



Assessing the Interpretation of the Producer Definition under Directive 2002/96/EC (WEEE) for the Purpose of Transposition in National Laws and for the Purpose of Enforcement at National Levels

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1. Why assessing the definition of the “producer” in Directive 2002/96/EC?

The principle of producer responsibility is at the heart of the Directive 2002/96/EC on Waste Electrical and Electronic Equipment (WEEE) and plays a crucially important role. That is why national law must properly define the obligations of the “producer” (and the other actors) and must provide for an unambiguous understanding of who the legally responsible person is.

If “producer” is not unambiguously understood, or the obligations of the economic actors are not adequately addressed, the directive will fail to be properly enforced, putting at risk the practicability of this directive as well as legal certainty for producers and economic actors at large.

The term “producer” is defined in the directive. What is at stake, however, is that national lawmakers precisely define the obligations of all actors.

¹ Orgalime speaks for 32 trade federations representing some 130,000 companies in the mechanical, electrical, electronic and metalworking industries in 21 European countries. These industries employ some 7.3 million people and account for 1200 billion Euro in the GNP and a third of the manufactured exports of the European Union. Orgalime’s national association members represent almost all sectors included in the scope of directives 2002/96/EC on WEEE and 2002/95/EC on RoHS.

Directive 2002/96/EC on WEEE defines the “producer” in article 3 (i):

‘Producer’ means any person who, irrespective of the selling technique used, including by means of distance communication in accordance with Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts:

- (i) manufactures and imports electrical and electronic equipment under his own brand,
- (ii) resells under his own brand equipment produced by other suppliers, a reseller not being regarded as the **‘producer’** if the brand of the **producer** appears on the equipment, as provided for in subpoint (i), or
- (iii) imports² or exports³ electrical and electronic equipment on a professional basis into a Member State.

Whoever exclusively provides financing under or pursuant to any finance agreement shall not be deemed a **‘producer’** unless he also acts as a distributor within the meaning of subpoints (i) to (iii).

This definition leaves room for interpretation who the producer exactly is as it is insufficiently specific and rather imprecise as to the specific economic operator and the specific obligation(s) he would have to fulfil. Consequently, one and the same product could have several “producers” in terms of article 3(i) of directive 2002/96/EC (a product moving freely between several Member States passing through the hands of several companies), which is neither practical nor legally enforceable.

2. The way forward

Orgalime believes that when transposing the directive into national laws, Member States should provide a harmonised understanding of who does what, i.e. which economic operators has to fulfil what kind of obligation under the directive. In doing so, Member States will guarantee the necessary clarity and certainty to industry and make the directive work in practice.

The following assessment demonstrates that national law should spell out the **specific functions of the economic operators** rather than endeavour to provide for a consistent and all-encompassing definition of “**producer**”.

We identify three functions:

1. **Manufacturer**
2. **EU-Importer** (importing from a third country into the European single market)
3. **National importer** (importing from one Member State into another Member State)

² For European Community law “imports” refers to imports for the first time into the EU market. Once a product is imported into common market, they will circulate freely in the common market. Article 3(i) of WEEE says “imports... into a Member State...” which could give rise to the misunderstanding that it may refer to goods moving between Member States. This cannot be the case as a product moving freely between several Member States, and several companies, would then have multiple “producers” within the EU. Instead of “Member State” it should have read “EU” or “common market”.

³ For EU law “exports” refers to exports from the EU market to third countries. With respect to the WEEE-directive “export” cannot refer to the export from the EU to outside the EU, as this directive does not apply to non-EU countries. As “export” does not exist between EU Member States (common market) the word “export” makes no sense in this context. It could be assumed that it was meant to be interpreted in connection with article 8.4 where a company selling products via e-commerce has to fulfill the obligations in the member states where he delivers the product to.

It is important to note that these different functions could be fulfilled **by one single company** (e.g. a manufacturer may also be a “national importer” of a product). Also, **one obligation may be addressed to more than one type of company**, but for the purpose of clarity in this paper the functions will be looked at separately. Finally, there are different approaches for “new” waste and for “historical” waste.

In accordance with Commission guidelines on existing Community legislation⁴ the three functions are defined as follows:

- **Manufacturer (M)**

A manufacturer, (in the meaning of New Approach), is the person who is responsible for designing and manufacturing a product with a view to placing it on the Community market on his own behalf. The manufacturer has an obligation to ensure that a product intended to be placed on the Community market is designed and manufactured, and its conformity assessed, to the essential requirements in accordance with the provisions of the applicable New Approach directives. The manufacturer may use finished products, ready-made parts or components, or may subcontract these tasks. However, he must always retain the overall control and have the necessary competence to take the responsibility for the product⁵.

- **EU Importer (importing from a third country into the European single market) (I)**

An importer-a person responsible for placing on the market- (in the meaning of New Approach directives) is any natural or legal person established in the Community who places a product from a third country on the Community market.

