

**Brussels, 15 June 2012**

## **DIRECTIVE 2011/65/EU (“RoHS2”): IMPACT ASSESSMENT OF ARTICLE 2.2**

### **EXECUTIVE SUMMARY**

Following the last BioIS stakeholder meeting on the RoHS2 scope impact assessment study, Orgalime appreciates the opportunity to provide additional input to the current discussion on impacts of article 2.2 RoHS2 and the notion of “making available” in particular.

We would like to stress that **this issue is relevant for any equipment newly in scope** following the recast of the Directive (see [Orgalime’s earlier comments](#)): If BioIS maintained its understanding that new equipment could fall either under category 11 or any other category of Annex I of RoHS2, the given scope of the impact assessment on category 11 “only” is too narrow and its results may be misleading and incomplete as all other affected product categories would not be taken into account.

**We are convinced that Article 2.2 in its present form results in significant negative economic, environmental and legal impacts and ask BioIS to spell these out in the final study report:**

1. **Environmental impacts:** The “hard stop” disposition in Article 2.2 brings no benefit for the environment as it does not prevent non-compliant product from entering the market. However, article 2.2 will force products that are already circulating on the market to be scrapped earlier than necessary as they will not be able to be sold, resold, reused or refurbished. This unnecessary generation of waste has to be counted as a negative impact.
2. **Economic impacts:** Any product newly in scope of RoHS2 and legally placed on the market will be declared as non-compliant and therefore illegal as of 22 July 2019. This will impact strongly on manufacturers’, distributors’ and users’ assets and stocks.
3. **Legal impacts:** There are issues of general legal inconsistencies, which cause risks and uncertainties for companies, which we kindly ask BioIS to highlight in its final report, too:
  - 3.1 Compliance obligations in product legislation have to be precise, specific and proportionate. Failing to do this implies room for free riding and unfair competition, an insufficient level playing field for companies and an arbitrary base for enforcement activities.
  - 3.2 EU law follows the general rule of non-retroactivity of obligations, which Article 2.2 would be in conflict with, thereby leaving EEE manufacturers in legal uncertainties and imposing disproportionate obligations, risks and impacts on them.
  - 3.3 Further negative impacts on companies will arise due to the given deadline of 22 July 2014 to amend the list of restricted substances in Annex II of the Directive.

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

While there is a case, the precise costs and figures of the impact may hardly be quantified at this stage, as neither the potential new substances to be restricted nor the outcome of the BioIS study and potential Commission amendment regarding the scope of the Directive are known at this stage of proceedings.

All these uncertainties and associated negative impacts and risks are also borne by companies, which we consider disproportionate.

Even if the impact assessments were not able to provide precise cost figures as regards the impacts of Article 2.2 in its present form considering above mentioned uncertainties, Orgalime believes it is going to significantly impact all the categories and products newly included in the scope of RoHS2 and all market operators (not only manufacturers) from an economic perspective with no benefit for the environment, but worse, with an overall negative environmental impact.

*Orgalime substantiates its position as follows:*

Orgalime believes that Article 2.2 of Directive 2011/65/EU (RoHS2) will have significant negative environmental, economic and legal consequences.

## 1. ENVIRONMENTAL IMPACTS/BENEFITS

The “hard stop” provision in Article 2.2 brings no benefit for the environment as it does not prevent non-compliant product to enter the market.

On the contrary, Article 2.2 rather encourages waste generation earlier than necessary, since used equipment instead of being refurbished will be used for only a limited time and would have to be discarded even before their end-of-life.

This, however, contradicts the WEEE Directive, the Waste Framework Directive and the new flagship initiative on resource efficiency, which promote reuse according to the EU’s Waste Hierarchy. These EU laws consider reuse as the most effective measure for dealing with an increase of electronic waste in the context of the wider waste hierarchy. By preventing re-use, Article 2.2 goes against the principles set forth in these overarching EU laws and gives rise to a negative environmental (and legal) impact.

Moreover, Article 2.2 applies “only” to EEE newly in the scope of RoHS2, while EEE already in the scope of RoHS1 would not be affected. This provision creates discrimination without any justification between different product categories and their environmental relevance. This furthermore reduces benefits for the environment, if any.

## 2. ECONOMIC IMPACTS

Any product newly in scope of RoHS2 and legally placed on the market will be declared as non-compliant product and therefore illegal as of 22 July 2019.

This particular provision of RoHS2 raises the issue of remaining stocks of affected appliances that will have to be scrapped, since they will no longer be able to be sold to the end user after that date: For other products, rather than scrapping, repair and exchange is the favoured alternative by RoHS2. Some companies repair EEE and then offer "exchange products" (i.e. "used EEE") to users who have a faulty EEE. These activities benefit both, the environment and EU industry (by also providing employment for skilled EU workers).

A strict interpretation of Article 2.2 would jeopardise these environmentally and commercially beneficial activities.

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*The European Engineering Industries Association*

The common practice of trading old equipment, especially capital investment goods for new ones, will be forbidden after 2019, thus, inevitably leading to a sudden increase of the price on new equipment with the consequent impact on companies and their markets.

In addition, enforcement of Article 2.2 in the second hand market is unworkable: companies or individuals (e.g.: sellers via eBay) selling used products will not have access to the original technical file produced by the manufacturer and will therefore be unable to determine whether or not the EEE is RoHS2 compliant.

