their own products. This would be compatible with the “polluter pays principle”, would give companies legal certainty and would establish an incentive for the design of products.

Producers must never be required to pay for costs over which they have no control. Industry therefore supports the European Parliament's Amendment 41 for Article 7.2, together with Amendment 19 for Article 3. This particular principle has been backed by non-governmental environmental and consumer organisations.

It is important to note that individual producer responsibility is not in contradiction with the establishment of collective systems/schemes to carry out take-back, treatment and recycling of waste (please see Annex I for more explanation on this aspect).

¹ Orgalime represents the mechanical, electrical, electronic and metal working industries of 21 European countries. Its 31 member federations represent over 100 000 companies of all sizes. With production valued at 1200 billion euros in 2001, and employing 7.5 million people, the engineering industry is the largest industrial sector.

- ***A flexible approach to financing, Article 7.2***

The flexible approach to financing proposed by the European Parliament's Amendment 41 is crucial. In cases where precise allocation of costs between individual producers is not feasible in practice for technical or economic reasons, it must be possible for producers to share the costs.

- ***Strong measures to prevent "free riders", Article 7.4***

The Directive must be drafted so that it can be rigorously applied by Member States to ensure that no actor can either intentionally or unintentionally evade his individual legal responsibility. Industry is strongly opposed to the Council's proposal for Article 7.4. As drafted, this paragraph would require the remaining producers to pay for the take-back, treatment and recycling of products from producers that had meanwhile disappeared without making provisions for the end of life treatment and recycling of their products. This fails to address the free-rider problem and could easily become an incentive to free ride.

Instead, it is essential to avoid a situation where free-riders arise. The European Parliament unanimously proposed Amendment 92 to Article 7.4 to do just that: to prevent the problem happening in the first place rather than trying to cure it afterwards. It requires that each actor placing products on the market provides guarantees (e. g. recycling insurance, a blocked bank account or participation by the producer in appropriate financial schemes for the financing of the management of WEEE) for the future recycling of these products. The objective is to prevent society or remaining producers having to pay the costs of the management of WEEE from producers that are no longer present. This provision is of utmost importance as it establishes a means by which enforcement authorities would be able to prevent free-riding (i.e. where products are put on the market but their future recycling cost is not covered).

Along the same lines, the European Parliament has also sensibly suggested to draw up a register of producers (Articles 11.1 and 14a). This would be an important tool to limit the existence of free-riders.

- ***A fair deal for producers on historical waste (waste from products sold before the Directive), Article 7.3***

Imposing a legal obligation on producers for historical waste is a questionable principle in law. If producers are required to finance the recycling of historical waste, then this cost can only be shared collectively by all producers, in proportion to their respective market share when the recycling cost occurs. Producers should also be explicitly allowed to show the recycling cost for historical waste on their products for ten years, as proposed by the European Parliament. Although the Council does refer to the concept broadly in a recital, industry wishes to see this brought firmly into Article 7. The European Parliament's proposal for Article 7.3 contained in Amendment 42 achieves this.

- ***Take-back, Treatment and Recycling systems***

It is important that existing schemes in certain Member States be allowed to continue their operations after the Directive has entered into force, as has been proposed by the European Parliament's version of Article 7.3 in Amendment 42. To meet their obligations in the most cost-effective manner, producers must be allowed to set up take-back, treatment and recycling schemes that may be operated collectively. Both the Council and European Parliament have clarified this usefully in Articles 4.1 and 5.1. As this continues, nonetheless, to be a point of occasional confusion, please see the attached Annex I explaining that such arrangements are not in contradiction to the principle of individual producer responsibility.

Annex I

Producer Responsibility and Recycling Systems

Notes on the distinction between Producer Responsibility and Take-back, Treatment and Recycling Systems/Schemes

Article 7 (referring to products from private households) deals with the legal financial obligation of the producers, whereas Articles 4 and 5 deal with the practical handling of waste.

Through Amendments 19 and 41 the European Parliament is introducing the overall goal of individual producer responsibility for products sold in the future, with the objective of giving manufacturers an incentive to the design of products by ensuring that individual companies benefit from their own efforts.

It is correct to specify, as the Parliament has done, that each producer should be responsible for the recycling and financing of the products it has produced. This would be compatible with the “*polluter pays principle*” and legal principles requiring that an actor should only be made responsible for activities under its control. With the Council wording for Article 7.2, the legal responsibility would not be established in a clear way, making it difficult for enforcement authorities to judge who was responsible for what in case of problems.

It has been claimed that the emphasis on individual producer responsibility as introduced by the Parliament would make it necessary that

- each producer has to set up his own take-back, treatment and recycling system for the products he has produced and that
- producers would not be allowed to organise collective recycling systems.

These claims are based on a misunderstanding. Individual responsibility can be achieved within and is compatible with collectively set up and operated take-back, treatment and recycling systems.

Articles 4 and 5 will ensure that producers can work together to handle the take-back, treatment and recycling of end-of-life electric and electronic equipment. Even if it is unlikely that a company would choose to set up its own recycling system, this should still be a possible alternative, as is foreseen with the formulations of Articles 4 and 5.