The importer must ensure that he is able to provide the market surveillance authority with the necessary information regarding the product, where the manufacturer is not established in the Community, and has no authorised representative in the Community. The natural or legal person who imports a product into the Community may, in some situations, be considered as the person who must assume the responsibilities placed on the manufacturer according to the applicable New Approach directives. (Compare with “distributor”)⁶

- **National importer (NI)**

Provisions regarding national importers are in general not included in New Approach directives. A national importer is to be considered as any natural or legal person in the supply chain who takes subsequent commercial actions after the product has been placed on the Community market⁷. The national importer shall act with due care in order not to place clearly non-compliant products on the Community market. He shall also be capable of demonstrating this to the national surveillance authority.⁸

⁴ European Commission: Guide to the implementation of directives based on the New Approach and the Global Approach

⁵ European Commission: Guide to the implementation of directives based on the New Approach and the Global Approach, page 21

⁶ European Commission: Guide to the implementation of directives based on the New Approach and the Global Approach, page 23

⁷ Companies selling for the first time on the national/regional/local market), could but not necessarily need to be manufacturers or importers into the EU.

⁸ European Commission: Guide to the implementation of directives based on the New Approach and the Global Approach, pages 23-24

The perspective of the member states

From a European perspective it is obvious that specific measures influencing intrinsic characteristics of a product (e.g. the use of specific substances or the design for environment in general) can only be influenced by the (one and only) manufacturer. The (one and only) EU Importer can be made responsible for fulfilling essential requirements, too.

The obligations of the WEEE (and of the RoHS) directives must be enforced at national level, because there is no common European law that can be enforced by national authorities likewise within the borders of their respective country as outside this borders.

From the perspective of the member states that transpose the directive into national law it seems obvious that they would be looking specifically to “national importers” as they reside in their territory or to manufacturers or EU-importers if they reside in their territory.

The concept of individual producer responsibility brings along obligations, which in practice can be borne by “national importers” only if they have the possibility to transfer some of the obligations to the manufacturers or EU-importers. Otherwise “national importers” would be forced to cover unpredictable risks and to make the products identifiable with their own name.

Individual producer responsibility refers to manufacturers and importers by default. Manufacturers and importers have the most important role in the putting into practice of the principle of producer responsibility. The “national importer” must be considered the legally responsible person in case the manufacturer or importer does not provide an appropriate guarantee for the product.

Without a guarantee and a possibility to identify the national importer the product may not be sold. The registers will keep track of the actors that provide the guarantees. Either the national importer is not entitled to sell goods which have no guarantee or which are not registered, or the national importer explicitly designates himself as “producer”, with all consequences. A national importer cannot become “producer” by accident. In such a case the “national importer” needs to provide the guarantee for the product himself and the product needs to be identifiable, or labeled with the name of the “national importer” according to WEEE directive article 11(2). The reason for this proviso is that the “national importer” would be responsible for the product’s future recycling and as such it is necessary that this company can be identified at the product’s end of life.

3. Assessment of the specific functions of economic operators in directive 2002/96/EC on WEEE

For the transposition of the specific obligations of the WEEE directive the specific functions should be preferred instead of the ambiguous “producer”. Therefore, the following text is a notional specified text of the WEEE-directive. The word “producer” has been clarified in each case by the specific function(s) mentioned above.

Reference	Specified notional text of Directive 2002/96/EC (WEEE) (The word “producer” has been clarified by specific functions)	Precise economic function	Remarks (problems, possible way forward, ORGALIME proposals)
Article 4 Product design	In this context, Member States shall take appropriate measures so that manufacturers and EU-importers do not prevent, through specific design features or manufacturing processes, WEEE from being reused, unless such specific design features or manufacturing processes present overriding advantages	M, I	
Article 5 Separate collection	2 (c) without prejudice to the provisions of (a) and (b), manufacturers, EU-importers and national importers are allowed to set up and operate individual and/or collective take-back systems for WEEE from private households provided that these are in line with the objectives of this Directive	M, I, NI	Any company should be in a position to work together with other companies to fulfill its obligations.
	3. In the case of WEEE other than WEEE from private households, and without prejudice to Article 9, Member States shall ensure that manufacturers, EU-importers and national importers or third parties acting on their behalf provide for the collection of such waste	M, I, NI	Any company should be in a position to work together with other companies to fulfill its obligations.
Article 6 Treatment	1. Member States shall ensure that manufacturers, EU-importers and national importers or third parties acting on their behalf, in accordance with Community legislation, set up systems to provide for the treatment of WEEE using best available treatment, recovery and recycling techniques	M, I, NI	Any company should be in a position to work together with other companies to fulfill its obligations.
	2. The systems may be set up by manufacturers, EU-importers and national importers individually and/or collectively.	M, I, NI	Any company should be in a position to work together with other companies to fulfill its obligations.
Article 7 Recovery	1. Member States shall ensure that manufacturers, EU-importers. national importers or third parties acting on their set up systems either on an individual or on a collective basis, in accordance with Community legislation, to provide for the recovery of WEEE collected separately in accordance with Article 5.	Historical waste: NI, M New waste: M, I, (NI: see comments art. 8(2))	Difference relates to the distinction of responsibilities of article 8(2) and (3)