Besides, large engineering projects can take years to build and commission before they are finally handed over to the end user/operator. The EEE used in these projects may have been provided by the manufacturer to a distributor, then to a systems integrator (main contractor), before finally being supplied to the end user/operator.

We doubt that enforcement authorities will be in a position to police the hand-over of each such project that is completed after 22 July 2019 and check whether the EEE supplied is RoHS2 compliant.

Finally, article 2.2 in its present form will significantly diminish the value of the companies' assets: indeed, any EEE that could no longer be made available on the Union market after 22 July 2019 will subsequently lose all its economic value as no longer allowed to be sold, rented or leased and will therefore have to be disposed of. The market value of equipment, however, directly enters companies' balance sheets. Therefore, Article 2.2 will have negative impact on the balance sheet of companies, which may in some cases lead them to being technically bankrupt.

For the time being, RoHS2 contains a list of six restricted substances spelled out in Annex II. Article 6.1 RoHS2 envisages the first review and potential future amendment of the list of restricted substances by 22 July 2014. For that purpose, the Commission has already launched the process to identify and assess substances taking into account recital 10 RoHS2.

Coupled with the interpretation of Article 2.2, the given deadline of 22 July 2014 will have damaging consequences on companies, as potential additional substance bans on EEE would also prevent any kind of resale, renting, leasing or donation after 22 July 2019, of products not conforming with these new provisions, but which were compliant with legislation existing at the time of their placing on the market.

### 3. LEGAL INCONSISTENCIES

The notion of *"making available"* is defined in article 3 RoHS2 as *"any supply of an EEE for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge"* and *"placing on the market"* is defined as *"making available an EEE on the Union Market for the first time"*.

Any European legislation must provide clear and specific requirements to ensure fair implementation and enforcement, in particular in the are of product legislation.

Article 2.2 addresses the issue as of which date equipment newly falling in RoHS2 but not falling in RoHS1 (Categories 8, 9 and 11 and any equipment previously excluded from RoHS1), will have to comply with the RoHS2 requirements, and it introduces a transition period for equipment, which has been *"made available on the market until 22 July 2019"*.

Following the above mentioned definition of *"making available"*, RoHS2 clearly hinders the principle of legal certainty as it does not provide any specific moment in time for manufacturers to ensure compliance of their products falling now into RoHS2. Usually this moment is the *"first making available of the product"*.

This unclear and variable time frame for the entry into force of the RoHS2 obligations will have negative implications on the production chain, and it will generate unfair competition. It also generates negative implications on other economic operators in the subsequent supply chain with regards to their obligation under RoHS2 to verify technical documentation and the presence of the CE marking on the EEE/apparatus in scope of RoHS2.

In contrast, the definition of “*placing on the market*” as “*making available for the first time*”, does set one specific date for manufacturers to ensure compliance of their products, for other economic operators to fulfill their RoHS2 verification obligations and for fair enforcement practices (Article 4.3).

Furthermore, Article 2.2 appears not to be in line with the general principle of “non retroactivity of law”. Indeed, following the definitions of “*making available*” and “*placing on the market*”, EEE can be legally “*placed on the market*” until 22 July 2019. Consequently, RoHS2 retroactively applies to products that comply with the legal requirements in force at the moment of their first placing on the market.

However, such equipment will be declared illegal and therefore will no longer be able to be “made available” i.e., sold, rented, leased or given free of charge after 22 July 2019.

**We kindly request BioIS to highlight all these facts in its final study report.**

#### 4. PROPOSAL FOR A SOLUTION

The above mentioned far reaching consequences on all EEE new in scope of RoHS2 should, in our view, not be neglected on the basis of an Impact Assessment, whose scope has been defined too narrow, before the real amplitude of Article 2.2 has been identified.

For this reason, Orgalime believes that adding exclusions from the provision of Article 2.2 will not be sufficient nor the right way to proceed: the set up of a necessary list of exemptions of affected product groups including a full assessment of the impacts would require far more time and resources while still not be able to overcome the general legal inconsistencies. Also, we see difficulties in finding agreement on such a list, as Member States’ scope interpretations of RoHS1 and consequently of what the new product groups in scope would indeed have to be, differ.

**Therefore, Orgalime advocates for a horizontal solution that ensures legal consistency, proportionality and fair rules to avoid the negative economic and environmental consequences of Article 2.2 in its present form. In concrete terms:**

- **We see the need of amending Article 2.2 of the Directive itself in the context of the review foreseen in article 24.1 RoHS2. In particular, the term “*made available*” in Article 2.2 of Directive 2011/65/EU should be replaced by “*the first making available of the EEE on the Union market*”, hence, its “*placing on the market*”.**
- **As the ongoing discussions under the BioIS impact assessment study and subsequent Commission decision to be taken may also affect the future FAQs on RoHS2, Orgalime would like to suggest that any **FAQs should at this stage abstain from providing detailed interpretations of article 2.2** but reflect the current state of play, namely that the issue is subject of an impact assessment and discussion (See Orgalime [Position Paper on RoHS2 and the application of the New Legislative Framework](#) of 26 April 2012).**

**Finally, we recommend that the final BioIS study report should also take this proposal into consideration as the most effective solution to remove the unnecessary negative impacts of article 2.2, which aims at preserving the spirit and level of environmental protection of the RoHS2 Directive.**