Producers foresee setting up and using collective take-back, treatment and recycling systems as a pragmatic solution to the handling of waste electric and electronic products. Differentiation of the financing will be investigated and used where beneficial within such collective systems.

The European Parliament’s amendments to Article 7 are widely supported by the industry sectors concerned.

Annex II

Comparison between European Parliament Second Reading and Council Common Position

Background

The Common Position is shown in the left-hand column, the European Parliament's adopted amendments at Second Reading are shown in the right hand column. The texts reproduced here relate essentially to producer responsibility and recycling systems.

Recycling Systems

EP Amendment 23 Article 4

4.1.b

...

Without prejudice to the provisions of (a) and (b), Member States **may allow** producers **to** set up and operate individual and/or collective take-back systems for their WEEE.

...

4.1.b

...

Without prejudice to the provisions of (a) and (b), Member States **shall ensure that** producers **can** set up and operate individual and/or collective take-back systems for their WEEE.

...

EP Amendment 24 Article 5, paragraph 1, subparagraph 1

1. Member States shall ensure that producers or third parties acting on their behalf, **either on an individual and/or collective basis**, in accordance with Community legislation, set up systems to provide for the treatment of WEEE.

...

1. Member States shall ensure that producers or third parties acting on their behalf, in accordance with Community legislation, set up systems to provide for the treatment of WEEE **using state-of-the-art recovery and recycling technology.**
The systems may be set up by producers collectively and/or individually.

...

Producer Responsibility for Products Sold After the Directive

EP Amendment 19 Article 3 (new)

1 a) 'individual financing' means the responsibility of each producer for the costs associated with its own products.

Article 7.1 (Not modified by EP)

1. Member States shall ensure that, thirty months after the entry into force of this Directive, producers provide at least for the financing of the collection, the treatment, recovery and environmentally sound disposal of WEEE from private households deposited at collection facilities, set up under Article 4(1), onwards.

EP Amendment 41 Article 7.2

2. The financing referred to in paragraph 1 of the management of WEEE shall be provided by means of collective and/or individual systems in accordance with Community legislation. There shall be no Unjustified differentiation between Producers who opt for collective systems And those who opt for individual systems.

2. Member States shall ensure that the financing referred to in paragraph 1 is provided on an individual basis. To this end, Member States shall ensure that producers make provision for appropriate guarantees for the financing of the management of WEEE.

A Member State may, following a request to the Commission, use collective financing schemes if it can demonstrate that the introduction of individual financing schemes would involve disproportionately high costs.

The costs of collection, treatment and environmentally sound disposal shall be internalised within the product price.

Member States in which other financing agreements are already in place before the entry into force of this Directive may maintain those agreements, subject to the outcome of a review, but for no longer than ten years after the entry into force of this Directive.

Producer Responsibility for Products Sold Before the Directive (Historical Waste)

EP Amendment 42
Article 7.3

3. The responsibility for the financing of the costs of the management of WEEE from products put on the market before the ***entry into force of this Directive*** ("historical waste") shall be ***provided by one or more systems to which all producers, existing on the market when the respective costs occur, contribute proportionately.***

3. The responsibility for the financing of the costs of the management of WEEE from products put on the market before the ***expiry of the period referred to in paragraph 1*** ("historical waste") shall be ***shared collectively by all producers existing at the time the costs arise in proportion to their respective share of the market by type of equipment.***

Member States shall ensure that, for a transitional period based on the average life of equipment, but for no longer than ten years after the entry into force of this Directive, producers are allowed to show users the cost of collecting, treating and disposing in an environmentally sound way of historical waste on a voluntary basis at the point of sale of new products.

Producers making use of this provision must ensure that the costs mentioned represent the actual costs incurred.

Free-riders

*EP Amendment 92
Article 7, paragraph 4*

4. The management of WEEE coming from producers that are not longer present on the market or which can no longer be identified *at the time when the costs occur shall also be financed by producers, and Member States may provide that it is financed in accordance with paragraph 3.*

4. To prevent costs for the management of WEEE coming from producers that are not longer present on the market or which can no longer be identified (orphan products and free-riders) from falling on society or the remaining producers, Member States shall ensure that producers provide a guarantee when placing a product on the market, as specified in paragraph 2, and that producers clearly mark products in accordance with Articles 9(3a) and 10(1a). The guarantee shall be used to finance the management of WEEE from producers that have disappeared. The guarantee may take the form of a recycling insurance, a blocked bank account, or participation by the producer in appropriate financial schemes for the financing of the management of WEEE. Where an importer cannot provide any of the above, customs authorities shall charge a guarantee provision (together with VAT and customs duties) when the product enters the EU.

Producer Responsibility & Distance Communication

Article 7, paragraph 5 (Not modified by EP)

5. Member States shall ensure that producers supplying electrical or electronic equipment by means of distance communication also comply with the requirements set out in this Article for the equipment supplied in the Member