Reference	Specified notional text of Directive 2002/96/EC (WEEE) (The word “producer” has been clarified by specific functions)	Precise economic function	Remarks (problems, possible way forward, ORGALIME proposals)
	2. Regarding WEEE sent for treatment in accordance with Article 6, Member States shall ensure that, by 31 December 2006, the responsible actors according to Art. 7 (1) meet the following targets	See article 7 (1)	
	3. Member States shall ensure that, for the purpose of calculating these targets, the responsible actors according to Art. 7 (1) or third parties acting on their behalf keep records on the mass of WEEE, their components, materials or substances when entering (input) and leaving (output) the treatment facility and/or when entering (input) the recovery or recycling facility	See article 7 (1)	
Article 8 Financing in respect of WEEE from private households	1. Member States shall ensure that, by 13 August 2005, manufacturers, EU-importers and national importers provide at least for the financing of the collection, treatment, recovery and environmentally sound disposal of WEEE from private households deposited at collection facilities, set up under Article 5(2).	Specified in comments to article 8(2) and 8(3)	
	2. For products put on the market later than 13 August 2005, each manufacturer, EU-importer or national importer acting on behalf of a manufacturer or EU-importer shall be responsible for financing the operations referred to in paragraph 1 relating to the waste from his own products	<ul style="list-style-type: none"> • M/I • NI 	<p>Article 8(2) refers to both end of life of a product <u>and</u> at its placing on the market:</p> <ul style="list-style-type: none"> • Each manufacturer/EU-importer shall finance the recycling of the product that he has brought onto the European common market. He also has to be in a position to provide evidence that (a) his products are registered in a European register, (b) that a guarantee for its products is provided for, and (c) that the appropriate recycling infrastructure is in place. • In any case where the national importer takes over the responsibility for the financing (and in parallel provides a guarantee without agreement of the manufacturer or EU-importer) he will have to mark and re-label the product

Reference	Specified notional text of Directive 2002/96/EC (WEEE) (The word “producer” has been clarified by specific functions)	Precise economic function	Remarks (problems, possible way forward, ORGALIME proposals)
	2. The manufacturers, EU-importers or national importers can choose to fulfil this obligation either individually or by joining a collective scheme		Any company should be in a position to work together with other companies to fulfill its obligations.
	<p>2. Member States shall ensure that each manufacturer, EU-importer or national importers acting on behalf of a manufacturer or EU-importer provides a guarantee when placing a product on the market showing that the management of all WEEE will be financed and that manufacturers and EU-importers clearly mark their products in accordance with Article 11(2).</p> <p>[New:] In case the manufacturer or EU-importer does not provide financing and the financial guarantee for the recycling of the product, the national importers shall provide financing and the financial guarantee for their products and clearly mark their products in accordance with Article 11(2).</p>	<ul style="list-style-type: none"> • M/I • NI 	<ul style="list-style-type: none"> • manufacturer or EU-importer have to provide the financial guarantee when the product is put on the common market • national importer has to be in a position to provide evidence of the existence of the guarantee and registration to be allowed to sell the product. He can either refer to the guarantee provided by the manufacturer/EU-importer or provide his own guarantee in the country concerned in case the manufacturer/EU-importer is not providing it. (Re-labeling!)
	2. The guarantee may take the form of participation by the manufacturer, EU-importer or national importer in appropriate schemes for the financing of the management of WEEE, a recycling insurance or a blocked bank account.	<ul style="list-style-type: none"> • M/I • NI 	
	3. The responsibility for the financing of the costs of the management of WEEE from products put on the market before the date referred to in paragraph 1 (historical waste) shall be provided by one or more systems to which all national importers, manufacturers and EU-importers acting as national importers existing on the market when the respective costs occur, contribute proportionately, e.g. in proportion to their respective share of the market by type of equipment	NI	<p>Article 8(3) has only an effect on economic operators when bringing a product onto the market:</p> <ul style="list-style-type: none"> • “Share of the market” logically relates to national market (not European single market) • It concerns the proportion of products sold on the national market • national importers actually active at a national market (could be any mix of types of economic actors, e.g. a manufacturer or EU-importer in the role of the national importer)

Reference	Specified notional text of Directive 2002/96/EC (WEEE) (The word “producer” has been clarified by specific functions)	Precise economic function	Remarks (problems, possible way forward, ORGALIME proposals)
	3. Member States shall ensure that for a transitional period of eight years (10 years for category 1 of Annex IA) after entry into force of this Directive, national importers, manufacturers and EU-importers acting as national importers are allowed to show purchasers, at the time of sale of new products, the costs of collection, treatment and disposal in an environmentally sound way	NI	national importers actually active at a national market (could be any mix of types of economic actors, e.g. a manufacturer or EU-importer in the role of the national importer)
	4. Member States shall ensure that manufacturers, EU-importers or national importers 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 State where the purchaser of that equipment resides	<ul style="list-style-type: none"> • M/I • NI See art. 8(2) and (3)	
Article 9 (COM amended proposal) Financing in respect of WEEE from users other than private households	<p>1. Member States shall ensure that, by 13 August 2005, the financing of the costs for the collection, treatment, recovery and environmentally sound disposal of WEEE from users other than private households from products put on the market after 13 August 2005 is to be provided for by manufacturers, EU-importers or national importers acting on behalf of a manufacturer or EU-importer.</p> <p>Member States shall ensure that, by 13 August 2005, for WEEE from products put on the market before 13 August 2005 (historical waste), the financing of the costs of management is as set out in the third and fourth subparagraphs.</p> <p>For historical waste being replaced by equivalent products or by products fulfilling the same function, the financing of the costs shall be provided for by manufacturers, EU-importers or national importers of those new products when supplying them. Member States may, as an alternative, provide that users other than private households also be made, partly or totally, responsible for this financing.</p> <p>For other historical waste, the financing of the costs shall be provided for by the users other than private households.</p> <p>2. Manufacturers, EU-importers, or national importers and users other than private households may, without prejudice to this Directive, conclude agreements stipulating other financing methods.</p>		

Reference	Specified notional text of Directive 2002/96/EC (WEEE) (The word “producer” has been clarified by specific functions)	Precise economic function	Remarks (problems, possible way forward, ORGALIME proposals)
Article 10 Information for users	3. With a view to minimising the disposal of WEEE as unsorted municipal waste and to facilitating its separate collection, Member States shall ensure that manufacturers, EU-importers or national importers appropriately mark electrical and electronic equipment put on the market after 13 August 2005 with the symbol shown in Annex IV	<ul style="list-style-type: none"> • M, I • NI (in those cases that that they have taken the explicit decision to take over the responsibilities of M/I) 	
	4. Member States may require that some or all of the information referred to in paragraphs 1 to 3 shall be provided by manufacturers, EU-importers or national importers , e.g. in the instructions for use or at the point of sale	<ul style="list-style-type: none"> • M, I • NI 	
Article 11 Information for treatment facilities	1. In order to facilitate the reuse and the correct and environmentally sound treatment of WEEE, including maintenance, upgrade, refurbishment and recycling, Member States shall take the necessary measures to ensure that manufacturers, EU-importers or national importers provide reuse and treatment information for each type of new EEE put on the market within one year after the equipment is put on the market.	<ul style="list-style-type: none"> • M, I, NI 	
	1. It shall be made available to reuse centres, treatment and recycling facilities by manufacturers and EU-importers of EEE, or national importers in the form of manuals or by means of electronic media (e.g. CD-ROM, online services).	M, I	
	2. Member States shall ensure that any manufacturer and EU-importer of an electrical or electronic appliance put on the market after 13 August 2005 is clearly identifiable by a mark on the appliance. [New:] In case the national importer is not acting on behalf of a manufacturer or EU-importer and the manufacturer or EU-importer does not provide financing and the financial guarantee for the recycling of the product, the national importer shall mark the product with his name.	M, I, NI	

Reference	Specified notional text of Directive 2002/96/EC (WEEE) (The word “producer” has been clarified by specific functions)	Precise economic function	Remarks (problems, possible way forward, ORGALIME proposals)
Article 12 Information and reporting	1. Member States shall draw up a register of manufacturers, EU-importers and national importers and collect information, including substantiated estimates, on an annual basis on the quantities and categories of electrical and electronic equipment put on their market, collected through all routes, reused, recycled and recovered within the Member States, and on collected waste exported, by weight or, if this is not possible, by numbers	M, I, NI	
	1. Member States shall ensure that manufacturers, EU-importers and national importers supplying electrical and electronic equipment by means of distance communication provide information on the compliance with the requirements of Article 8(4) and on the quantities and categories of electrical and electronic equipment put on the market of the Member State where the purchaser of that equipment resides	M, I, NI	
Article 13 Adaptation to scientific and technical progress	Before the Annexes are amended the Commission shall inter alia consult manufacturers and EU-importers of electrical and electronic equipment, recyclers, treatment operators and environmental organisations and employees' and consumer associations.	M, I	